FINANCIAL ADVICE ASSOCIATION AUSTRALIA

Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Via Email: economics.sen@aph.gov.au

26 April 2024

Dear Committee Secretariat,

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

The Financial Advice Association of Australia[1] (FAAA) welcomes the opportunity to provide feedback to the Senate Economics Legislation Committee on the Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024.

We have limited our submission to only addressing Schedule 1 of the Bill on Delivering better financial outcomes—reducing red tape, which directly relates to the activities of our members.

The FAAA is broadly supportive of the Bill, however we have the following significant concerns, which impact the intent of the Quality of Advice Review recommendations: to improve the access and affordability of financial advice for consumers. We have provided detailed feedback below with respect to each Part of Schedule 1.

- Part 1 of Schedule 1 and the actions super fund trustees need to take to approve the payment of advice fees from superannuation accounts - The requirements of Section 99FA of the SIS Act, as we have interpreted them, are impractical and inconsistent with the overall objective of the Delivering Better Financial Outcomes (DBFO) reform package of reducing the cost of financial advice and removing red tape. In practice, these requirements would significantly increase red tape for both super fund trustees and for financial advisers.
- Ministerial mandate to use a prescribed fee consent form - the requirements with respect to the Minister being able to mandate a fee consent form and the apprehension that this is only an option and may not actually happen.

We also recognise the opportunity for improvement in the transitional arrangements for the removal of Fee Disclosure Statements (FDS) - The Bill removes the existing requirement for advisers to provide an annual FDSs to clients, which is both costly and duplicative of other requirements. While we support and welcome the removal of this obligation in the Bill, we question the transition arrangements that the FDS regulatory burden would be continued for a further six months after the law is enacted. Given there is no disadvantage

[1] The Financial Advice Association of Australia (FAAA) is the largest association representing the financial advice profession in Australia, with over 10,000 members. It was formed in 2023 following the merger of the two leading financial planning/advice bodies in Australia – the Financial Planning Association (FPA) and the Association of Financial Advisers (AFA). With this merger, a united professional association that advocates for the interests of financial advisers and their clients across the country was created.

to consumers to remove this obligation, rather it drives up the cost of advice, we strongly urge for the repeal of the FDS obligation, as part of the Bill, be implemented immediately following Royal Assent.

We are appreciative of some important changes that the Government has made since the draft legislation, that was released in November 2023, particularly including the following:

- Enabling the Minister to mandate a fee consent form.
- Promoting the prospect that the fee consent obligation may be completed through an electronic means.
- Removal of fixed anniversary dates for client renewal and enabling the client and adviser to agree to change the date to better align with the preferred timing to undertake a review.
- Enabling Financial Services Guides to be provided to clients via a website, without the need to also otherwise provide them.

We also note a number of more minor modifications, including with respect to client consent for insurance commissions, where our previous feedback has been adopted.

The FAAA welcomes the opportunity to provide feedback on this legislation. We are supportive of much of Schedule 1 of this Bill, however have taken this opportunity to address areas where we have serious concerns as to how it would apply. It has taken a long time to get from the announcement of the Quality of Advice Review in 2021, to this point, and we are very enthusiastic to ensure that this reform package delivers genuine and meaningful change for the benefit of financial advice clients and the financial advisers who serve them. Please contact me on 0417 280 270 if you have any questions.

Yours sincerely,

Phil Anderson
General Manager Policy, Advocacy & Standards
Financial Advice Association Australia (FAAA)

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

Effective date: 26/04/2024
Submitted to: Senate Economics Legislation Committee

FINANCIAL ADVICE ASSOCIATION AUSTRALIA
GPO BOX 4285 SYDNEY NSW 2001

CONTACT@FAAA.AU
WWW.FAAA.AU

T 1300 337 301
ABN 62 054 174 453

PART 1—SUPERANNUATION

The FAAA have been supportive of the Quality of Advice Review recommendation to provide certainty to the deduction of advice fees from superannuation funds and the treatment of those deductions for tax purposes. We believe that the legislation achieves these objectives, however it goes a lot further.

The proposed new Section 99FA of the SIS Act has generated significant concern within the advice profession. It is possible to interpret the requirements of this new obligation to include the trustee being required to review the financial advice documents for each and every client each year and confirming that the fees being charged to the member's account are limited to those fees that could reasonably be concluded as relating to their interests in the fund and therefore meeting the requirements of the Sole Purpose Test (SPT).

This is highly problematic; there are clear privacy issues involved in such an outcome. This provision will facilitate the disclosure to the super fund of each client's personal information that would be inappropriate to share with them. This might include other super fund holdings, other sources of funds, and sensitive personal health information.

Financial advisers are very conscious of the obligations of the Sole Purpose Test (SPT), however, have been frustrated by the lack of guidance on this obligation. This was compounded by two letters that APRA and ASIC jointly wrote to superfund trustees about oversight of advice fees in April 2019 and June 2021. These documents were somewhat vague and set out an expectation of some form of risk-based checking of advice documents to confirm the appropriateness of the advice and compliance with the SPT. We have for a long time argued that some level of commonsense needed to be applied and that Privacy Act obligations should be taken into account. We are particularly concerned that this has still not been done despite the release of this new Section 99FA of the Corporations Act. The intent of the changes in the Bill, as recommended by Michelle Levy and agreed to by the Government, was to address this issue and provide certainty to allow consumers to choose to pay for financial advice from their superannuation account in accordance with the SPT, to make advice more affordable and accessible for consumers.

As drafted, the new s99FA of the Corporations Act would require an adviser to provide a client's full Statement of Advice (SOA) and other documentation to the superannuation fund. SOAs can be over 100 pages in length and, under the law, must include the client's relevant circumstances, which is detailed information that we consider is inappropriate to disclose to the fund.

Should the law require the provision of this type of information at the client level, then we propose that there must be other options to meet this requirement, such as the provision of a letter of engagement (that describes the services to be provided and the provision of advice and fees), or an ongoing fee arrangement that does the same thing.

These documents are likely to include some form of costs allocation between the different advice services being provided and where those fees are being charged. We further suggest that it should not be necessary to provide fee information that relates to other product holdings to the super fund trustee, however some form of this document could be provided to the trustee to give confidence that the Section 99FA obligation has been complied with. As this is typically a projection for the coming year, it also needs to be clear that an estimate would be satisfactory.

Further, it is not clear if the application of this obligation should apply at the time of the establishment of a new fee arrangement or whether it should be completed each year for ongoing fee arrangements. This highlights the need for greater certainty and finding a more efficient solution in the primary legislation and one that should not add to the costs to access personal advice, or the administration costs of running a superannuation fund. At present, advice firms who provide advice documents to trustees, need to spend a significant amount of time redacting personal information. This alone highlights a flaw in this regime.

We strongly oppose the trustee reviewing client level data, such as SOAs for every client. This would be costly and inefficient for both trustees and advisers, with the cost ultimately being paid by consumers.

Recommendations

This matter could be resolved by amending s99FA to incorporate the following solutions (explained below):

- Option 1 - Trustees being permitted to take a risk-based approach.
- Option 2 - The utilisation of a reliance type model including attestation requirements.

A blanket exemption for retirement phase products and members over 60 years of age, should be implemented with either option 1 or option 2.

<u>Option 1 - Risk Based Approach</u>

We propose that the trustees should be able to take a risk-based approach. Potential risk-based solutions might involve one or a combination of the following:

- Reviewing the first couple of cases that an adviser submits with that trustee, followed by spot checks on a random basis. This would be limited to reviewing terms of engagement and/or ongoing fee arrangement agreements. We would envisage that random checks, under a risk-based model, would only involve looking at appropriate documents for around one in a hundred client files.
- Reviewing cases that sit outside certain parameters, such as the scale of the fees (possibly defined as a fixed dollar amount or a percentage of funds under advice), or where a complaint has been received. Some trustees already apply this approach.

- Reactive checking of further cases when a problem has been identified with another client for the same adviser.

Option 2 - Reliance Based Model

Consistent with the approach that AUSTRAC takes in enabling product providers to place reliance on the identification of clients by advice licenses/financial advisers, we suggest that it should be possible for trustees to place reliance upon either licensees or advisers in terms of compliance with the SPT obligation. This could be achieved as a blanket exemption based upon some form of attestation by the licensee or even by individual advisers. The trustee would obviously retain the right to undertake independent reviews, particularly where there were any signs to suggest that a problem existed.

Exemption for Retirement Phase Products

A member who has met a condition of release and has transferred their superannuation from the accumulation phase to the pension phase, and can withdraw their funds if and when they choose, should be able to approve the release of their super funds for the payment of financial advice fees without the need for the trustee to take the steps suggested by section 99FA of the SIS Act. This should be grounds for an exemption. These members already have the right to have this money released and the provision of a complying consent form should be sufficient.

We also propose that such an exemption could include all members of superannuation funds over the age of 60 in the accumulation phase, as they have met their preservation age and accessing their super is relatively easy under a number of circumstances.

It may make best sense for the law to be altered to provide the Minister with the ability to prescribe circumstances when the requirements of section 99FA(1) do not apply.

Amendment to the primary legislation

We strongly favour that this problem be resolved by a variation to the law, rather than through changes to the Explanatory Memorandum. Changes to the EM will not address the prospect of significant variation existing in the marketplace and inefficient processes becoming dominant.

We are concerned by Note 1 to section 99FA of the SIS Act, which states that *'Trustees are not required to pay the cost of providing financial product advice in relation to a member under this subsection'*. We would not like this to be applied in an arbitrary manner. The position that the trustee takes with respect to the payment of fees should be applied consistently and be made very clear up front.

PART 2—ONGOING FEE ARRANGEMENTS

Removal of FDS

Complying with the ongoing fee arrangement obligations has, for many years, been very challenging. The production of FDSs has been highly problematic, due to the difference between when a fee is taken out of the client's account and when it is paid to the adviser, the taxation treatment of fees, and the fact that there is no level of materiality. A number of licensees have moved to 12 month fixed term agreements in order to avoid the need to do FDSs. We are strongly supportive of the removal of FDSs as part of this change to ongoing fee arrangements.

Fee consent forms

Fee consent forms are an obligation that was introduced as a result of the Banking Royal Commission. One of the biggest problems was that they were introduced with only four months notice, and given the broad application of these obligations across product providers, each of them built their own solution, including systems and forms. This has caused a substantial amount of inconsistency across the financial services sector, which ultimately delivers a poor outcome for consumers and significant additional work and cost for financial advisers and super fund trustees. Standardisation of the fee consent process is critically important.

The draft legislation suggested that the use of a standard form was only optional. This would have meant that few if any of the product providers would have implemented these changes and utilised a standardised form, as they have already spent a lot of money to build their current systems.

In response, the FAAA proposed the complete removal of the obligation to provide the fee consent form to the product provider. Alternatively, we suggested making the form mandatory.

We are pleased that the Government has stipulated that if the Minister approves a form, that it will be mandatory. This is a positive development, however it does reinforce how critical it is that the Minister does choose to approve a form. We are concerned that either this may not happen, or it may be delayed. It is unclear to us the process by which a form may be approved and the extent to which there will be engagement with both product providers and advisers.

Anniversary day

We warmly welcome the ability for the renewal date to be varied, including by agreement with the client or by the adviser being able to do it at any stage between 60 days before the anniversary day and 150 days afterwards. This is a sensible change that will now allow advisers and their clients to agree the time of the year when they would like to undertake a review and consent to the continuation of the ongoing arrangement for another year.

Other feedback

We are concerned about the inclusion of a note under section 962Y(1) that despite the use of the mandated from, the product provider may request additional information from the financial adviser. We are concerned that this could be used by product providers in an arbitrary manner where they might be able to request additional information that makes it unnecessarily difficult for the financial adviser, along with requiring the disclosure of detailed information about the client. We would prefer that only the information in the standard mandated form is required for funds and advisers to meet this requirement. The legislation could set reasonable parameters for circumstances under which a fund could request additional information. This would make it clear to super funds, financial advisers and their clients when such requests could be made, and ensure a consistent application across the industry in a manner that is reasonable and respectful of privacy concerns. However, it should not be a blanket permission for funds to access client information as is currently permitted under the Bill.

Whilst we would strongly prefer that some elements of this reform, such as the repeal of FDSs could commence as soon as possible, we understand why there needs to be sensible transition arrangements for other parts. With the exception of the repeal of FDSs, the other transition arrangements are sensible and much clearer than what was contained in the November 2023 draft legislation.

PART 3—FINANCIAL SERVICES GUIDES

The FAAA is supportive of the amendment to enable providers of personal advice to meet their obligations to provide a Financial Services Guide (FSG) by reference to the same content being placed on a website. We believe that this is a sensible change to reduce the administration workload in providing FSGs to clients, including whenever there has been a change to an FSG. This is an area where there is always close attention to compliance with the law, and hope that this change will reduce the workload that is required.

Part 3 of the schedule 1 of the Bill has changed significantly since the draft, particularly with respect to reference to the enforcement provisions.

Whilst we note that the criminal penalties that apply with respect to the provision of FSGs have not changed as a result of this amendment, we believe that it is appropriate to raise our concern about the draconian nature of some of these penalties. At the high end, someone could be subject to up to 15 years imprisonment for knowingly giving a defective FSG. Even in the case of altering a website disclosure without approval from the licensee or failing to disclose the date of a material change to the disclosure information can involve up to 2 years imprisonment.

Seemingly this is less likely to happen with respect to a printed version of an FSG if good processes are in force. We are concerned that it could more easily happen with a website version,

including where someone from an IT team is making changes to a website, without understanding the consequences of making such changes. We believe that this is worthy of consideration.

PART 4—CONFLICTED REMUNERATION

We fully support the changes to the conflicted remuneration obligations, particularly with respect to the change in the definition of conflicted remuneration to specifically exclude benefits paid by clients and to confirm that this applies when a client has directed a superannuation fund to pay the benefit on their behalf.

We also support the removal of the 'Execution Only' exemption, where no advice had been provided in the last 12 months (section 963B(1)(c), as this is no longer appropriate or in fact capable of being utilised.

We are supportive of the immediate commencement arrangements for many of these changes, however we suggest that the transition arrangements for employees and agents of 'Approved Deposit Taking Institutions' is very generous. Evidently, the remuneration provisions in these agreements would need to be changed before the prohibition would commence, and that could take years. We note that previous changes to conflicted remuneration law (such as grandfathered commissions) have been implemented more quickly.

PART 5—INSURANCE COMMISSIONS

We are supportive of the insurance commission changes and the introduction of these new client consent obligations, which for financial advisers providing life insurance advice, largely reflects existing practice.

We note the addition of section 963BB(1)(a), which limits this provision to cases of personal advice and as a result would ban the payment of commissions for general advice. This limitation was not included in the draft legislation released last year. Importantly, whilst most of our members only provide life insurance advice through personal advice, and would not be impacted by this change, we note that this is not the case with other operators and can understand the calls to address this issue.

We are appreciative of the changes that have been made since the draft legislation, which was released in November 2023, including the extension of the transition timeline to 12 months to better enable industry to implement these changes, the statement that the provision of consent is a requirement of the law, and the treatment of the fact that the commission is irrevocable. We also believe that the changes that have been made to the 'Transfer of financial product advice business' provisions in section 963BB(4) will now capture all relevant situations which needed to be included.