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Retirement, Advice and Investment Division
The Treasury
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AFA Submission - Better Advice Bill - Exposure Draft Regulations

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for 75 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

With the exception of Independent Directors, the Board of the AFA is elected by the Membership and Directors are practicing financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting their wealth.

Introduction

We thank you for the opportunity to provide feedback on the Better Advice Bill Regulations.

We are broadly supportive of what has been proposed in these regulations, although we make the point that we continue to have some major concerns with the Better Advice legislation, that cannot be overcome by more sensible regulation. Even at this late stage, we believe that the legislation needs to be sensibly modified to ensure that this does not become an inefficient, ineffective and costly regime.

The AFA is supportive of the concept of a Single Disciplinary Body (SDB), as long as it is efficient and focussed upon more serious matters. Where the SDB is focussed upon minor and administrative matters, this will simply lead to an inability to focus on what is important, and a delay in taking action against the financial advisers involved in the most serious matters. Our concerns relate not just to what must be referred to a Financial Services and Credit Panel (Panel), but also to what matters need to be considered by ASIC, even if they don't choose to refer it to a Panel. Any matter that is considered by ASIC, no matter how minor in nature, will consume resources. The SDB legislation needs to also recognise the role of Licensees in

addressing minor and administrative matters as a reputable alternative to all matters being addressed by ASIC or a Panel.

We have set out our responses to the various proposals below.

When a Financial Services and Credit Panel Must be Convened

The AFA is broadly supportive of what has been proposed in the regulations for the matters that must be referred to a Financial Services and Credit Panel, however we note that this only determines which matters must be referred to a Panel. ASIC can still choose to refer more minor matters to a Panel. We also continue to have a major concern with Section 921S, which forces ASIC to give a written warning or reprimand to financial advisers where they believe that there has been a breach of the law and they choose not to refer the matter to a Panel. This means that even for the most minor of breaches of the law, ASIC are forced to undertake an investigation of the matter in order to issue a written warning or reprimand. This is both unnecessary and inefficient and will drive significant cost.

Our feedback, to this point, has been to sensibly limit the number of matters that go to a Panel, and also to limit the number of matters that need to be considered by ASIC. One sensible mechanism to achieve this is to ensure that breaches of the law addressed in Section 921K of the Corporations Act are limited to matters reportable under Section 912D. In our view there also needs to be an awareness, and the application of, a distinction between unintended mistakes and deliberate misconduct. To suggest that every unintended mistake requires disciplinary action of some form, is setting the bar far too high, particularly in the context of the incredibly complex regulatory regime that financial advisers operate within.

We broadly support the criteria for when a matter must be referred to a Panel as defined in Section 12N. Bankruptcy, conviction for fraud and being assessed as no longer meeting the test for fit and proper, are all grounds that would warrant consideration by a Panel.

In terms of a failure to meet Sections 921BA(1), (2) or (3) of the Corporations Act, it is reasonable that these matters would be considered by a Panel, however it is necessary to note that it is the responsibility of the licensee to assess compliance with the education standard and the professional year obligations. The licensee should not allow the adviser to continue to operate if they are unable to meet these requirements. The responsibility for this does not entirely rest with the adviser and there is the possibility of confusion around whether the requirements have been met. With respect to Section 921F(4) and the fact that a supervisor must approve a Statement of Advice (SoA) in writing before it is presented to a client, it is possible that the SoA could be presented by mistake or without the knowledge of the supervisor. Presumably these issues might become apparent as part of the investigation.

We fully support strong action against unregistered relevant providers, although we note that if they are unregistered, then the Panel may not be the most appropriate forum to address this conduct.

We support the inclusion of a criteria for serious contraventions of financial services laws, and accept that this should cover situations where the breach has directly caused material loss or damage to the client and where it involves dishonesty or fraud. In our view, Example 1 in the draft explanatory materials is not sufficiently clear, in that it does not demonstrate that the client loss is due to a fault in the advice. A client may suffer a material loss due to a decline in investment markets, even when the advice was entirely appropriate. Also, it should be that the loss is directly related to the breach of the law and not something that is market related, that would have happened regardless of the breach. For example, in the situation where a client did not receive an FSG, and then subsequently went on to receive a Statement of Advice that was implemented, but resulted in a significant loss due to a market downturn, then we would not consider that this should be covered by this provision. The example needs to be clearer in terms of causality.

We are concerned about the concept of a contravention resulting in a material benefit to the relevant

provider. Financial advisers should be paid a material benefit for providing financial advice. Where some element of the advice or the advice process involved a breach of the law, is it really possible to attribute the benefit to the breach. In using the example above about the failure to provide an FSG, then it is easy to argue that the advice fees were not paid purely on the basis of the breach of the requirement to provide an FSG. This is likely to lead to a lot of uncertainty and confusion. The issue of causality needs to be better addressed. It would be beneficial to include an example of the case of a material benefit to the adviser.

We support the inclusion of the factor related to the involvement of a financial adviser in the repeated failure to pay AFCA determinations.

Civil Penalty Provisions that are not taken to be Significant Under the Breach Reporting regime

We support the proposal to exempt breaches of the Code of Ethics, the CPD requirements for financial advisers and the CPD requirement for the provision of tax (financial) advice services from the deemed significance test under the reportable breaches regime.

In our view, it is not necessary or appropriate to treat these breaches as reportable breaches. It should be noted that a major breach of the Code of Ethics is likely to trigger a reportable obligation under one of the other elements of Section 912D.

Sanctions to be Listed on the Financial Advisers Register

We support the proposal with respect to what sanctions would be included on the FAR, including the proposal with respect to not reporting the first sanction in certain cases. We particularly recognise this proposal for not reporting first offences when it comes to breaches that may occur early in an adviser's career. The prospect that a mistake that arises early in a career could stay on the FAR for the rest of the adviser's career is totally unreasonable.

We note that this is a matter attributable to the legislation, rather than the regulation, however we seriously question why the payment of an infringement notice must be recorded on the FAR, when it needs to come with the following disclaimers:

- "that the adviser has complied with the notice;
- that compliance with the notice is not an admission of guilt or liability; and
- the individual is not regarded as having contravened the provision specified in the infringement notice."

In this context, what is the value in listing this on the FAR and how is this beneficial for clients?

Example 6 in the Explanatory Materials includes the statement that Infringement Notices may be required to be included on the Register if the circumstances meet the requirements in paragraph 922Q(2)(ud) of the Corporations Act. In our view this implies that there are a range of conditions, however seemingly it is just a matter of whether the adviser pays the infringement notice on time, or not. If they fail to pay on time, then a range of further options are available to ASIC to take more extreme action against the adviser. Example 6, also sets out a scenario where a sanction for a matter investigated by the FSCP that is made following an Infringement Notice, is not recorded on the FAR, as it would be classified as the first sanction. This implies that an Infringement Notice is not a sanction, which only strengthens the argument as to why it is recorded on the FAR in the first place.

We strongly support the outcome where written warnings and reprimands would not be recorded on the FAR. That is a good outcome and one that we welcome. We also accept that suspension or prohibition orders should be recorded on the FAR, although we would argue that there should be a time limit for them to remain on the FAR, at least for suspensions.

We support the proposal that recording suspensions and prohibitions on the FAR would be mandated.

Extending the Deadline for Certain Financial Advisers to Complete the FASEA Exam

We strongly support the regulation to provide an extension to complete the exam through until 30 September 2022 for all advisers who have attempted the exam at least twice by the end of 2021. This was announced by the Government on 24 June 2021, and the advice profession and many financial advisers have been working on that basis. It is important that this outcome be delivered.

Amendments to the Tax Agent Services Regulations 2009

We note the amendments to provide for tax (financial) advisers who are not relevant providers, however it is our view that this is a problem that was unnecessarily created by the inadequacies of the legislation and the failure to address this feedback that was provided as part of the Senate Economics Committee process. In our view, it is remarkable that a financial adviser who only provides general advice and a financial adviser who only provides personal advice to wholesale clients could now be classified as tax agents.

This section is incredibly complex and involves a range of different scenarios where impacted parties will want absolute certainty as to how they are affected. In our view the complexity of this has not been adequately addressed, and at a point just two and a half months before it is due to start, this is an unacceptable situation. Equally, we believe that it is necessary for the Government to explain what other implications there might be for these individuals, such as increased CPD requirements.

The new item 210 applies in the case of a tax (financial) adviser in the situation where "immediately before 1 January 2022, the individual was a registered tax (financial) adviser within the meaning of the Act as in force at that time". What provision is there for someone who might be moving between licensees as at the end of 2021 or on a career break at that time.? Seemingly they would be forced to apply for registration through one of the other categories.

We also question the equity of these advisers being forced to pay more to register with the TPB as tax agents, than they would have needed to pay as tax (financial) advisers, if the existing regime was left unchanged.

We also remain concerned, to ensure that financial advice licensees and Corporate Authorised Representatives will not also be caught out by these arrangements and required to apply for registration as a tax agent. This is not adequately explained in the Draft Explanatory Material documents. Pure financial advice licensees and Corporate Authorised Representatives should not be forced to be registered as tax agents with the TPB and this should be clearly set out in the Explanatory Materials.

Finally, we do have reservations about the appropriateness of people who are not covered by the education, exam and CPD standards that apply to financial advisers, being recorded as tax agents.

Education and training standards for relevant providers – Exam Standard

In terms of 'Principle 1: testing relevant knowledge and skills' in the new Exam Standard, it is arguable as to whether the FASEA exam from 2022, should include the Tax Agent Services Act, given that tax (financial) advisers will be removed from the TASA regime.

With respect to alternate arrangements for taking the exam, we are conscious that a number of advisers have struggled with the technology element, and we are aware that FASEA have recently referred to the option to do a paper-based exam. We would like to see this mentioned.

In terms of the section on 'Marking and results', we are conscious that the exam was set at the Credit Standard, and understood that this meant that an adviser needed to get at least 65%. It is concerning to see the statement "which is to be marked to an overall credit grade (a range of between 65% and 74%, with the final passing mark for a particular exam, being determined by ASIC". This is particularly vague and suggests that the mark could be much higher than the 65% base of the credit range. We request that this be addressed.

We are surprised that the note at the bottom of Section 2-55(12), in discussing exceptional circumstances, fails to specifically refer to both natural disasters or the impact of a pandemic.

> *Exceptional circumstances beyond the person's control under paragraph (a) may include acute illness, recent loss or bereavement, hardship or trauma (including being the victim of crime or severe disruption to domestic life), unforeseen call-up for service (including military service, court appearance, jury service or emergency service), an unexpected equipment failure or malfunction during the exam.*

In the context of what the country has gone through over the last couple of years, this should have been incorporated into the wording.

Registration, Education and Training Requirements for Financial Advisers Providing Tax (Financial) Advice Services

It seems that there is no professional body that needs to approve the Commercial Law and Taxation Law courses that a financial adviser may be required to do. Given the criticism of the variability in the standard of the Diploma of Financial Planning courses in the past, and the often repeated claim about how quickly a financial adviser could achieve the education requirement, it is surprising that these courses will be subject to the same risks.

Section 3-170, 3-171 and 3-172 only apply to a person who is a relevant provider immediately before 1 January 2022. There is no coverage for someone who comes off the FAR in late December 2021 and then looks to become registered on the FAR again in early January 2022. This could arise as a result of an adviser moving from one licensee to another or advisers who are forced to leave a licensee that is closing down. It is also relevant for people on a career break or maternity leave at the time of the transition. The failure to address this is surprising, given that advisers on a career break as at 1 January 2022, have been recognised by ASIC under Info Sheet 260.

Someone who applies for registration with the TPB before 1 January 2022, but does not get an answer by 1 January 2022 cannot provide tax (financial) advice services from 1 January 2022 until the application is approved. This basically means that they cannot provide financial advice for this period, as almost all advice involves some element of taxation. This is unreasonable, particularly when someone who has never applied for registration with the TPB and never paid the registration fee, can continue to provide tax (financial) advice services until 31 December 2025. This seems particularly inequitable. We suggest that the solution is that they are allowed to provide tax (financial) advice until their application is finalised.

We are also conscious that there will be a considerable number of financial advisers who will have to pay a fee to register or re-register themselves and their Corporate Authorised Representative with the TPB in the months leading up to the end of 2021. These registrations are for a three year period and it seems unfair to require them to pay the full registration fee, when this will only be required for a short period of time. In the case of those who apply before 1 January 2022, but do not receive their approval until after 1 January 2022, they will effectively never be operating under the oversight of the TPB. This raises questions about the appropriateness of this process. It also seems inequitable that those who were never registered with the TPB, will not be required to pay a registration fee, yet can continue to operate as a tax (financial)

adviser beyond 1 January 2022. The Government should not be charging a fee for a service that will not be provided.

New Fees for the Exam and Adviser Registration

We consider the increase in the cost of the exam from $540 (plus GST) to $948 to be excessive. To spend nearly $1,000 on an exam in order for an adviser to stay in the profession, is very costly. For those advisers who might be forced to sit the exam on multiple occasions, this will be a very expensive exercise.

We are also very concerned about the cost of the exam being a disincentive for new advisers to join the profession. This is a material financial barrier for young people to confront.

We are also conscious that the registration fee of $95 for financial advisers is nearly twice the current fee to register an adviser on the Financial Adviser Register. We recognise that some additional information will be required, however we expect that it should be possible to automate these requirements. Such a large increase also seems excessive. In the context that this fee could apply to at least 16,000 advisers, this would amount to at least $1.5 million in additional costs.

Concluding Comments

Whilst we continue to have material concerns about the Better Advice Bill, we are supportive of many of the proposed regulations, although we have identified a number of important issues above, that we believe are important to address.

The AFA supports measures to sensibly reduce the volume of minor and administrative matters that will need to be considered by either ASIC or a Financial Services and Credit Panel. The proposed regulation will likely contribute to some reduction in the matters that would be considered by a Panel, however it will still involve an extensive number of matters and there remains a high level of discretion on the part of ASIC.

Until the legislation is passed, the Government still has the chance to fix the underlying legislation to ensure that the SDB regime does not become overwhelmingly complex and costly.

We would be happy to discuss this matter further, or to provide additional information if required. Please contact us on (02) 9267 4003.

Yours sincerely,

Helen Morgan-Banda
Chief Executive Officer
Association of Financial Advisers Ltd