Committee Secretary
Senate Standing Committees on Economics
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Dear Committee Secretary

Submission: Senate Economics Committee Inquiry into Treasury Laws Amendment (2023 Measures No. 1) Bill 2024.

The Financial Services Council (FSC) is pleased to provide its submission to the Senate Economics Committee's Inquiry into the *Treasury Laws Amendment (2023 Measures No. 1) Bill.* We thank the Committee for granting the FSC an extension of time in which to submit and we hope our recommendations will be considered closely as it considers the Bill's implications.

The FSC is a strong and persistent advocate for financial advice laws that make financial advice more affordable and accessible for consumers. Our comments are limited to Schedule 1 of the Bill which unfortunately fails to deliver on these stated Government objectives due to defective legislative drafting, with detailed comments provided in **Attachment A**.

The Bill introduced into Parliament, despite having some worthy measures, will on the whole make advice less affordable and more inaccessible for consumers. It's crucial that the drafting of the law is also solid. There are at least two key points in the drafting process that cannot be ignored because they will also not be ignored during enforcement, despite any explanations provided by the Government or the broader "sole purpose test."

The Bill sets strict conditions for trustees to comply with before they can provide advice to members. This means the advice must be personal, and it must be charged based solely on the cost. Simply being satisfied with meeting these conditions isn't enough for trustees; they must actually meet them, or else they could be in breach of the law. This could lead to significant expenses for trustees. For example, if the advice doesn't satisfy the conditions in section 99FA, despite what the trustee believes, they could still be in breach of the law.

The unintended consequences of the drafting could undermine the positive intentions of the law. As has been publicly acknowledged, similar issues arose with recent changes regarding commission payments in this very Bill, where the fault lay with unintended drafting rather than the Government's intent. This legislation involves complex issues, and mistakes in drafting are easy to make. The specific concerns noted below together demonstrate that the Parliament should not pass the Bill absent these issues being resolved. The FSC recommends the Committee to make recommendations that these concerns are addressed.

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The legislative changes in Schedule 1, Part 1 of the Bill relating to legal basis and appropriate and justified oversight of adviser fee deductions by superannuation trustees from member accounts, which the FSC supports, are defective. Implementation of this recommendation was meant to provide industry with certainty that advice fees could be deducted from superannuation in a way that did not add undue and additional regulatory burden that would push up costs for consumers. Instead, there are multiple interpretations of the law's impacts, a further lack of clarity, and concerns the legislation will make the existing situation worse. Specific concerns include:

1. The legislative stance of the amendments may result in a black letter interpretation of the provision by superannuation trustees. This interpretation will necessitate superannuation trustee to move beyond their existing risk-based practices of ensuring compliance with the sole purpose test and best financial interest duty when deducting adviser fees from member accounts. As a result, superannuation trustees will instead need to check every single piece of advice, which is inconsistent with current industry practice and the stated policy intent of the Government.
2. These additional requirements to check each piece of advice forced upon superannuation trustees due to the amendments in the Bill go beyond clarifying the law and the stated objectives of the quality of advice review and impose significant costs of verification that will be borne by consumers either as an individual charge or a higher administration cost for the fund.
3. The amendments also inadvertently, through ambiguous drafting, have the potential to force superannuation trustees to reject advice fee deductions on the basis that they are not charged on a cost basis, in effect meaning financial advisers risk not being paid the fair market price of their advice.
4. The amendments restrict the ability to charge for advice services provided through general advice, which was not a stated policy objective of relevant recommendation of the Quality of Advice Review.
5. The impacts of these unintended consequences may be that some superannuation trustees will decide not to facilitate advice deductions from members accounts where the adviser is independent of the superannuation fund. The choice by some superannuation trustees to remove the facility to allow a member to fund financial advice through their superannuation account will have a chilling effect on the access to professional financial advice provided by independent, appropriately trained and qualified individuals, as members will not be able to fund advice on their superannuation from their own superannuation account.
6. We note the explanatory materials to the Bill do not reference and are not accompanied by an independent Regulatory Impact Assessment or Statement by the Office of Impact Analysis.

The FSC also notes our submissions covers off on other issues with Schedule 1 of the Bill where legislative amendments or further clarity would improve the legislation which can be summarized as including:

- **Schedule 1, Part 1 – Deduction of Advice Fees from Superannuation:** In addition to the concerns highlighted above, specific amendments to fix errors in current legislation. Specifically:
  - Consequential amendments should be made to section 99FA so that there is clarity that superannuation trustees can pay the price of advice and are not restricted to cost recovery.
  - Consequential amendments (to section 99FA of the Superannuation Industry Supervision Act 1993 and the Income Tax Assessment Act 1997) should be made to

permit deduction of advice fees for personal and general advice (the current provision has moved to be limited to personal advice which is not the current position at law).

- **Schedule 1, Part 2 – Ongoing Fee Arrangements**: Further technical refinements to ensure the provisions work as intended and further reduce red tape, noting the welcome changes already in the legislation. Specifically, consequential amendments to the consent requirements for ongoing fee arrangements need to:
    - allow for consent to be obtained 60 days before the new reference day without this being moved forward;
    - clarify the 30-day time frame for terminating fee arrangements; and
    - remove the 150-day renewal period allowing consent to be signed and agreed within a 15 month period.
- **Schedule 1, Part 3 – Financial Services Guides**: Further technical refinements to ensure the provisions further reduce cost, noting the welcome changes already in the legislation.
    - Consequential amendments to the proposed Financial Services Guide (FSG) provisions should apply to general advice as well as personal advice as a further red tape reduction measure and to provide consistency around the provision of an FSG.
    - Consequential amendments to correct references in s943N to records of advice for "further market related advice" which have been removed under Regulation 7.7.10AE.
- **Schedule 1, Part 4 – Conflicted Remuneration**: Further clarifications to ensure the explanatory memorandum accurately explains the changes which the FSC supports.
    - Specifically ensuring consistency between the Explanatory Memorandum and the Bill's provisions in Section 963A which is not currently the case.
- **Schedule 1, Part 5 – Insurance Commissions Consent and Disclosure:** The FSC notes the widespread industry concern over the drafting errors in this provision which the Government has publicly committed to correct and notes our strong support that these errors are corrected via amendments to the law.
    - Specifically, consequential amendments to ensure that the consent and disclosure requirements, which the FSC supports, do not prevent the payment of commissions on life insurance and general insurance products under general advice.
- **Schedule 1, All Parts – Commencement and Transitional Arrangements**: Appropriate commencement and transitional arrangements are made to avoid cost and disruption for consumers.

Finally, we would welcome the opportunity to speak to our submission at a hearing of the Committee.

Yours sincerely,

Spiro Premetis
Executive Director – Strategic Advocacy

ATTACHMENT A – FSC COMMENTS ON SCHEDULE 1

FSC Recommendations

The FSC makes the following recommendations for the consideration of the Committee.

Schedule 1, Part 1 – Deduction of Advice Fees from Superannuation

FSC Recommendation 1: The Government address shortcomings in the drafting in the Bill so that the stated policy objective is achieved and unintended consequences are avoided, specifically that:

- Superannuation trustees and financial advisers have legal clarity that they are authorized by the SIS Act 1993 to facilitate adviser fee deductions if they choose to provide this facility;
- Superannuation trustees and financial advisers have legal clarity that an advice fee paid in accordance with member consent is treated as expense of the fund;
- Superannuation and financial advisers have clarity that financial advisers can receive their market price for the financial advice they provide; and
- Superannuation trustees and financial advisers have legal clarity that the law does not require superannuation trustees to check each individual piece of advice.

These amendments should retain the existing obligations in relation to the sole purpose test and best interest duty which can be met with a risk-based compliance approach.

FSC Recommendation 2: Consequential amendments should be made to section 99FA of the SIS Act 1993 so that there is clarity that superannuation trustees can pay the price of advice and are not restricted to cost recovery.

FSC Recommendation 3: Consequential amendments (to section 99FA of the SIS Act 1993 and the Income Tax Assessment Act 1997) should be made to permit deduction of advice fees for personal and general advice (the current provision has moved to be limited to personal advice which is not the current position at law).

FSC Recommendation 4: Ensure current tax practice relating to tax deductions on financial advice should be preserved and final legislation should provide further clarity on Goods and Services Tax (GST) treatment (particularly the availability of input tax credits or reduced input tax credits) to be applied in respect of the financial advice fees paid by the superannuation fund.

Schedule 1, Part 2 – Ongoing Fee Arrangements

FSC Recommendation 5: Consequential amendments to the consent requirements for ongoing fee arrangements need to:

- allow for consent to be obtained 60 days before the new reference day without this being moved forward;
- clarify the 30-day time frame for terminating fee arrangements; and
- remove the 150-day renewal period allowing consent to be signed and agreed within a 15 month period.

Schedule 1, Part 3 – Financial Services Guides

FSC Recommendation 5: Consequential amendments to the proposed Financial Services Guide (FSG) provisions should apply to general advice as well as personal advice as a further red tape reduction measure and to provide consistency around the provision of an FSG.

Schedule 1, Part 4 – Conflicted Remuneration

FSC Recommendation 6: Ensuring consistency between the Explanatory Memorandum and the Bill's provisions in Section 963A which is not currently the case.

Schedule 1, Part 5 – Insurance Commissions Consent and Disclosure

FSC Recommendation 7: Consequential amendments to ensure that the consent and disclosure requirements, which the FSC supports, do not prevent the payment of commissions on life insurance and general insurance products under general advice.

Schedule 1, All parts - Commencement and Transitional Arrangements

FSC Recommendation 8: Appropriate commencement and transitional arrangements are made to avoid cost and disruption for consumers.

Schedule 1, Part 1: Deduction of advice fees from superannuation

Analysis of the Bill and Explanatory Memorandum

Recommendation 7 of the Quality of Advice Review (QAR) recommended a clear legal basis for trustees to lawfully pay advice fees from super where the fees are paid on the direction of a member:

> *"Superannuation trustees should be able to pay a fee from a member's superannuation account to an adviser for personal advice provided to the member about the member's interest in the fund on the direction of the member.* ***"The objective of this recommendation is to provide superannuation fund trustees with more certainty about paying advice fees agreed between a member and their financial adviser from the member's superannuation account and ensure that adviser fees are not paid in breach of the SIS Act and are not taxable benefits for members.***
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> *"…… I recommend that section 99FA of the SIS Act be repealed and replaced with a provision giving trustees permission to pay, on the direction of a member, a fee for advice provided to the member from a financial adviser about the member's superannuation in the fund. …. And so, rather than having to put in place an arrangement by which the advice fee is an expense incurred by the trustee … the SIS Act would authorise the trustee to pay an advice fee, including an ongoing advice fee, on the direction of the member.*
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> *The direction would operate in the same way that investment directions and binding death benefit nominations work…. An advice fee paid in accordance with the direction would be treated as an expense of the fund despite the fact that the trustee will not be a party to the arrangement with the adviser and despite the fact that the expense will not have been incurred personally by the trustee.*
>
> *The trustee will still need to be confident the advice related to the member's interest in the fund and so it would need some ability to confirm that. This might mean that trustees will only permit financial advice fees to be paid at the direction of members to advisers with whom they have an agreement 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. This proposal is not intended to change fundamentally what trustees do now, but it will place it on a firmer foundation and make it easier."*[1]

Currently, trustees rely on the existence of a tripartite arrangement between the adviser, trustee and member, for the advice fees to be an expense of the fund which can be paid from the fund. However, given how these arrangements actually work in practice and given that this has never been tested in court, it creates legal uncertainty for trustees as explained in Part 7.4.4 of the Final Report of the Quality of Advice Review. Recommendation 7 intended that a member direction to pay advice fees would operate in the same way as investment directions and death benefit directions.

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[1] Extracted from Part 7.4.4 of the Quality of Advice Review Final Report

The Bill's drafting may have the following impacts:

- **Undermined consumer access to professional financial advice and agency:** This runs against the Government's intent and the QAR to enable members to draw on their superannuation for the purposes of advice.
- **Increased red tape by introducing new requirements (e.g. SOA checking by Trustees):** Trustees are not equipped to replicate more onerous compliance processes than advice AFSLs, and this will come at a cost to all members of the fund regardless of whether they receive advice at all. For a trustee to satisfy themselves they will need to look at the entire situation of a client, but practically SOAs cover circumstances relevant to the consumers interest in the fund and outside of it. Trustees will receive redacted SOAs and will not be able to satisfy themselves that the proportionality required has been met.
- **Further restrict access to independent financial advice:** The Bill's provisions risk privileging certain models (e.g. tied advice provided by the trustee); undermining consumer choice and the value of personal financial advice. This is unnecessary given the significant consumer protection independent licensed financial advisers provide consumers subject to the Code of Ethics and the Best Interests Duty and would undermine trust between trustees and AFSL holders.
- **Reduced access to advice:** If trustees interpret the current proposal to mean they must check every piece of advice (which has been the experience so far), then it's going to have the exact opposite effect to the intended objectives of Recommendation 7, which is to reduce the amount of advice provide to superannuation members.

<u>Privacy and cost implications</u>

Superannuation trustees lack the skills and expertise to make determinations about the financial advice and will now be required to do this for each individual piece of advice at significant cost.

- Advice licensees already make these required assessments under existing corporations law, are regulated entities under the *Corporations Act* and which, in turn, are licensed and supervised by ASIC. Duties to act in client interests are imposed on advice licensees and their advisers by Advice Laws.
- It is hard to contemplate how a trustee would go about satisfying the requirements of the proposed framework without making some assessment of the SOA provided by the AFSL to the fund member, or an Advice Record should the Government proceed with reform of the SOA requirements.
- Trustees would be without the expertise to determine the proportion of the fee that relates to the member's interests in the superannuation fund so that, despite their best efforts, could still end up breaching the proposed law.
- The cost of administering any assessment would be charged back to a fund and members. Given the effort required by the trustee to make the assessment on each advice fee to be deducted this may be a significant expense and the trustee may determine it is not in members' best financial interests to incur such expense and therefore the trustee may opt to not permit advice fees to be deducted from members' superannuation accounts. If the member is not able to pay the cost of the advice directly this could result in the member not being able to afford valuable financial advice.

<u>Example: How the Bill's provisions would impact a couple with advice in a single SOA</u>

The current drafting of the Bill assumes if an adviser provides a couple with joint advice in a single SOA and is part of which relates to one members of the couple's superannuation interest in a

particular fund. To discharge its obligations as currently drafted, the trustee would request a copy of that SOA was required to be assessed by that member's superannuation trustee. This is in addition to the current practice trustees will take in relation to advice, including but not limited to, for example:

- Confirming the Adviser providing the advice is licensed and their employing AFSL.
- Requiring further documentation from the Licensee as further due diligence prior to any payments.
- Spot checking superannuation member account to ensure the right amount is deducted.
- Taking subsequent action on the member's account to mitigate against potential cases of fee for no service.
- Superannuation funds do not typically vet advisers deducting fees as this is the role of the licensee not a trustee.
- In accordance with privacy obligations, the adviser (and their Advice Licensee) would generally look to redact any information not related to that superannuation interest. This renders any such assessment highly artificial, adds unnecessary cost and creates delay in the advice fees being deducted and paid. In addition, it makes it difficult for a trustee to form an accurate opinion on the relative cost of the advice.

If the trustee was provided with an unredacted version of the SOA and assuming the clients had given consent to its provision (overcoming privacy concerns for the clients and adviser), the trustee would still be required to fully or partially erase the document now information that is not required to perform its obligations.

Amendments to s99FA proposed in the Bill

Section 99FA(1) in the Bill does not provide legal certainty for superannuation funds to deduct advice fees on the direction of the member as envisaged by the QAR. This is because:

- **Trustees will be required to individually check Statements of Advice:** The legislation as per the current Bill before Parliament suggests that trustees will need to check every piece of advice individually to ensure it meets the requirements of s99FA. Even if that is not the intention, the current wording does not make that clear and very likely to be interpreted this way by either trustees or the regulator. Specifically:
    - Section 99FA (1)(a) will likely be read by trustees and/or regulators as a requirement to form their own opinion on whether the financial product advice is personal advice or not. This is notwithstanding all other mechanisms in place making it self-evident the advice is personal advice – member directions and consents.
    - Section 99FA(1)(b) requires that the amount charged does not exceed the cost of providing advice about the member's interest in the fund. Trustees and/or regulators will potentially interpret this requirement that they need to form their own opinion about the relative cost of the advice where it relates to members interest in the fund. This is typically impossible for a trustee of the superannuation fund to do as they are not privy to (nor legally entitled) to see the cost profile of an advice provider – even if they have access to the Statement of Advice and / or the related file.

The opposing legal argument, that there is no issue with the drafting, suggests that the new draft of the law is seen as maintaining the current situation and is being put forward to strengthen this stance. It's believed that this aligns with the Government's intentions, which are undoubtedly well-founded. However, it's crucial that the drafting of the law is also solid. There are at least two key

points in the drafting process that cannot be ignored because they will also not be ignored during enforcement, despite any explanations provided by the Government or the broader "sole purpose test." These two points are:

- The law sets strict conditions for trustees to comply with before they can provide advice to members. This means the advice must be personal, and it must be charged based solely on the cost. Simply being satisfied with meeting these conditions isn't enough for trustees; they must actually meet them, or else they could be in breach of the law. This could lead to significant expenses for trustees. For example, if the advice isn't genuinely personal, despite what the trustee believes, they could still be in breach of the law.
- Third-party advisers cannot charge more than the actual cost of their advice. This is based on wording used in another section of the law and is another requirement that cannot be ignored, even if tested in court. Trustees could be in breach of the law even if they believed they were complying with it.

These unintended consequences could undermine the positive intentions of the law. Similar issues arose with recent changes regarding commission payments, where the fault lay with unintended drafting rather than the Government's intent. This legislation involves complex issues, and mistakes in drafting are easy to make.

FSC Recommendation 1: The Government address shortcomings in the drafting in the Bill so that the stated policy objective is achieved and unintended consequences are avoided, specifically that:

- Superannuation trustees and financial advisers have legal clarity that they are authorized by the SIS Act to facilitate adviser fee deductions if they choose to provide this facility;
- Superannuation trustees and financial advisers have legal clarity that an advice fee paid in accordance with member consent is treated as expense of the fund;
- Superannuation and financial advisers have clarity that financial advisers can receive their market price for the financial advice they provide; and
- Superannuation trustees and financial advisers have legal clarity that the law does not require superannuation trustees to check each individual piece of advice.

FSC Recommendation 2: Consequential amendments should be made to section 99FA of the SIS Act 1993 so that there is clarity that superannuation trustees can pay the price of advice and are not restricted to cost recovery.

SIS Act and 1993 and Income Tax Assessment Act 1997

The drafting of Items 5 and 6 of Schedule 1 under Division 2 Part of the Bill limits the application of the Bill in respect of fees to ‘personal advice’. It should not be limited to personal advice and the word personal should be removed.

FSC Recommendation 3: Consequential amendments (to section 99FA of the SIS Act 1993 and the Income Tax Assessment Act 1997) should be made to permit deduction of advice fees for personal and general advice (the current provision has moved to be limited to personal advice which is not the current position at law).

GST treatment of financial advice fees

The Bill contains amendments that provide appropriate clarity on the income tax aspects of the changes. However, there is a notable omission of any provisions to clarify the GST treatment of *all* financial advice fees paid by the superannuation fund. There are implications for superannuation funds and Investor-Directed Portfolio Services (**IDPS**) where fees for advice on a consumer's interest in the fund is deducted from their account.

The absence of clarification under the rules, including confirmation of an acquisition by the fund and the reduced input tax credit status and applicable percentage, would give rise to significant GST uncertainty for superannuation funds associated with the proposed changes as the long-term GST treatment would be unclear.

An example of the effects of this uncertainty is recent ATO guidance on the current law, which interprets superannuation funds and IDPS as no longer being the recipient of the supply of advice in certain circumstances. As a result, tax relief may no longer be available on the advice and the cost to consumers will increase by approximately 7 per cent. It also risks significant consequences throughout the advice value chain.

In addition, the introduction of GST uncertainty arising from the Bill is likely to result in the following negative outcomes for consumers:

- result in increased disputes;
- pricing of risk into fees
- an increased cost of providing advice to members, whether due to cost of disputes, loss of entitlement to reduced input tax credits or otherwise.

This would detract from the stated objective of Recommendation 7 to provide certainty on the charging of advice fees. These outcomes also run counter to the Government's policy of making financial advice affordable and accessible for more Australians by increasing the cost of advice.

Further clarity should be provided in the context of the GST treatment (particularly the availability of input tax credits or reduced input tax credits) to be applied in respect of the financial advice fees paid by superannuation funds and IDPSs on behalf of their members. In part this is because:

- The amendments do not address the issue of the contractual arrangements regarding provision of the advice and payment of the fees. In the proposed amendment to sub-section 295-490(1) Item 5 paragraph (a) it is made clear that the deduction is available to the fund "regardless of whether that cost was incurred by the provider, the member or another entity".
- In paragraph 1.58 it is said "the cost can be incurred by the fund, or, incurred by the member and subsequently paid by the fund". This could potentially lead to inconsistent GST treatments for the same economic transaction.
- proposed new sub-section 99FA(5) of the SIS Act states that "if the cost of providing financial product advice in relation to a member is charged in accordance with subsection (1), the cost is taken to be a direct cost of operating the fund" but this is limited to being for the purposes of the SIS Act and Regulations.

An appropriate amendment to the GST provisions to clarify that the superannuation fund or

investment platform is the acquirer of the supply of the financial advice services and is entitled to an appropriate input tax credit or reduced input tax credit would provide clarity on the long-term GST treatment of advice fees while ensuring that Recommendation 7 of the QAR is implemented.

FSC Recommendation 4: Ensure current tax practice relating to tax deductions on financial advice should be preserved and final legislation should provide further clarity on Goods and Services Tax (GST) treatment (particularly the availability of input tax credits or reduced input tax credits) to be applied in respect of the financial advice fees paid by the superannuation fund.

Schedule 1, Part 2 - Ongoing fee arrangements

Analysis of the Bill and Explanatory Memorandum

We welcome the Bill's provisions to:

- Allow the Minister to prescribe a standard form;
- Incorporation into primary law provisions to validate a consent where a fee recipient changes;
- Remove the civil penalty for failing to provide a termination notice within 10 days;
- Permit fee consent obligations to be discharged electronically”; and
- Consolidate terminology such as ‘anniversary day’ and ‘renewal day’.

Rationale or Additional Amendments

- **Obtaining consent 60 days before the new reference day without having to bring this forward is more practical:** The Bill will create complexity for licensees monitoring service delivery and consent renewal as there will be anniversary dates and reference dates, clients can provide consent 60 days prior or up to 150 days after the anniversary or reference date.
- **Removing the 150-day renewal period will allow flexibility for advisers and consumers:** While reference to a ‘renewal period’ is removed, it still ultimately exists. The 150-day renewal period is an arbitrary requirement on advisers only allowing them to renew and agreement after the anniversary date, and not reflective of different consumers. Advisers may wish to meet clients out of cycle and in advance for a variety of reasons (e.g., if the client is travelling overseas). Removing ‘renewal period’ and allow consents to run for 15 months from when the consent was given. This would give advisers the flexibility to reset the annual review, but each time for a period of up to 15 months. A timeframe of 15 months is also simpler than 150 days to manage (given the changing days in a month).
- **This should be supported by guidance on what this would mean in relation to the service period and anniversary OFA are connected to the service commitments specified within the consent (e.g. the services that the client will be entitled to receive under the arrangement during that period).**

  Reference: 1.112 of EM [Schedule 1, item 10, paragraphs 962G(2)(a) to (j) of the Corporations Act]

    - It should be clearer that Ongoing fee consent form must display the annual fee amount of the fee, as per the current industry adopted approach. At the moment it’s unclear whether the intention of the legislation is instead for the disclosed fee amount to be for the "maximum consent period". Having to disclose the fee amount for the maximum consent period would cause double ups in disclosure of fees. This becomes even more messy given that

adviser/client can now pick the date that the next renewal period will be based on, so could be less than 12 months.

- Also it is unclear as to the date that the fee estimate should commence from E.g. for a renewal of consent would the estimate need to be taken from the date that the renewal is signed, taken from the most recent reference date that was used as the basis for the renewal period. Our preference would be that consent is taken from the most recent reference date.

Reference: 1.36 of Explanatory Memorandum (EM) [Schedule 1, item 2, subsection 99FA(2) of the SIS Act] - Where a fee consent form is being provided to a Trustee, the Trustee should only be required to obtain the consent relating to the "the amount to be charged against the member's interest in the fund", and not the total "amount to be paid for providing the advice". Therefore, there should be the ability for such fee consents to be separate and this should be considered in the design of the form/s.

- **30 day timeframe for terminating fee arrangements:** need for clarity around termination of an agreement given the time that elapses between when an agreement ceases or terminates and an adviser missing a run on platform to put the termination into effect.

FSC Recommendation 5: Consequential amendments to the consent requirements for ongoing fee arrangements need to:

- allow for consent to be obtained 60 days before the new reference day without this being moved forward;
- clarify the 30-day time frame for terminating fee arrangements; and
- remove the 150-day renewal period allowing consent to be signed and agreed within a 15 month period.

<u>Other matters</u>

- **Consultation on forms issued by the Minister will address underlying complexity in the Bill and allow for a form reflective of the consumer and industry experience:** Industry co-design of the single consent form with regulators and government will reduce much of the complexity of the proposed requirements.
  - **Primary law should only provide a baseline set of data fields that a consent form should require and not prescribe vague or ambiguous terminology that leads to variation in the industry. This can be resolved in the design of the form in consultation with industry.** We question the import of two ASIC legislative instruments[2] prescribing the data fields (e.g., name and contact details). This uses existing language that has led to different interpretations across the industry. The form would need to be specific about the data fields required either in the form it approves following consultation and where necessary supported by guidance. For example, 'contact details' would need to be specified.
    - Some operators consent forms include a small number of 'non-prescribed' fields such as the member's address, mobile, email. These data points are used as part of the member verification as a risk mitigation measure to provide comfort that the member providing the form, is truly the member. It also assists in ensuring we have the right form for the right member. This will be simplified by the

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[2] ASIC Corporations (Consent to Deductions—Ongoing Fee Arrangements) Instrument 2021/124
ASIC Superannuation (Consent to Pass on Costs of Providing Advice) Instrument 2021/126

process afforded through attestation we propose but this example is equally relevant to ensuring primary law is not unduly prescriptive where required data fields are concerned.

- **Advisers attestation acknowledges fee consent as an inherently adviser-client interaction providing regulatory certainty for trustees**: The Bill should provide for an attestation product issuers can rely on and responsibility for this should sit with advisers. The member's professionally qualified and licensed financial adviser should be responsible for securing the member's consent to deduct fees and attesting this to the trustee or product issuer(s) – a fundamental change that should accompany the introduction of a single consent form. Now, positive client consent has been interpreted to mean that the trustee must receive, and sight signed forms from clients. In practice this has meant the adviser is required to obtain the signed form and submit this to the trustee along with a client ID that contains a client signature for comparison. This has created onerous obligations on the adviser and the trustee to manage and significant inefficiencies. While a digital client consent option has been developed, the vast majority of advisers and clients do not take this option up. Such a form will support those organisations working with advisers in the background engaging with product issuers. An impact of the existing requirements would be to entrench the multiplicity of different forms.
- **Displaying product information in appendices (or by other means) will address the privacy implications of single consent form covering multiple products.** For example, rather than having to redact information when using a single consent form for multiple accounts having the consent captured on a standardised form with the different account information in appendices would address privacy issues and be more efficient (and less risky) than having to redact. Allowing product information to be provided via appendices (or by other means) will have several benefits:
  - maintain the privacy of consumers when consenting to the deduction of fees across multiple products;
  - product issuers can have confidence that they have the information within the member consent that they need to facilitate payment of the correct advice fee through their product; and
  - support a consistent approach not currently apparent across the industry that is feasible.

- **Clarity in the law that a consent is valid when a licensee or adviser changes should be retained, and applying a similar provision for changes to the fund such as including Successor Fund Transfers (SFTs):** ASIC Corporations and Superannuation (Amendment) Instrument 2023/512 enables that where a member's name, or the name and contact details of a financial product advice provider change, a new written consent does not need to be obtained from the account holder or member provided that no other information in the written consent has changed. The law and any form that is created should continue to provide this flexibility.

  "(7) For the purposes of paragraph (1)(e), a consent is taken to meet the requirements of paragraph (2)(c) if the consent includes the name of the fund from which the cost of the advice is requested to be paid at the time the member signs the written request or written consent and the member's interest is later transferred to a successor fund."

  In the Bill the main change to section 99FA is to:

  - *replace the current language "must not directly or indirectly pass on the cost of providing financial product advice" with "must not charge against a member's interest in the fund*

the cost of providing financial product advice" to clarify the prohibition against charging such costs against the members' interests; and
- *clarify that a trustee is not required to agree to the member's request to charge the relevant costs even when the requirements are satisfied.*

The requirements for the consent require the name of the fund from which the ASFs will be deducted to be specified on the consent form. In an SFT scenario this will change post the SFT, so the section is problematic and would be resolved implementing the FSC's recommendation. Final legislation and the design of the form should ensure that where the name of the fund changes due to a change in trustee and/or SFT the consent continues under the new fund and a new written consent does not need to be obtained.

Schedule 1, Part 3 – Financial Services Guides

Analysis of the Bill and Explanatory Memorandum

The FSC welcomes the Bill's provisions to support the provision of a FSG on a company website. We question the provision requiring the guide to be provided in the event that a client requests it.

The Bill as drafted enables FSG information to be provided as website disclosure information rather than having to provide the client with a copy of the FSG. However, this is only permitted in circumstances where the financial service provided to the client is personal advice (s941C(5)).We are not confident that the intended flexibility will be achieved given the way the Bill is currently drafted.

This is because providers of personal advice often meet with prospective clients before the provision of personal advice as part of the initial engagement and fact-finding process and during this process may provide general advice to the prospective client. For example:

- discussing potential strategies/products for the purpose of identifying the subject matter of advice sought by the client or
- making inquiries about their relevant circumstances for the provision of personal advice that will be contained or recorded in an advice document.

Following this the client may or may not then proceed to obtaining personal advice from the adviser. Under this scenario if the adviser proceeds on the assumption they will subsequently provide personal advice and therefore only make the FSG information available to the client on their website, then the adviser has not met the personal advice exemption and should have provided a copy of the FSG to the prospective client.

We suggest that the exemption should apply to the process of providing personal advice by a relevant provider, rather than so closely tying it to the actual provision of personal advice.

Further, the Australian Financial Complaints Authority (**AFCA**) rules and other tools of regulatory enforcement should update their practices from examining whether clients were given an FSG to reflect that these can be made available on company websites.

FSC Recommendation 5: Consequential amendments to the proposed Financial Services Guide (FSG) provisions should apply to general advice as well as personal advice as a further red tape reduction measure and to provide consistency around the provision of an FSG.

Schedule 1, Part 4 Conflicted remuneration

Analysis of the Bill and Explanatory Memorandum

We welcome the amendments to s963A(1)(b) of the Bill was amended from the Exposure Draft so that it no longer requires that benefits paid by clients be for financial advice to be exempted from conflicted remuneration.

There are examples, like brokerage, where a fee paid by a client may not be for advice, but which could still influence advice, and so this change was welcome. However, the EM (at paras 1.255 and 1.257) still refers to 963A(1)(b) being a fee that is paid by the client for advice. The EM is now not consistent with the Bill and needs to be updated. We have highlighted the relevant parts below which are inconsistent.

Section 963A

Meaning of conflicted remuneration—general

(1) ***Conflicted remuneration*** *means any benefit, whether monetary or non-monetary, given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that:*

(a) *because of the nature of the benefit or the circumstances in which it is given:*

(i) *could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or*

(ii) *could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative; and*

(b) ***is not given to the licensee or representative by a person who is a retail client in relation to a financial product or financial service provided by the licensee or representative to the client.***

(2) *For the purposes of this Subdivision, a reference to giving a benefit includes a reference to causing or authorising the benefit to be given*

Explanatory Memorandum

1.255 The new definition builds on the former one, so that conflicted remuneration means:

- any benefit (monetary or not) that is given to an AFS licensee or an authorised representative of an AFS licensee, who provides financial product advice to retail clients; and
- that because of the benefit, could reasonably be expected to influence the recommendation or the advice given by the licensee or authorised representative to the retail client;

- but the benefit is not given by a retail client (or on their behalf) to the licensee or authorised representative **in relation to financial product advice provided by the licensee or authorised representative.**

1.257 Therefore, to ensure a benefit given by a retail client to an AFS licensee or its authorised representative will not be conflicted remuneration, the benefit must be given in the following circumstances:

- The benefit is given directly by a retail client or a retail client causes or authorises another party to give the benefit on their behalf.
- The benefit is given by a retail client, or on behalf of the client, including from one or more financial products in which the retail client has rights or benefits. This can include, for example, where a benefit is paid out of a premium paid by a client.
- **The benefit is given in return for the provision of financial product advice that the retail client has requested or agreed to receive.**

FSC Recommendation 6: Ensuring consistency between the Explanatory Memorandum and the Bill's provisions in Section 963A which is not currently the case.

Schedule 1, Part 5 – Insurance commissions

The FSC welcomes the introduction to of consent and disclosure requirements for insurance commissions. We note the drafting error which the Government has agreed to correct.

FSC Recommendation 7: Consequential amendments to ensure that the consent and disclosure requirements, which the FSC supports, do not prevent the payment of commissions on life insurance and general insurance products under general advice.

Schedule 1, (all parts) - Commencement and transitional arrangements

The Bill's provisions in respect of fee consent requirements for prescribed forms in relation to ongoing fee arrangements should allow for appropriate time to consult and implement by industry to minimise cost and disruption for consumers.

Commencement and transitional arrangements should be made for clients subject to the law prior to the Bill receiving Royal Assent and coming into force during the course or following termination of their arrangement.

FSC Recommendation 8: Appropriate commencement and transitional arrangements are made to avoid cost and disruption for consumers.