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LAWYERS

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General Manager
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The Treasury
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Attention: Bede Fraser

Dear Sir/Madam

Exposure Drafts:
Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (draft Bill)
Corporations Amendment (Streamlining of Future of Financial Advice) Regulation 2014 (draft Regulations)

Minter Ellison is a full service commercial law firm which provides legal services to clients in a variety of industries and sectors, including the financial services industry and the wealth management sector of that industry. Our clients include banks, fund managers, insurance companies, investment platform operators and other administrators and financial planning firms. As a service provider to the industry, we have a good understanding of the potential consequences of the proposed amendments to Future of Financial Advice (**FOFA**) regime for our clients.

We welcome the Government's proposals to simplify the FOFA regime and address inappropriate and anomalous consequences of particular provisions. While we strongly support the introduction of many of the substantive FOFA provisions, we have become all too familiar with the complex issues some of those provisions give rise to.

We appreciate the opportunity to provide comments on the draft Bill and draft Regulations which are provided in two forms:

(a) We have set out below comments on some key issues arising from the Exposure Drafts.

(b) The schedule to this letter includes a table of more detailed or technical comments on certain provisions.

We have also had the opportunity to see the submission made by the Financial Services Council. We generally support its submission.

1. Submissions on the draft Bill

1.1 General advice

We support the proposed amendment to restrict the ban on conflicted remuneration to circumstances where personal advice is given. We have noted a technical drafting issue in the Schedule.

1.2 Life risk insurance exemption

We support the proposal to ensure that commissions should be able to be paid in relation to life risk insurance cover, however it is provided, where advice is given in relation to the cover. We therefore support the FSC's submissions on this aspect of the draft Bill.

1.3 Fee disclosure statements - Opt-In

We support the Government's proposed amendments to repeal items 20-23 of the draft Bill.

However, these amendments should be made retrospectively to commencement from the FOFA commencement date. Advisers and licensees should be given certainty that no penalty or liability can arise where they were not able to comply with the FDS requirements for existing clients, including where they have been relying on the Government's promise to remove this requirement.

1.4 Volume based shelf space fees

It is our understanding that this prohibition is intended to apply to 'volume based' fees (as indicated by the heading to this provision) and not annual or one-off dollar based fees (not related to "volume") charged by platform operators to fund managers. However, the drafting of the proposed amendment to this provision does not appear limited to volume based payments.

Subsection 964A(2) currently presumes all payments which are dependent on the total number or value of a fund manager's financial product are 'volume based shelf space fees'. However, this language is proposed to be removed from the ban and instead new tests relating to whether the payment will influence the total number of fund manager products included on a platform (although the language used in this limb is somewhat unclear in its application) or to give preferential treatment to the fund manager's products.

While we welcome the move to define the types of fees caught by the ban and to turn the circumstances in which it does not apply into proper exemptions, we believe that this would be better done by retaining the concepts in the current section and simply to change it from a presumption to a definition.

We welcome the proposal to expressly exempt life and general insurance products from the ban given they are not provided by 'fund managers'. However, we submit that this exemption should also be extended to banking products which are also not provided by fund managers.

We are also concerned that as currently drafted and in the proposed changes the prohibition would apply to platforms which only have wholesale clients. We do not believe that this was intended and therefore recommend excluding such platforms from the ban.

1.5 Intra fund advice

We are concerned that the proposal to refer to 'intra fund advice' in a note (item 9 of the draft Bill) will not be particularly useful. We believe that the term should be properly defined and excluded from the operation of the ban on conflicted remuneration.

There are circumstances where a superannuation trustee may wish to delegate its ability to provide intra fund advice. This is because there may be a conflict between the obligations of a superannuation trustee under the *Superannuation Industry (Supervision) Act 1993* (Cth) and general law when compared to duties imposed by the FOFA best interest duty . When such delegation occurs, the trustee needs to be in a position to pay the adviser. On this basis, intra-fund advice should be excluded from the ban on conflicted remuneration.

1.6 General modification and exemption powers

We believe that it is important to include a general exemption and modification power in Part 7.7A, similar to other parts of the financial services regime in Chapter 7 of the Corporations Act. There should be an ability to modify all of the provisions of Part 7.7A by regulation or by ASIC instrument. This power would allow the Government and ASIC to adapt the operation of the law to novel or unforeseen situations and ensure that the regime can keep up with market developments.

2. Submissions on the draft Regulations

2.1 Performance bonuses

We welcome the proposal to include an exemption for performance bonuses. It is important for licensees to be able to recognise representatives who are doing a good job. While many of the measures will relate to the quality of the work performed, we believe it is appropriate to be able to include some measures which give representatives a stake in the work they are doing. This approach enhances engagement and ensures a better service experience for clients. We also agree that it important to ensure that representatives who receive these types of benefits are at least equally incentivised to comply with their obligations and in particular the obligations arising under Division 2 of Part 7.7A.

Nevertheless, we believe that the following improvements that can be made to proposed Regulation 7.7A.12EB:

(a) There is no reason to limit the exemption to employees. Licensees often engage contractors on a short or long-term basis in place of or in addition to employees. Furthermore, where a performance bonus represents a small proportion of total remuneration, it should not matter whether the adviser is an employee or authorised representative.

(b) It should be made clear that the exemption will apply where the benefit is partly dependent on financial products not otherwise exempt. In other words, the low value requirement should only be based on products for which conflicted remuneration may be paid. Where the bonus also includes measures relating to exempt products such as insurance and basic banking products, the total value of the bonus should be able to be larger provided the part relating to the non-exempt products would only give rise to a 'low value' benefit.

(c) There is no need for the exemption to refer to a 'class of retail clients' given conflicted remuneration relating to general advice is to be made exempt in any case.

(d) We submit that the last element of the exemption, paragraph (f), should not require advisers to provide advice which is in 'the best interests of the client'. This would prevent the exemption being used in conjuction with the safe harbour in section 961B(2). We note that licensees are required to take reasonable steps to ensure that their representatives comply with the requirements of Division 2 of Part 7.7A under section 961L in any case. There is therefore no need to include paragraph (f) in the exemption. However, if it is retained, then we submit that it should simply refer to ensuring compliance with the obligations of Division 2 of Part 7.7A.

2.2 Grandfathering adviser's book of business on movement from one Licensee to another

We welcome the proposal to amend Regulation 7.7A.16F to permit movements of authorised representatives between licensees and to permit employed representatives to become authorised representatives and to permit grandfathering to extend to purchasers of businesses under draft Regulations 7.7A.16A(5A) and 7.7A.16B(4A).

However, these changes do not address all of the concerns relating to restrictions on adviser movements. In particular, the change to permit authorised representatives to move between licensees will not in fact allow authorised representatives to take grandfathered remuneration with them when they move licensees where the remuneration is received by their current licensee and passed on by the licensee to the representative. In this most common scenario, the Regulations will not permit the new licensee to receive the grandfathered remuneration where the new licensee does not have an existing arrangement with the product issuer for payment of remuneration for transferring advisers.

We submit that there needs to be an explicit exemption given to permit grandfathered remuneration to be paid to an adviser's new licensee where the adviser ceases to represent a licensee to whom grandfathered remuneration was being paid in respect of the adviser. It is important that the exemption applies to any new licensee – in other words, the exemption should not be limited to the first time an adviser moves between licensees.

We have discussed our concerns regarding these provisions in more detail in the Schedule.

2.3 Passing on benefits

We welcome the proposal in draft Regulation 7.7A.12HA for benefits calculated by reference to exempt benefits to be also exempt. Once a benefit is exempt it should remain exempt. Any other outcome will produce significantly complexity for clients having to agree not only to the benefit they are giving to the licensee but also to the remuneration paid to individual advisers.

We note that the heading to this Regulation states that it applies to grandfathered benefits. However, Regulation 7.7A.16F may prevent Regulation 7.7A.12HA applying to grandfathered benefits. Regulation 7.7A.16F appears to operate as a restriction on the circumstances in which grandfathered benefits can be passed on to advisers – not only does it state that no more than 100% of the benefit can be passed on Regulation 7.7A.16F(b) also states that benefits can only be passed on if give under an arrangement entered into before 1 July 2013. Unless this paragraph is removed from 7.7A.16F, there will at best be uncertainty whether Regulation 7.7A.12HA can operate in relation to grandfathered benefits irrespective of the reference to them in its heading.

We have discussed these concerns in more detail in the Schedule.

We would be very happy to discuss any of our comments in more detail. Please contact us if you have any questions about any aspect of this submission.

Yours faithfully
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Schedule

A. draft Bill

	Section	Subject matter	Issue
1.	961B(2)(ba)	Steps which must be undertaken to rely on the safe harbour to the best interest duty	We are not convinced that this step is in fact required. Step (b)(ii) already requires an adviser to identify the circumstances of the client that would reasonably be considered as relevant to advice sought on the subject matter of the advice. Requiring an adviser to identify circumstances that are disclosed by the client seems an unnecessary addition and risks requiring the adviser to make a record of matters that are not relevant to the advice. Perhaps this could be address by making it clear that only the relevant circumstances need to be identified or that it is circumstances relevant to the scope of the advice.
2.	961B(4A)	Scaled advice	We welcome the proposal to give explicit recognition to the ability of the client to agree on the scope of the advice. This ensure that client's can obtain the advice they require without having to pay for advice they do not want. However, we believe that this provision should also refer to the general best interests duty under section 961B(1), as it should be equally possible for the client to agree on the scope of the advice where the general duty applies. In fact, we believe that this provision should apply to all of the obligations in Division 2 of Part 7.7A.
3.	963A	General advice	As noted above, we support limiting the definition of conflicted remuneration to personal advice. However, we note that this amendment has been implemented by including reference to 'personal advice' in sections 963A(a) and (b) (Items 24 and 25 of the draft Bill). We would have thought it would be simpler to replace the first reference to 'financial product advice' in provision with 'personal advice'.
4.	963B(3) 963B(4)	Execution only services exemption from ban on conflicted remuneration	We welcome the change proposed at item 32 of the draft Bill. However we note that the exemption will not apply where any advice is given in the past 12 months. We believe that the exemption should apply to any dealing activity and where no advice is given in connection with the dealing activity.
5.	963D(c)(iii)	Benefits for employees of ADIs	'consumer creditor insurance' (emphasis added) should be changed to 'consumer

	Section	Subject matter	Issue
			credit insurance'.
6.	964A(3)(b)	Volume based shelf space fee ban – economies of scale	The wording of this section should be expanded to operate in relation to 'economies of scale gained or expected to be gained.' (underlined content added). This additional phrase would preserve intent of the exemption yet remove the possibility that a platform operator may inadvertently fall out of the exemption if no economy of scale eventuated.

B. draft Regulations

	Regulation	Subject matter	Issue
7.	7.7A.12B(1)(a) 7.7A.12B(1)(b)(i)	Stamping fees	The Items should read: Omit "the provider dealing in", substitute "the initial issue or sale of". (additional word underlined)
8.	7.7A.12EB(1)(b)	Performance bonuses	In addition to the matters discussed in relation to Regulation 7.7A.12EB above, we also note the following: • the reference to section 1529 should be to section 1528; and • paragraph (1)(b)(v) should also to refer to section 1528 itself – it should not be limited to regulations made under it.
9.	7.7A.16A(5A)	Grandfathering of conflicted remuneration paid by a platform operator	This amendment should apply to Regulation 7.7A.16 which is the basic grandfathering provision applicable to payments by platform operators, rather than Regulation 7.7A.16A which does not create rights, but operates as a restriction on the rights provided under Regulation 7.7A.16. Often retiring advisers who look to exit the industry are not able to sell their entire business, but rather are forced in the circumstances to sell part of their businesses or client servicing rights only. Therefore, the benefit of the exemption in this proposed regulation should also extend to sales of "client servicing rights". As currently drafted, there is scope to interpret the exemption as only applying to full business sales. The explanation of items 19 and 20 in the Explanatory Statement appears to have confused the respective roles of the payer and the recipient of the benefit. What this proposed regulation should address is the

	Regulation	Subject matter	Issue
			sale of a representative's or licensee's business (where that representative or licensee is in receipt of payments from a platform operator before the sale), and not the sale of the platform operator's business. This exemption should also be repeated in relation to Regulation 7.7A.16F (pass through of grandfathered benefit).
10.	7.7A.16B(4A)	Grandfathering of conflicted remuneration paid by non-platform operators	This Regulation purports to pass on the benefit of Regulation 7.7A.16B to the acquirer of a planning business where the seller enjoyed the benefit of the Regulation. As per the comment above, Regulation 7.7A.16B does not provide any rights, but instead serves to limit s.1528(1) of the Act which includes the basic grandfathering exemption for non-platform payments which are Conflicted Remuneration. We would suggest that Item 20 (subject to the other changes referred to below) instead be enacted as a separate Regulation which extends the benefit of s.1528(1) to acquirers of financial planning businesses. Broadly speaking, the same comment as above applies in relation to extending the exemption to include the sale of client servicing rights (i.e. it should not be limited just to business sales). The exemption should also expressly apply to sales of part of a business. This may apply where an adviser sells part of their book, for example as part of a succession plan or where there is more than one purchaser. Unlike item 19, item 20 is most likely to arise in a sale situation involving a business where the selling adviser receives net commissions from his or her licensee where that licensee has received the gross commission from a product issuer. The proposed regulation would effectively grandfather the licensee to adviser net commission flow, but not the manufacturer to distributing licensee commission flow unless there were an existing, pre-application day arrangement in place between the acquiring adviser's licensee and the relevant product issuer. Therefore, any

	Regulation	Subject matter	Issue
			future commission payments by relevant product issuers to the new licensee would not be under a grandfathered arrangement and would arguably fall foul of the ban on Conflicted Remuneration. Our suggestion is that existing Regulation 7.7A.16F is amended to (i) clarify its core purpose (which was never clear) and (ii) to allow the acquiring adviser's licensee to receive and pay on to the acquiring adviser the commission (net of applicable dealer percentage) which is otherwise grandfathered in the hands of the acquiring adviser. This should be allowed to apply even though the new licensee may not have existing distribution agreements in place with relevant product issuers.
11.	7.7A.16B(5A)(b)	Pension switches	'after 1 July 2014' should be added at the end of this paragraph to make it clear that it does not only apply to elections before that date.
12.	7.7A.16F(2)	Adviser movement	This proposal would ensure that the requirement in Regulation 7.7A.16F that grandfathered benefits can only be passed on under an existing arrangement does not apply to certain adviser movements. While this is welcome, it does not fundamentally address the restriction on adviser movement where an adviser wishes to move to a new licensee where the new licensee is not be able to receive the grandfathered remuneration because it does not have an existing arrangement with the payer. We are unable to see how the proposed amendment is effective.