HOLLEY NETHERCOTE
LAWYERS

19 September 2022

Email to: advicereview@treasury.gov.au

Submission in relation to the Quality of Advice Review Consultation Paper – Proposals for Reform

Name/Organisation: Holley Nethercote Lawyers

Questions

Intended outcomes

1. Do you agree that advisers and product issuers should be able to provide personal advice to their customers without having to comply with all of the obligations that currently apply to the provision of personal advice?

1. Yes. Some of the current obligations are a significant burden to the industry with limited benefit to consumers. We put the safe harbour provisions, SOA content requirements and ROA requirements in this category. However, some obligations should be retained like the training requirements applicable to relevant providers.

We have reservations about removing obligations in a way that results in a "one size fits all" set of obligations for all providers of personal advice to retail clients. For example, is it really appropriate to have the same set of obligations for a highly trained financial planner as for a product issuer call centre employee? We make this observation even taking into account the proposal that relevant providers still be subject to the Financial Planners and Advisers Code of Ethics.

What should be regulated?

2. In your view, are the proposed changes to the definition of 'personal advice' likely to:

a) reduce regulatory uncertainty?

b) facilitate the provision of more personal advice to consumers?

c) improve the ability of financial institutions to help their clients?

2(a) Yes. The proposed changes remove the uncertainty currently linked to the distinction between general and personal advice, particularly the uncertainty that arises when a provider of advice holds information about the client but it is unclear whether the provider takes that information into account when providing advice.

The regulatory uncertainty attached to the distinction between general and personal advice creates a significant drain on licensees' resources and the cost of this is ultimately borne by the consumer. The current definitions are not well suited to the dynamic nature of human interaction.

To avoid further regulatory uncertainty, it would be necessary to draft the new "personal advice" definition carefully. For example, the definition would need to make it clear that personal advice is triggered by "personal conversations and interactions" as suggested on page 11 of the Proposals Paper. Otherwise, uncertainty might occur in certain situations, for example, for an organisation delivering what we would currently regard as general advice to a group of its clients, when it holds information about each of those clients.

Other steps would also be required to prevent further regulatory uncertainty. For example, for institutions that hold an AFSL but also provide what is currently general advice, it would need to be clear whether and how the "efficiently, honestly and fairly" obligation would apply to sales communications that would not be regarded as financial services under the proposed framework.

2(b) Yes. The change in definition would facilitate the provision of more personal advice when coupled with the winding back of the regulatory obligations currently applicable to the provision of personal advice. However, businesses may be disinclined to operate under a personal advice model under the proposed changes if too uncertain about what constitutes "good advice".

2(c) Yes. It will be easier to provide personal advice (see our response to 2(b)) and personal advice is of greater use to a client than general advice.

Measures to ensure staff do not stray beyond general advice (such as scripts) are clunky and often interfere with good communication and customer service. The removal of the need to have such measures in place would improve the ability of institutions to communicate effectively with, and therefore provide advice to, their clients.

3. In relation to the proposed de-regulation of 'general advice' - are the general consumer protections (such as the prohibition against engaging in misleading or deceptive conduct) a sufficient safeguard for consumers?

a) If not, what additional safeguards do you think would be required?

3. We are uncertain.

Rares J (in *Wingecarribee Shire Council v Lehman Bros Australia Ltd (in liq) (2012) 7 BFRA 1, [948] (Rares J); [2012] FCA 1028*) has described laws in the area of misleading or deceptive conduct as "legislative porridge". It can be difficult to select which one or ones apply.

If general consumer protections were to be relied upon to keep the general advice sector "in line" then these laws would need to be effectively enforced. Also, AFCA and the Courts would need to be sufficiently well resourced that civil causes of action would be accessible to affected consumers.

Consideration would also need to be given to what is required to prevent this conduct from being caught by two overlapping regulatory regimes, or it being unclear which regime would apply. For example, section 12DA of the *ASIC Act 2001* applies to conduct in relation to financial services. If it were no longer a financial service, some general advice would attract the application of this provision but some would not, depending on whether it had sufficient connection with financial services. In the latter case, this would put it in the domain of the Australian Consumer Law and the ACCC instead. This is obviously not a desirable outcome and would impede enforcement outcomes. The legislative drafting would need to ensure that general advice was corralled into one regime or the other, ideally the financial services regulatory regime, where ASIC is well equipped to understand conduct of this nature.

3(a) By way of additional safeguards, perhaps an "efficiently, honestly and fairly" obligation could be imposed, via the Australian Consumer Law, on organisations that provide what is currently general advice and do not provide any other financial services.

How should personal advice be regulated?

4. In your view, what impact does the replacement of the best interest obligations with the obligation to provide 'good advice' have on:

a) the quality of financial advice provided to consumers?

b) the time and cost required to produce advice?

4(a) The impact would be good.

The current framework, with its focus on the process of providing the advice (particularly via the safe harbour provisions) and including onerous documentation requirements (in the form of SOA requirements), actually distracts advisers from the simple task of delivering good quality advice, a task which relevant providers, at least, are now well qualified to complete without prescriptive requirements.

It would be important to ensure that ASIC guidance in relation to "good advice" did not create a framework akin to the current safe harbour provisions, thereby introducing a quasi-legislative framework which reintroduces the same issues that current exist.

The delivery of good advice (using the definition proposed or one of a similar ilk) will arguably compel an adviser to act in the best interests of the client in any event, thereby subtly conserving the duty ostensibly being replaced. If this is not considered sufficient, a provision which creates a statutory presumption (which could be rebutted by evidence to the contrary) that the relationship between a financial adviser and a client is fiduciary in nature, combined with an obligation to provide good advice, could be a less prescriptive way of bringing about this outcome. This could be applied to relevant providers only, or to providers of personal advice more broadly.

To avoid further regulatory uncertainty and meet the aim of providing good advice, it may be necessary to finetune what is meant by "having regard to the information that is available to the provider at the time the advice is provided." To what extent would a provider of personal advice

be able rely on information currently held and to what extent would they need to seek further information and with what level of effort?
4(b) The replacement should reduce the time and cost required to produce advice. The current regime has time and money costs caused by advisers following checklists, filling in templates and addressing layers of administration. The proposal should reduce the use of checklists and templates and the need for administrative tasks.

However, if industry felt there was too much uncertainty around what is meant by "good advice", we wonder if this would cause organisations to over-engineer solutions to the uncertainty, such as by introducing new internal processes or producing lengthy documents to try to manage risk.

5. Does the replacement of the best interest obligations with the obligation to provide 'good advice' make it easier for advisers and institutions to:

a) provide limited advice to consumers?

b) provide advice to consumers using technological solutions (e.g. digital advice)?

5(a) In theory, it should make no difference. All advice relates to a defined subject matter and is therefore limited in some respects.

However, there is a view among some in the industry that the safe harbour steps make it difficult to provide advice with a limited scope. Therefore, in a practical sense, industry may find it easier to provide limited advice with those steps removed.

5(b) Yes.

Of perhaps greater significance is the desirability of removing the awkwardness of having an algorithm act in a client's best interests. An outcome-based approach ("good advice") is much more appropriate to the digital context than a trust and motivational style approach (as exist currently in the form of the best interests duty and the conflicts priority rule).

Other aspects of the proposals that would make it easier to provide digital advice are the suggested removal of the SOA requirements.

6. What else (if anything) is required to better facilitate the provision of:

a) limited advice?

b) digital advice?

6(a) Somehow remove the term "limited advice" from the industry vernacular. The term "limited advice" is unhelpful as all advice is, to a degree, limited, as we point out above. As the term does not exist in the legislation, it can hardly be removed. But perhaps other steps could be taken to help extinguish it from common parlance in the industry.

Fear or risk aversion tends to deter providers from providing limited advice. This fear and risk aversion are likely to decline as the industry becomes more sophisticated (particularly the relevant provider portion of the industry). To achieve greater sophistication perhaps further educational measures are required or perhaps it is just necessary to await the passage of time. By way of comparison, lawyers provide limited advice comfortably but belong to a longstanding and highly educated profession.

6(b) We have no comment in relation to this.

7. In your view, what impact will the proposed changes to the application of the professional standards (the requirement to be a relevant provider) have on:

a) the quality of financial advice?

b) the affordability and accessibility of financial advice?

7(a) The proposed changes to the application of professional standards would have minimal impact on the quality of advice provided by a financial planner. However, they would accommodate a broad range of people providing more tailored (and therefore, presumably, better) quality advice on behalf of institutions, without those people having to jump through multiple hoops to be able to do this. Page 20 of the Consultation Paper suggests that providers of this kind be competent, appropriately trained and supervised. We suggest that a more formal, objectively measurable, training framework, like that in RG 146, might be appropriate.

7(b) One would expect that advice would become more affordable and accessible because more people would be able to enter the personal advice industry without having to obtain significant qualifications. This has the obvious corollary that the advice provided by such people would, at times, be of lesser quality than that provided by a relevant provider.

8. In the absence of the professional standards, are the licensing obligations which require licensees to ensure that their representatives are adequately trained and competent to provide financial services sufficient to ensure the quality of advice provided to consumers?

a) If not, what additional requirements should apply to providers of personal advice who are not required to be relevant providers?

8. No. We understand this question to be addressing training in relation to individuals providing personal advice who would not be relevant providers under the proposed changes.

In our experience, training can be inconsistent and not always well handled in relation to representatives who are not relevant providers and are not RG 146 compliant.

8(a) We recommend a modified form of RG 146 or something akin to this. These requirements are, on the whole, straightforward and easy to understand.

However, confusion has arisen in recent times due to ASIC not maintaining the training register associated with RG 146. While RG 146 is not, on its face, part of the law, a note to licence conditions 6 and 7 in PF 209 indicates that those conditions relate to RG 146. In other respects, RG 146 itself suggests that it is intended as guidance in relation to section 912A(1)(c), (e) and (f) of the *Corporations Act 2001*. It would be wise to take the opportunity to ensure that any training requirements in this area were set out with clearer legal foundation and that specific requirements or course specifications are updated as appropriate by whichever delegated authority has power to do this, whether ASIC or the relevant Minister.

Special consideration should be given to training or professional standards for natural persons overseeing the provision of personal advice digitally. Technology will become more sophisticated over time, leading to more complex automated personal advice. The natural persons overseeing the provision of personal advice digitally should be subject to the same professional standards as natural persons.

Superannuation funds and intra-fund advice

9. Will the proposed changes to superannuation trustee obligations (including the removal of the restriction on collective charging):

a) make it easier for superannuation trustees to provide personal advice to their members?

b) make it easier for members to access the advice they need at the time they need it?

9(a) Yes.

9(b) Yes, but this would obviously depend on each particular trustee's personal advice resources.

We note that super funds play a crucial role in educating large numbers of people, particularly those transitioning to retirement, and the proposed changes would assist them in this role. However, the potential for conflicts of interest needs to be considered and whether they would be sufficiently well managed under the proposals and the section 912A obligations, particularly in relation to retail funds.

Disclosure documents

10. Do the streamlined disclosure requirements for ongoing fee arrangements:

a) reduce regulatory burden and the cost of providing advice, and if so, to what extent?

b) negatively impact consumers, and if so, how and to what extent?

10(a) Yes. In particular, the current FDS requirements, particularly the difficulties with harmonising clients' anniversary days, require significant additional time and resources from licensees.

10(b) Possibly. The fact that consent would still be required is positive.
However, there are some possible downsides. The consumer would no longer be presented with a snapshot of the fees paid and services received for the previous year, making it harder for them to identify with ease when they were not getting value for money. The Paper points out that the fees paid would generally be clearly visible when paid from investments, due to statement and reporting practices. However, when paid from the client's day to day bank account, the fee would not necessarily be particularly visible among dozens of other transactions.

11. Will removing the requirement to give clients a statement of advice:

a) reduce the cost of providing advice, and if so, to what extent?

b) negatively impact consumers, and if so, to what extent?

11(a) Yes. However, we expect that licensees would still require their representatives to provide advice in writing so that they were able to assess whether it was good advice. Organisations which currently provide template advice document solutions via platforms may also encourage industry to keep using templates of some kind.

The general injunction that the document should not be longer than necessary to communicate the advice effectively, would be good if it can be articulated in the legislative framework. Where appropriate, good advice should be evidenced in writing and any written communication of the advice should be not longer than necessary to effectively communicate the advice. This would leave the courts to define "appropriate" and "necessary" over time. The danger is that every additional requirement has the tendency to morph into volumes of prescription, imposed either by ASIC or industry.

11(b) No. We have reviewed many SOAs and they are often full of dense, useless information and contain errors or cutting and pasting faux pas.

We expect that licensees that currently prepare succinct and well set out SOAs will continue to provide succinct and well set out letters, emails or other advice documents under the proposed regime.

For those that struggle with SOAs (and indeed for all personal advice providers), their removal offers an opportunity to focus care and attention on providing good advice rather than on ticking boxes and auto generating mindless content.

12. In your view, will the proposed change for giving a financial services guide:

a) reduce regulatory burden for advisers and licensees, and if so, to what extent?

b) negatively impact consumers, and if so, to what extent?

12(a) Yes. We have observed the FSG requirements tend not to be nearly as significant a burden as some other regulatory requirements. However, content obligations have evolved over time and are probably more extensive than they need to be.

The proposal in relation to FSGs makes reference to remuneration and other benefits, internal dispute resolution and AFCA. In our view, it is also important that the client be told what financial services can be provided by the licensee (or representative).

Introducing greater ability to use a website to convey this information is sensible and we wonder if, in due course, a full transition to providing the information only over a website would be a regulatory possibility. At this point in time, however, modes of providing this information need to take into account that there are still many members of the population (particularly the elderly) who are not comfortable obtaining information via the internet.

12(b) No, subject to the observation that it is important that consumers are made aware of what financial services the licensee (or representative) is authorised to provide to them.

Design and distribution obligations

13. What impact are the proposed amendments to the reporting requirements under the design and distribution obligations likely to have on:

a) the design and development of financial products?

b) target market determinations?

13(a) The proposed amendments may make it more difficult for product issuers to obtain information about the people to whom their products are being distributed, thereby having a negative impact on the design and development of financial products.

In particular, we query whether the requirement for relevant providers to report significant dealings to the product issuer should be removed. To what extent would product issuers be disadvantaged by losing access to this information?

We agree that any consideration of the current ability of product issuers to mandate the reporting of particular information by distributors should take into account the policy problems with giving product issuers this power in a relationship that may not be contractual.

13(b) The effect on TMDs will be similar to the effect on design and development of financial products, as set out above. Product issuers will have less information to use when reviewing their TMDs.

Transition and enforcement

14. What transitional arrangements are necessary to implement these reforms?

14. We suggest not having an opt in period but having sufficient lead time for the new arrangements to start.

Opt in would work for some measures (such as FDS requirements) but not for others (such as the personal advice definition). In the former case, it would be possible for part of the industry

to be following a different set of requirements. In the latter case, it would not be workable (either from an enforcement or a consumer perspective) for some organisations to follow one regime and some to follow another.

It is also clear that the proposals are intended to work together therefore allowing opt in for some but not for others is clearly not a solution.

When considering appropriate lead time for the new requirements to start, we suggest giving thought to the fact that many organisations have taken significant time and resources to adjust to the current FDS regime, in some cases employing additional staff to assist with this. Winding back the changes too quickly may be unwelcome in this context. Perhaps further industry consultation could occur on this front.

General

15. Do you have any other comments or feedback?

We welcome the tenor of the proposals.

The extent to which they aim to simplify a ridiculously complex regulatory framework is positive and sets a good base from which to work, even if more complexity is added as consultation proceeds.

Reducing the regulatory cost of providing good advice will improve the financial viability of financial advice businesses. Increasing the supply and reducing the cost of good advice, delivered within an ethical framework, will be a net benefit to consumers.

The recommendation to make it clear that the sole purpose test accommodates the application of fund money for the provision of personal advice is sensible and would complete a legal puzzle which is missing a piece.

When determining how to regulate the provision of personal advice by super trustees, consideration should be given to the trustee's pre-existing statutory best interests obligations towards members, stemming from its role as super trustee.

Some industries in which general advice models are prevalent may not have been well represented in this consultation process due to an absence of industry bodies to represent their interests. Such industries include the CFDs industry, the cross-border payments (retail and corporate) industries, financial educators, and the (soon to be regulated) crypto industries. It may be worth reaching out to these industries for input.