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Senate Economics Legislation Committee
Parliament House
Canberra ACT 2600

Inquiry into Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024

CHOICE and Super Consumers Australia welcome the opportunity to provide input to the committee as it considers the first tranche of legislation for the Government's financial advice reforms.

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 comments on key details of the Bill. This builds on our joint submission to Treasury's consultation on the exposure draft.[2]

We recommend that the Committee:

- ensure that the reforms retain a clear obligation on superannuation trustees to only pay advice fees out of members' superannuation accounts for advice directly related to members' superannuation interests;
- 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;
- add 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;

[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
[2] CHOICE and Super Consumers Australia, "Delivering Better Financial Outcomes – reducing red tape and other measures", https://superconsumers.com.au/wp-content/uploads/2024/03/SCAandCHOICEsubmissionDeliveringBetterFinancialOutcomestranche1.pdf

- require advisers to explain key information contained in the Financial Services Guide (FSG) to clients, and to publish FSG information in a single, early accessible and prominent location on their website;
- repeal the exemption from the ban on conflicted remuneration for all forms of advice about insurance products;
- repeal the exemptions from the ban on conflicted remuneration for general advice about insurance, general insurance and consumer credit insurance;
- require advisers and product issuers to obtain explicit client consent in order to rely on the exemption from the definition of conflicted remuneration for benefits given by a retail client in relation to financial product advice;
- clarify that super trustee payments for intrafund advice are subject to the ban on conflicted remuneration;
- remove the consent requirements for insurance commissions from the Bill; and
- if the consent requirements are adopted, broaden the scope of situations for when consent is required, and require ASIC to review the effectiveness of the consent requirements after no more than two years.

Deduction of adviser fees from superannuation

In principle, we do not support the deduction of advice fees from superannuation accounts. Super Consumers Australia has previously outlined that people may be more likely to value advice if they have to actively pay for it from their own pocket, rather than have fees deducted from their super account.[3] There was compelling evidence in the Financial Services Royal Commission and the 'fees for no service' actions brought by ASIC that there is a high risk people will be ripped off if fees can be charged from super with limited oversight.

However, if advice fees are to continue to be permitted to be deducted from superannuation accounts, trustees must ensure that fees are only deducted for advice directly related to the member's interest in the fund. This is an important safeguard that limits the scope for financial advice fees to erode people's retirement savings. It is also consistent with the objective of super set out in legislation currently before the Senate.

The requirements in new section 99FA in the Bill clarify the existing law, which requires super trustees to ensure that all money paid from the super fund relates to the provision of benefits on a member's death or retirement. This is in the sole purpose test of section 62 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act). It is generally understood to mean that where advice is provided that is broader than just superannuation advice, then only the cost relating to the member's superannuation interest can be deducted from their super account.

[3] Super Consumers Australia, 2020, "Financial Services Royal Commission – Enhancing consumer protections and strengthening regulators", https://superconsumers.com.au/wp-content/uploads/2023/12/FSRC_Enhancingconsumerprotectionsandstrengtheningregulators-GoogleDocs-1.pdf

These are well established obligations. As Commissioner Hayne noted in 2019, the law already requires that trustees must not allow fees to be deducted for financial advice relating to broader advice than permitted by the sole purpose test, such as how to maximise a client's wealth generally.[4]

Even the Quality of Advice Review, in recommending changes to section 99FA of the SIS Act, recognised that trustees need to have confidence that the advice relates to the member's interest in the fund and to have the ability to confirm that, for example, by only allowing advice fees to be paid from the fund if there is an arrangement "that enables a trustee to review advice provided to members from time to time or to require an audit of that advice to be undertaken."[5]

The financial advice industry has attempted to argue that the reforms in the Bill will increase red tape for advisers and require trustees to check every piece of advice individually.[6] There is no basis for this argument, which appears motivated by a desire to remove appropriate oversight of advice deductions from super and reduce consumer protections.

APRA and ASIC have already made clear in regulatory guidance that trustees can review a sample of Statements of Advice and other documents to provide assurance that advice is being provided, it falls within the sole purpose test, and advice fee deductions have been authorised by members. This could be a regular review of a random sample of documents, or a specific review where misconduct is suspected. The regulators have explicitly said that trustees do not need to obtain a copy of every Statement of Advice produced.[7] This is established regulatory guidance that has been in place since 2021.

Trustees and advisers should already have the oversight processes in place that law and the regulators expect of them. If they do, it is difficult to see why the new provisions in the Bill will require major changes, either to industry practices or to the regulators' guidance.

To the extent that there is uncertainty in how trustees should exercise their new obligations, expectations about how they should exercise oversight in practice could be set out in the Explanatory Memorandum and supplemented by further guidance from the regulators if necessary.

It is also important that the regulators enforce the rules and hold both advisers and trustees to account for misconduct. A risk with giving super trustees an oversight role is that some will not

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[4] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 2019, Final Report, p. 240.
[5] Quality of Advice Review (2022), Final Report, p. 117.
[6] For example, Joint Associations Working Group, 2024, "Still time to fix advice reforms so 'hot mess' doesn't turn into disaster", https://fsc.org.au/resources/2722-media-relase-statement-from-the-joint-associations-working-group
[7] See APRA and ASIC, 2021, "Further guidance on oversight of advice fees charged to members' superannuation accounts", https://download.asic.gov.au/media/oc4fxkjw/apra_asic_joint_ffns_trustee-letter_30_june_2021-update.pdf and APRA and ASIC, 2019, "Oversight of fees charged to members' superannuation accounts", https://download.asic.gov.au/media/5070047/apra-asic-rse-letter-10-april-2019.pdf

take this as seriously as others. We would be very concerned if lax trustee oversight arrangements were to facilitate less scrupulous advisers recommending that their clients roll over their super to a particular fund, which the adviser can more easily extract fees from. This would be a poor outcome for consumers with a significant cost to their retirement savings.

Further—and contrary to the advice industry's arguments—the reforms should lead to greater consistency in trustees' interpretations of fee deduction rules. If anything, the reforms will *reduce* costs and red tape for advisers by clearly establishing what conditions need to be met for advice deductions to be consistent with the sole purpose test and other obligations.

We specifically oppose previous calls by parts of the advice industry to oblige trustees to pay a member's advice fees out of their super account if the member has directed them to do so and the advisor has attested that the fees relate to the member's interests in the fund.[8] This would effectively be giving financial advisers the ability to override the trustee in relation to money paid out of a super fund. It is at odds with trustees' duties under the SIS Act and under trust law generally, and would be a significant reduction in consumer protections.

History gives us powerful and painful lessons as to why oversight of advice fee deductions from superannuation is so important. The Royal Commission exposed a swathe of misconduct relating to fees for no service, conflicted advice, hidden fees and lax (or simply absent) oversight. We would not want to see a situation where advisers can take money out of a super fund with little or no oversight, causing significant harm for their clients when they retire.

CHOICE and Super Consumers Australia therefore support the reforms in Schedule 1, Part 1 of the Bill.

Recommendation: Ensure that the reforms retain a clear obligation on superannuation trustees to only pay advice fees out of members' superannuation accounts for advice directly related to members' superannuation interests. Expectations about how this oversight role should be exercised in practice—for example, by taking a risk-based approach to reviewing advice documentation—could be set out in the Explanatory Memorandum.

[8] Financial Services Council, 2023, "Submission: Delivering Better Financial Outcomes package – Reducing red tape and other measures", https://fsc.org.au/resources/2694-fsc-submission-exposure-draft-legislation-treasury-laws-amendment-2023-measures-no-1-bill-2024/file

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.

We also support the components of the Bill that would mandate a standard consent form for ongoing advice fees, as well as non-ongoing advice fee deductions from superannuation. This should improve consistency for consumers and advisers and reduce scope for product issuers to design forms that are confusing or misleading for consumers.

We recommend some specific changes to the Bill to strengthen consumer protections. First, advisers should be obliged to refund any ongoing fees that are paid after an ongoing fee arrangement terminates or 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 (sections 1317GA and 1317GB of the Corporations Act).

The status quo may have been useful at limiting the costs of unintentional non-compliance when fee consent requirements were first introduced, but now the industry has had ample time to understand its basic obligations, this is no longer necessary and reduces the incentive for advisers to comply with the fee consent laws.

Recommendation: Oblige financial 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.

Further, we think that additional information should be provided to clients when an adviser is seeking their consent for an ongoing fee arrangement. Any conflicted remuneration the adviser may be eligible to receive should be disclosed. Clients should also be provided information about what fees they paid in the last year, what services they were 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.

Recommendation: Add to the list of items in new subsection 962G(2) in the Bill 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.**

Flexibility for FSG requirements

We broadly support giving advisers flexibility about how they provide their Financial Services Guides to clients. However, the reforms in the Bill are about reducing red tape for advisers but little thought has been given to assisting and protecting consumers.

FSGs contain important information, including on the types of advice an adviser can provide, the fees they charge and how they will deal with complaints. Not all consumers may read the FSG, or read it in full, but it is an important source of information if something goes wrong and valuable transparency about remuneration and conflicts of interest (including related party arrangements).

Advisers should ensure potential clients understand this information, regardless of how it is conveyed to them.

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 about the services they are providing. 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 are also concerned that allowing the information to be dispersed across different locations on the website (as explained in paragraph 1.206 of the Explanatory Memorandum) will give industry the ability to hide information or make it hard for consumers to access. The difficulty for consumers is exacerbated by the removal of the proposed obligation to give a FSG to any client that requests one (which was in the exposure draft of the Bill).

Accordingly, we recommend that advisers be required to publish the information required of an FSG in a single, easily accessible and prominent location to their client. They should also clearly explain to clients the scope of services the adviser can provide, the fee and commission arrangements, and where the client can find more information about these things.

Recommendation: If advisers are allowed to publish FSG material on their website instead of giving every client a copy, then the information must be in a single, easily accessible and prominent location on the website. Advisers should 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.**

In addition, advisers should 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 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.[9]

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.[10] 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).

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.[11]

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

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[9] CHOICE and 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

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

[11] Treasury, 2022, Quality of Advice Review, Final Report, p. 166.

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.

While personal advice is subject to the best interests duty and a duty to prioritise the client in the event of a conflict, on their own these duties have not been sufficient to protect consumers in practice, and the duties do not extend to general advice. Conflicts must be removed at their source.

All forms of conflicted remuneration should be banned immediately.

Recommendation: Repeal the exemption from the ban on conflicted remuneration for all forms of advice about insurance products.

Scope of the exemption

If Parliament is unwilling to ban all conflicted remuneration, it should tighten the exemption further. It is particularly unclear to us how conflicted remuneration could ever be justified for general advice about insurance, general insurance or consumer credit insurance. These sorts of advice should be removed from the exemption. The Bill already does this for general advice, even though this was not the Government's intention.

The Financial Services Royal Commission revealed that these carve-outs lead to poor consumer outcomes. Consumers have been sold into general insurance that is inappropriate to their needs. 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.[12]

The risks of misselling are particularly high for conflicted general advice, as commissions give strong incentives to sell products using generic 'cookie cutter' advice, unconstrained by any form of best interests duty.

Recommendation: Retain the provision in new paragraph 963B(1)(a) in the Bill that will remove the exemption from the ban on conflicted remuneration for general advice about insurance.

Recommendation: Repeal paragraphs 963B(1)(a) and (ba) of the Corporations Act that create an exemption from the ban on conflicted remuneration for general insurance and consumer credit insurance.

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

We support the reforms to remove the exemptions for banks to pay volume and sales-based incentives to employees to recommend products to consumers, and for advice that has not been provided in 12 months or longer.

Exemption for benefits given by a client

We are concerned that the provisions of the Bill that seek to clarify the definition of conflicted remuneration leave the back door open for fees to be structured in a way that circumvents the ban on conflicted remuneration. This is because the way the exemption for benefits paid by a retail client is drafted 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.

Recommendation: Amend new subsection 963A(2) in the Bill to require advisers and product issuers to obtain explicit client consent (e.g. through non-ongoing or ongoing fee consent forms) in order to rely on the exemption from the definition of conflicted remuneration for benefits given by a retail client in relation to financial product advice.

We are concerned that the Bill does not provide clarity about whether intrafund advice payments would be subject to the ban on conflicted remuneration. Typically, these are payments from a super trustee to an AFS licensee (or if the trustee holds an advice licence, to its own employees) to cover the cost of advice given to members, where the cost is paid as an operational expense of the fund rather than through explicit fees charged to members' accounts.

There are inherent conflicts in allowing super trustees to give members advice on their own products. Super funds have a strong incentive to promote their own products, even when members would be better served by switching to a different fund. For example, in a recent 'shadow shop', Super Consumers Australia and CHOICE found that the intra-fund advice that funds offer free to their members can be unhelpful or conflicted.[13] We saw examples of advisers being unable to help consumers understand how their fund is performing compared to others in the market. We also saw advisers recommending that a member makes voluntary contributions, without adequately considering other financial needs (like paying off a mortgage) or their desired spending levels in retirement.

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 of the Corporations Act, 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.

[13] D. Herborn, 2022, "Is your fund best placed to help you plan for retirement?", CHOICE, 21 December.

However, the Bill appears to 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 could therefore enable trustees to pay advisers conflicted remuneration to recommend specific products to members.

The Explanatory Memorandum does not provide much clarity, stating that trustee payments to advisers for advice that is collectively charged to members are not conflicted remuneration (paragraph 1.262), while also stating that benefits “provided at the instruction of the product issuer or seller” are not considered to be benefits given by a retail client for the purposes of the new exemption (paragraph 1.258). As trustee payments to advisers for intrafund advice are generally made at the trustee’s instruction (as the product issuer), these statements are difficult to reconcile.

Exempting intrafund advice from the ban on conflicted remuneration would increase the scope for super trustees to give conflicted, vertically integrated advice about their own products, which risks more people ending up in poor quality products and entrenching poor member outcomes.

The risks will only grow as the number of members in the retirement phase continues to increase. Some funds only offer account-based pensions that lack explicit longevity production, and could provide incentives to their advisers to recommend these products to members—even though some members may be better served by switching to a fund that offers a longevity product. Conversely, other funds that do offer longevity products may give incentives to advisers to recommend these products to as many people as possible. As these are often highly complex products with hidden fees and costs that are almost impossible to get out of, the potential for harm is large.

Recommendation: Clarify in new subsection 963B(1) in the Bill that super trustee payments for intrafund advice, where the member is not directly charged for the cost of providing the advice, are subject to the ban on conflicted remuneration.

New consent requirements

The proposed reforms to introduce consent requirements for insurance commissions 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.[14] In a 2020 insurance inquiry, the ACCC recommended banning commissions and

[14] See ASIC and AFM, 2019, Disclosure: Why it shouldn’t be the default, Report 632 for examples.

other benefits given to insurance brokers, noting that ‘disclosure alone is insufficient to address the conflicts’.[15]

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

It appears that no consumer testing has been undertaken to understand whether and how seeking consent for insurance commissions will affect consumer decision making, as well as the effectiveness of different ways of disclosing commissions. This is despite CHOICE and Super Consumers Australia writing to Treasury to request that such consumer testing be undertaken before proceeding with these reforms.[16]

The justification for some elements of the Bill is puzzling and appears to undermine the potential effectiveness of a consent process as a consumer protection. Specifically:

- Why the Bill 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 commissions when renewing a general insurance product or when an advice business changes ownership. 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.

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[15] Recommendation 19.1 of ACCC, 2020, Northern Australia Insurance Inquiry, Final Report.
[16] CHOICE and Super Consumers Australia, “Delivering Better Financial Outcomes – reducing red tape and other measures”, https://superconsumers.com.au/wp-content/uploads/2024/03/SCAandCHOICEsubmissionDeliveringBetterFinancialOutcomestranche1.pdf

Recommendation: Remove the consent requirements for insurance commissions (Schedule 1, Part 5) from the Bill.

Recommendation: If consent requirements for insurance commissions are adopted, require financial advisers to:

- **obtain consent in writing before they have started providing advice;**
- **disclose to the client a reasonable estimate of the dollar value of commissions when seeing consent; and**
- **seek consent for commissions in relation to products sold before the reforms take effect, when renewing a general insurance product, and when an advice business changes ownership.**

If new consent requirements are adopted, there should be a review by ASIC after no more than two years to assess their effectiveness. This review should include a detailed assessment of advisers' compliance, the number of clients choosing to give or not give consent, and how the consent requirement influences clients' decision making. Government should resource ASIC to undertake this review.

Recommendation: If consent requirements for insurance commissions are adopted, require ASIC to review their effectiveness after no more than two years.

Yours sincerely

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