

20 September 2011

Future of Financial Advice  
Department of Treasury  
Langton Crescent  
Canberra ACT 2600

Email: [futureofadvice@treasury.gov.au](mailto:futureofadvice@treasury.gov.au)

Dear Sir \ Madam,

## **EXPOSURE DRAFT OF THE CORPORATIONS AMENDMENT (FUTURE OF FINANCIAL ADVICE) BILL 2011**

The Association of Superannuation Funds of Australia (ASFA) provides this submission in response to the release of the Exposure Draft of the Corporations Amendment (Future of Financial Advice) Bill 2011 (the Draft Bill).

### **About ASFA**

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. We focus on the issues that affect the entire superannuation system. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

### **Background Comments**

In this submission, we primarily focus on the "best interest" provisions of the Draft Bill. However, it must be noted that ASFA is supportive of the enhanced ASIC powers proposed in the Draft Bill.

ASFA's primary interest in the development of Future of Financial Advice legislation is to ensure that members of superannuation funds have access to "help" about their retirement savings. This "help" should be available from the trustee of their superannuation fund or the superannuation product provider whether the "help" amounts to factual information, general advice or personal advice.

ASFA also recognises that research shows that people who seek financial advice are more likely to achieve their goals for retirement. As such, ASFA believes that it is essential that:

- members of superannuation funds are able to obtain cost effective financial advice in regards to their retirement savings;
- individuals and members of funds have access to advice about simple or single-issue scenarios, particularly lower income or first time employees in Australia;
- any person providing advice is required to act in the best interest of the person seeking advice;
- persons seeking advice may receive it in person, over the phone, online or via tools such as calculators;

- the advisor bears the onus to ensure that the person is receiving appropriate advice relevant to their current circumstance; and
- the advisor has a duty not to provide advice where it would be in the best interest of the person not to.

### **General Comments on the Draft Bill**

ASFA is supportive of a best interests (advice) test being enshrined in legislation.

As we have mentioned above it is important that advice providers are able to scale advice with a degree of certainty so that providers are not deterred from providing, and fund members are not deterred from seeking advice on a single issue or simple scenario.

One of the more difficult issues in relation to scaling or de-scoping advice is what should be the obligation of the adviser and what should be the role of the client? ASFA is of the view that given (in general) the knowledge asymmetry between the adviser and the client, and also given the fiduciary nature of the relationship it is the adviser who, after making appropriate enquiries, is better placed to determine the scope of the advice. As such, ASFA is of the view that the notion of an “agreement between the consumer and the adviser” is not appropriate in the legislation. However, there must be appropriate protections for the advisor so that de-scoped advice can be provided in a cost effective manner without exposing the advisor to vexatious litigation. Accordingly, we are of the view that a “reasonable steps defense” is appropriate when the adviser has a duty to determine the scope of the advice. We acknowledge that a reasonable degree of protection is afforded in the Draft Bill (as amended) in that it prescribes the steps an adviser must follow to meet the best interest test, the test is no longer “inclusive but not exhaustive” and there is a “reasonable in the circumstances” provision in Section 961C(2).

### **Specific Comments on the Draft Bill**

ASFA notes that the Bill is complex and given the time, ASFA has taken the approach to work with the Draft Bill as much as possible rather than “re invent the wheel”. We have made a number of specific suggested drafting changes in the attached marked up Draft Bill. We believe these changes will assist advisers providing cost effective scaled advice with greater certainty without unduly watering down the best interests test and without significantly altering the tenor of the Draft Bill.

In order to assist the drafters and Treasury, we have used as a basis for our suggested changes a marked up Draft Bill from Michael Vrisakis (Freehills lawyers) on behalf of the FSC (and possibly others). We have altered this draft in the following respects:

- Section 961C(3)(b) – we have added a new sub-clause (iii) which requires providers to take into account conflicts with related third parties;
- Section 961E(2)(b) – we have removed the qualification that the scope of the advice be agreed between the adviser and the client; and
- Section 961E (2) (e) (i) – we have included a requirement that the reasonable investigation should have regard to the client’s existing products.
- Section 961J – Resulting advice still based on incomplete or inaccurate information – we have removed the suggested additional paragraph 6 – “For the avoidance of doubt, a reference to objectives, financial situation and needs of the client in this section and in this Division”
- We have also deleted the provisions relating to approved product lists (APL’s). We are of the view that as APL’s are not a regulated arrangement, it is inappropriate to regulate them in the Corporations Act. However, we do believe it is appropriate for ASIC to issue a regulatory guide in relation to them. Such guidance should also cover the provider’s

obligations in relation to the assessment not only of the product but of the product provider as well.

If you have any queries or comments regarding the contents of our submission, please contact me on (02) 8079 0858 or by email [dgraus@superannuation.asn.au](mailto:dgraus@superannuation.asn.au).

Yours sincerely

A handwritten signature in black ink that reads "D. Graus". The signature is written in a cursive style with a large initial "D" and a long, sweeping underline.

David Graus  
General Manager, Policy and Industry Practice.