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Dear Director

Herbert Smith Freehills Kramer Submission – Consultation on curbing lead generation activity

1 Introduction

This submission is made by Herbert Smith Freehills Kramer (**HSF Kramer**) in response to the Treasury Consultation Paper *Curbing lead generation activity* (dated April 2026) (**Consultation Paper**). All views set out in this submission are the views of HSF Kramer and not that of any other party.

HSF Kramer is an international law firm with 26 offices located around the globe and which specialises in, among other things, financial services and financial services regulation.

This submission is structured by reference to the reform proposals raised in the Consultation Paper. We agree with and strongly support the need to properly protect retail clients in the Australian financial system from harmful lead generation practices, such as practices of the kind alleged in relation to the Shield Master Fund (**Shield**) and First Guardian Master Fund (**First Guardian**) collapses. However, we consider that certain of the reform proposals canvassed in the Consultation Paper would have unintended effects beyond the regulation of harmful lead generation practices, and risk unduly restricting legitimate marketing, financial advice and consumer engagement activities.

A singular focus on lead generation can also distract from the important role of other parties in the value chain. In our view, had each layer of the ecosystem been appropriately regulated and supervised (such as through targeted enforcement action against lead generators providing unlicensed advice and financial advisers providing defective and inappropriate personal advice), the consumer harm generated by the Shield and First Guardian collapses could have been avoided or, at least, reduced. Relevantly, the Australian Securities and Investment Commission (**ASIC**) has commented on the key role that certain financial advisers played, and in its allegations against one of the relevant advisers has cited numerous failures to act in clients' best interests and the provision of conflicted advice (i.e. non-compliance with the existing duties required of providers of personal advice).[1]

[1] See the Concise Statement for *Australian Securities and Investments Commission v Ferras Merhi and others*.

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At its core, lead generation is an activity designed to create consumer interest in a product or service. In our view, where lead generation is limited to legitimate marketing or analogous activities in relation to existing superannuation funds, such activity has an important role to play in increasing member engagement and contributing to a thriving and competitive financial services market. A survey conducted by the Super Members Council revealed that more than one in four Australians could not name their own superannuation fund, with the proportion rising to 28% among younger Australians.[2] In addition, ASIC research has found that 46% of Australians report low financial literacy and low confidence when it comes to managing their retirement finances.[3] In this context, we consider that there is a valuable awareness-raising role for a well-regulated, consumer-oriented lead generation industry in the Australian financial services market.

Our submissions in respect of each proposal in the Consultation Paper can be summarised in the following terms:

(a) **Reform 1**: While the existing framework under Chapter 7 of the *Corporations Act 2001* (Cth) (**Corporations Act**) already regulates the harmful lead generation activities identified in the Consultation Paper, we in principle support a legislative clarification of this position. That said, we have concerns with:

   (1) an unnecessarily broad conception of ‘lead generation activities’ that extends beyond lead generation to also capture general marketing of superannuation products; and

   (2) a blanket ban on providing factual information about superannuation on an unlicensed basis, given the importance of ensuing that Australians can have access to information and sources of engagement with respect to the management of their superannuation.

(b) **Reform 2**: We strongly caution against the introduction of further prescriptive consent requirements as part of the anti-hawking regime, as this risks further complicating an already stringent regime. Further, there is a risk that removing or restricting the personal advice exemption in the anti-hawking regime would disrupt legitimate advice practices unrelated to lead generation and would not address the offending behaviour in the Shield and First Guardian collapses.

(c) **Reform 3**: We consider that amendments to the conflicted remuneration regime are unnecessary on the basis that:

   (1) the existing ban on conflicted remuneration under the Corporations Act already captures the remuneration and benefit structures of concern, including non-monetary benefits such as client flows/referrals arising from lead generation arrangements; and

   (2) the definition of the term 'benefit', generally under the Corporations Act and specifically under the conflicted remuneration regime, is already inclusive of non-monetary ‘benefits’ such as client flows/referrals.

(d) **Reform 4**: We agree, in principle, with the requirement for promotions relating to superannuation to identify the Australian financial services (**AFS**) licence of the party responsible for the advertisement. That said, to the extent that lead generators are expressly brought within the regulated perimeter under Proposal 1a, we do not consider that a further explicit extension of the stop order regime

[2] https://smcaustralia.com/media/young-aussies-not-checking-their-super-enough/

[3] ASIC media release dated 13 April 2026 titled ‘From anxiety to action: Helping Australians to plan for their financial future’: https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2026-releases/26-074mr-from-anxiety-to-action-helping-australians-to-plan-for-their-financial-future/.

to lead generators would be necessary, as lead generators would often be within the purview of the regime automatically.

Each of these submissions is elaborated below.

2 Reform 1: Enhance accountability for the conduct of lead generation activities

2.1 Existing regulatory framework

The AFS licensing regime in the Corporations Act has the objective to promote confident and informed decision making by consumers of financial products and services, as well as fairness, honesty and professionalism by those who provide financial services.[4]

Chapter 7 of the Corporations Act regulates the provision of financial services to meet these objectives. The legislature has cast the gateway concept of 'providing a financial service' broadly, and it includes, relevantly, circumstances where a person 'provides financial product advice' and 'deals' in a financial product.

We highlight that the approach to the drafting of Chapter 7 has been to draft the concepts central to the scope of regulation broadly, with provision for further inclusions or exclusions as required. *In International Litigation Partners Pte Ltd v Chameleon Mining NL* [2012] HCA 45 at [5], the joint judgment of French CJ, Gummow, Crennan and Bell JJ expressly identified 'overinclusiveness' as a fundamental characteristic of the Chapter 7 legislative scheme, stating:

> The legislative scheme implemented by the Reform Act has two significant characteristics. One is overinclusiveness. Rights and liabilities are drawn in overtly broad terms, on the footing that instances of overreach which become apparent in the administration of the legislation may be remedied by adjustments to the Act made not by remedial legislation but by exercise of powers conferred upon the Executive Government or bodies such as the Australian Securities and Investments Commission. The second characteristic is the creation by the legislation of rights and liabilities by means of criteria which reflect fluid market and economic usage rather than any ascertainable and stable meaning in the law.

2.2 Submission in relation to Proposal 1a: Bringing prescribed lead generation activities into the regulatory framework

Proposal 1a is predicated on lead generation activities falling outside of the existing regulatory framework. However, we consider that the existing legislative framework for AFS licensing is broad and already captures the vast majority of lead generation activities. Specifically, in our view, the financial services of 'providing financial product advice' (section 766A(1)(a) of the Corporations Act) and 'dealing' in a financial product (section 766A(1)(b) of the Corporations Act), when properly construed, already encompass lead generation activities of the kind alleged in the Shield and First Guardian matters, and those set out in the Consultation Paper (at page 8). In our observation, there is inconsistent application of this legislative framework to lead generation activities across the market, and the failure to apply existing legislative frameworks correctly and consistently is a primary cause of harmful lead generation activities in the market.

[4] Section 760A of the Corporations Act.

Accordingly, we consider that the clear and consistent application of the existing AFS licensing framework supported by appropriate targeted enforcement with respect to unlicensed financial product advice and dealing will significantly address perceived gaps in the regulation of lead generation conduct across the market.

For context, the parameters of 'financial product advice' are well established and broad. Section 766B of the Corporations Act sets out a two-limb test to determine whether something amounts to the provision of financial product advice:

(a) first, a recommendation or a statement of opinion (or a report of either) that is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products (or an interest in a particular financial product or class of financial products); or

(b) second, such a recommendation or statement of opinion which could reasonably be regarded as being intended to have such an influence.

As established by the High Court in *Westpac Securities Administration Ltd v ASIC* [2021] HCA 3,[5] the concept of financial product advice is a broad one, in line with the consumer protection purpose of the regime.

This broad definition of 'financial product advice' – comprising both general advice and personal advice – likely already captures much of the harmful lead generation activity identified in the Consultation Paper, and in ASIC's review of the lead generation industry.[6] While commentary in *ASIC v Westpac* (2019) FCAFC 187, at [22] confirms that there is no bright-line distinction between the mere distribution (i.e. the sales and marketing) of a financial product and the provision of financial product advice, the 'red flags' for harmful lead generation identified by ASIC in its review of advice licensees that utilise lead generation services, in our view, depart from the provision of merely factual information and extend to expressly or impliedly recommending a particular course of action through a favourable representation of one financial product in relation to another (see *ASIC v CBA* [2023] FCAFC 135 at [219] and *ASIC v Park Trent Properties Group Pty Ltd (No 3)* [2015] NSWSC 1527).

For example, we consider that each of the following is uncontroversially a 'recommendation intended to influence' consumers to make a decision in relation to a superannuation product (e.g. to acquire an interest in a new fund):

(c) pressuring consumers to act immediately in response to claims that their existing fund is underperforming;

(d) 'lead warming', whereby a lead generator contacts consumers to discuss and provoke an interest in making a future decision in relation to a class of financial products; and

(e) 'priming communications', whereby a lead generator makes comparative statements about products, where those comparisons are palpably recommendations or opinions that intended to influence consumers.

Separately, we consider that the definition of 'dealing' as set out in section 766C(1) of the Corporations Act, provides that a person 'deals' in a financial product by, among other things, 'arranging' for a person to issue such a financial product. The Corporations Act does not itself define the term 'arranging', but ASIC Regulatory Guide 36 *Licensing: Financial product advice and dealing* describes the breadth of the concept.

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[5] Kiefel CJ, Bell, Gageler and Keane JJ, at [17].

[6] https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2026-releases/26-029mr-asic-commences-new-review-of-advice-licensees-that-use-lead-generation-services/

While one would need to determine each circumstance of lead generation, and the use of lead generators, on its own facts and in the context of the relevant circumstances, we consider that the robustness of Australia's existing AFS licensing framework is sufficient to capture a significant proportion of lead generation activities, including the conduct identified in the Shield and First Guardian matters. We note that ASIC's Information Sheet 282 *Unsolicited contact leading to financial advice* already covers many of these circumstances and recognises that many lead generation activities are likely to constitute financial product advice or arranging.

By extension, it is also not apparent to us that there are any significant types of inappropriate lead generation activity which are, on a proper construction, *not* currently captured by the existing definitions of 'financial product advice' and 'dealing'.

Given this, we consider that the creation of a new category of financial service (i.e. prescribing lead generation activity as a financial service in its own right) would significantly overlap with the existing concept of 'general advice' and may, in certain scenarios, also overlap with the concept of 'arranging', without producing a tangible regulatory benefit. It would also not address root causes linked to the inconsistent application of the existing statutory framework.

Instead of legislating a new category of financial service, we consider that the existing licensing regime should be leveraged to better regulate lead generation activities, including through enforcement of unlicensed activities, with a view to improving consistency of treatment across the market.

That said, we also support the proposal to insert 'for the avoidance of doubt' provisions into either the 'financial product advice' or 'dealing' definitions to clarify that certain lead generation activities constitute the provision of those existing financial services and accordingly, require an AFS licence. In our view, this approach is preferable to the creation of an entirely new category of financial service, as it leverages the existing regulatory architecture and avoids the complexity and potential for overlap that would arise from the introduction of a parallel financial service.

2.3 Further submission in relation Proposal 1a: Defining lead generation activities

We have reservations about relying on a broad definition of the term 'lead generation activities' that will likely restrict both harmful and non-harmful lead generation activities.

In particular, the first limb of the proposed broad definition – being the collection of personal information which would reasonably be expected to be sold or passed to an advice licensee – may inadvertently capture general marketing activities. For example, if a licensee were to engage a marketing agency to provide advertising or conduct surveys, and on that basis, the marketing agency collects information that may be passed on to the licensee, the marketing agency may be captured by the proposed definition.

The breadth of the term 'information' in this context is also of concern, as it could extend to marketing agencies running analytics on viewers of advertisements (e.g. demographics of potential customers accessing click-through advertisements) and passing that information on to the licensee providing financial advice. In our view, this will likely be impractical for advertising agencies to adopt, with no corresponding tangible consumer benefit. We note that there is a highly complex statutory framework under the Corporations Act and the *Corporations Regulations 2001* (Cth) to appropriately exclude certain of these activities from licensing requirements and from the definition of financial product advice, for legitimate policy reasons. We are concerned that the narrowing of these exceptions to cover all lead generation activities, including legitimate and balanced information sharing activities, will not deliver sound consumer outcomes due to an over-restriction on access to and availability of information on financial products and services.

Further, the Quality of Advice Review (Final Report, December 2022) highlighted the need for more accessible and affordable financial advice for Australians. In this context, we consider that unduly limiting the methods by which a financial adviser or lead generator may engage with and encourage a retail client to obtain financial advice is contrary to the objective of making ‘quality advice’ more accessible. Facilitating awareness of and access to financial advice is a desirable policy outcome and should be preserved in any reform.

We agree with the proposal that incidental lead generation activities – that is, activities falling within the proposed definition of lead generation that are incidental to the ordinary course of a person's business – should be exempt from the definition. This exemption is necessary to ensure that legitimate referral activities that are subsidiary to a principal course of business (such as those undertaken by accountants, marketing agencies, real estate agents or other professionals additional to course of their ordinary business) are not inadvertently captured.

2.4 Submission in relation to Proposal 1b: Banning unlicensed communication to consumers, for commercial benefit, about superannuation

We submit that a blanket ban on all unlicensed communication for commercial benefit about superannuation represents a potentially disproportionate intervention. As noted above, particularly young Australians in large numbers are unaware of or are disengaged from their superannuation balances. This is problematic, given that Australians (as at 31 December 2025) have approximately $4,485.5 billion worth of retirement savings invested in superannuation, which continues to grow each year.[7] Unduly restricting access to communication channels which are more likely to help young Australians become more engaged, such as by social media advertising, in our view, could entrench existing apathy of a demographic with the most to gain from early engagement with their superannuation and, more broadly, financial planning.

Instead of a ban, we submit that it would be preferable for regulatory agencies to more closely supervise and regulate the content of such communications, so as to ensure that communications are accurate, balanced and containing the appropriate disclosures. We note that prohibitions against false, misleading or deceptive conduct already apply under various statutory schemes.

We consider that expressly confirming that lead generators fall within the regulated perimeter in Australia, and enforcing the requirement for lead generators to provide efficient, honest and fair financial services, comply with financial services laws, manage conflicts of interest, maintain competence and resources, have dispute resolution systems, and comply with record-keeping obligations, will raise standards across the industry without reducing access to information about the breadth of superannuation options available to Australians. In addition, the full suite of conduct and disclosure obligations will apply, including mandatory disclosures required on marketing material under section 1018A of the Corporations, and misleading or deceptive conduct and similar obligations. This outcome can be effectively achieved (as noted above) by clarifying that certain lead generation activities fall within the scope of financial product advice or dealing by arranging, as relevant.

2.5 Submission in relation to Proposal 1c: Enhance the accountability of licensees for the conduct of lead generation

We consider that inserting ‘for the avoidance of doubt’ provisions (as set out in our response to Proposal 1a) is the most clear and effective option for preventing the harmful lead generation practices that contributed to the Shield and First Guardian collapses.

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[7] APRA – Quarterly superannuation performance statistic highlights – December 2025 - https://www.apra.gov.au/quarterly-superannuation-performance-statistics-highlights-december-2025

It places the regulatory onus on entities that carry on lead generation activities to ensure that their practices are, among other things, provided 'efficiently, honestly and fairly'. The high barrier to entry inherent in obtaining an AFS licence will necessarily subject lead generators to a more rigorous regulatory burden and, by placing this responsibility on the lead generators themselves, could serve as an effective mechanism to drive improved conduct across the industry.

Simply enhancing the accountability of existing licensees (i.e. the financial advisers and the superannuation trustees) in respect of their engagement with lead generators, does not of itself comprehensively address the conditions that gave rise to the Shield and First Guardian collapses. In those matters, the majority of retail clients who invested their superannuation money in Shield or First Guardian, after engaging with a lead generator, had contact with a financial adviser who was already required to provide services in accordance with not only the general conduct obligations as set out in section 912A of the Corporations Act, but also the duties and obligations applicable to the provision of personal financial product advice, including:

(a) the best interests duty as set out in section 961B of the Corporations Act;

(b) the obligation to provide appropriate advice, having regard to the client's relevant circumstances, as set out in section 961G of the Corporations Act; and

(c) the duty to prioritise client interests as set out in section 961J of the Corporations Act where a conflict of interest exists between the client and the adviser (or their licensee).

Irrespective of any high-pressure sales tactics that may have been employed by the lead generators to encourage a consumer to switch their superannuation into the Shield and First Guardian, had the advice licensee properly complied with their obligations outlined above, it is conceivable that the affected consumers may not have had their money placed in Shield or First Guardian, and as such may not have suffered the resulting harm. Further, in most cases, the superannuation trustees who offered Shield and First Guardian as investment options in their fund or on their platform:

(a) did not have any direct contact with the lead generators; and

(b) in some cases, were not aware that lead generators were utilised by advice licensees in this regard,

which limits the practical utility of imposing additional due diligence obligations on trustees in this context. It is impractical and unrealistic to require superannuation trustees to have knowledge of commercial arrangements adopted directly between an advice licensee and a lead generator.

2.6 Submission in relation to Proposal 1d: Clarify and extend the application of the design and distribution obligations to lead generation

In our view, to the extent that lead generators are expressly clarified to be within the regulated perimeter under Proposal 1a, we do not consider that a further explicit extension of the design and distribution obligations (**DDO**) regime to lead generators would be necessary. This is because lead generators would often be within the purview of the regime automatically by virtue of being engaged in financial product advice or dealing by arranging, which constitute 'retail product distribution conduct' for the purposes of the DDO regime.

To the extent that lead generators provide general advice about a class of products without expressly engaging in 'retail product distribution conduct' in respect of a particular destination product, we acknowledge such activity would not fall within the existing DDO regime. However, it is difficult to envisage how the DDO regime could be said to apply to such activities, given that a central plank of the DDO regime is that distribution conduct must be aligned to a target market for a particular product, as defined by reference to a Target Market Determination. Further, to the extent that lead generation activity results in personal advice being given by a financial adviser, the conduct of the adviser is 'excluded conduct' and, equally, the product issuer is exempt from having to take reasonable steps in relation to such conduct (but importantly, the adviser is still required to ensure adherence to the stringent obligations that apply when providing personal advice, such as the best interests duty). It would be unreasonable and impractical to expect product issuers to regulate the conduct of lead generators in these circumstances, particularly given that lead generation activity can, and often does, occur without a product issuer even being aware of such conduct.

3 Reform 2: Extend anti-hawking requirements

3.1 Existing anti-hawking regulatory regime

Under the hawking prohibition in sections 992A and 992AA of the Corporations Act, a person must not offer a financial product to a retail client, or request or invite the client to ask or apply for a financial product, in the course of, or because of unsolicited, real-time contact. A consumer must positively, voluntarily and clearly consent to the contact before it occurs. This regime was introduced in October 2021 as part of the package of reforms introduced following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, with the concept of 'unsolicited contact' and consent requirements being expanded materially.

As a result of the 2021 reforms, the existing requirements for obtaining consent under the anti-hawking regime currently impose stringent conditions. In particular, we highlight the following aspects of the regime:

(a) an offeror may only rely on a consumer's consent to be contacted if the consent is positive and voluntary, and consent will not be voluntary if the consumer was pressured or induced into giving it. Such consent will also only be valid for a 6 week period and so, cannot become stale and must be expressly re-obtained through additional positive consent;

(b) in the case of an offer, request or invitation, the consent given must be specific as to a particular financial product;

(c) a consumer's consent must be clear such that a reasonable person would have understood that the consumer consented to the contact, meaning the consumer's consent must demonstrate the consumer's understanding of what they are consenting to; and

(d) the consumer can withdraw their consent at any time and specify conditions as to the permitted forms of contact.

The explanatory memorandum for the legislation introducing the anti-hawking regime, *Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* (**Explanatory Memorandum**), confirms, at [5.82], that a person making an offer, request or invitation in relation to a financial product must be satisfied on a reasonable basis that the consumer was sufficiently informed to understand they had provided consent to be contacted by the person, and that this contact may result in the offer, request or invitation.

Section 992A(2) of the Corporations Act provides certain exemptions to the operation of the anti-hawking regime, relevantly, in relation to 'an offer, request or invitation made in the course of the giving of advice to the consumer by a person who is required under Division 2 of Part 7.7A to act in the best interests of the consumer in relation to the advice', i.e. personal advice (**Personal Advice Exemption**).

3.2 Submission in relation to Proposal 2a: Enhance the conditions for consent

We strongly caution against the introduction of any further layers of prescriptive consent requirements to the anti-hawking regime – which, in our view, risk further complicating an already complex regime. The existing consent requirements, coupled with the definition of 'unsolicited contact', are already extremely onerous and already require financial services firms to expend significant costs to ensure compliance. Importantly, the existing regime applies to contact in respect of not only the offer of a financial product but also requests or invitations to consumers to ask or apply for a financial product. Accordingly, the existing regime operates not only at the point of sale of a product, but from a much earlier stage of the ecosystem and to an expansive range of potential communications.

In our observation, the enhanced anti-hawking regime introduced in 2021 has materially reduced the use of cold calling and outbound sales activities across the market. As it stands, under the current regime, a consumer must initiate contact with a financial services entity with respect to financial products (such as superannuation), unless the entity has a consent in place from the consumer. This means that the legal regime already materially restricts contact initiated by financial institutions and other market participants, with consumers being given the agency to initiate.

Accordingly, we do not consider that further amendment to the anti-hawking regime consent requirements will have any impact on harmful lead generation activities, given that much of the onus for initiating contact is already on consumers.

3.3 Submission in relation to Proposal 2b: Limit the exemption for financial advice

We submit that the removal, or restriction, of the Personal Advice Exemption from the anti-hawking regime is a disproportionate regulatory response that would not address the offending behaviour that contributed to the collapse of Shield and First Guardian.

The Explanatory Memorandum, at [5.92] sets out and confirms that the Personal Advice Exemption should not lead to any regulatory gap or cause harm to consumers who do receive personal advice. In particular it provides the following:

> **5.92** This exception is appropriate because the best interests duty already provides the consumer with adequate protection in relation to such offers. Division 2 of Part 7.7A of the Corporations Act provides that a person giving personal financial advice to a consumer must act in the best interests of that consumer. This duty to act in the consumer's best interests protects consumers from being sold financial products which they do not need or that are not fit for purpose.

We agree with this reasoning, noting that the additional obligations for a licensee providing personal financial advice are designed to ensure that clients receiving personal advice are not mis-sold products.

Again, referring back to the Shield and First Guardian matters, the financial advisers responsible for placing many of the consumers into Shield and First Guardian allegedly did not comply with their existing obligations as providers of personal advice, leading to Australian consumers being mis-sold interests in Shield and First Guardian. In our view, removing the Personal Advice Exemption would be ineffective at addressing the above issue, being effective compliance.

Moreover, as outlined earlier in this submission, the Quality of Advice Review emphasised the need for greater affordability and accessibility of financial advice for Australians. The Personal Advice Exemption has been designed to facilitate consumers obtaining personal advice that allows for the recipient of that advice to practically implement that advice, which in our view, facilitates advisers to provide quality financial product advice. We have concerns that limiting the scope of the Personal Advice Exemption would impose a significant additional compliance burden on already compliant financial advisers, limiting the circumstances in which they can engage with new clients and causing, by way of additional regulation, a reduction in the quality and utility of professional personal advice. In this way, this proposal would add another barrier to access financial advice for Australian consumers.

We acknowledge the concern that certain market participants have used the Personal Advice Exemption to 'cleanse' hawking conduct, especially in the context of the Shield and First Guardian matters; however, we submit that this issue would be better addressed through appropriately targeted supervision and enforcement of the existing best interests duty and conflict management obligations. Removing the exemption would have detrimental consequences given that it serves a legitimate policy purpose and delivers tangible consumer benefits with respect to access to advice.

4 Reform 3: Target remuneration structures that may incentivise poor conduct

4.1 Existing conflicted remuneration ban

The conflicted remuneration regime is housed in Part 7.7A of the Corporations Act. Under section 963A of the Corporations Act:

> **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, because of the nature of the benefit or the circumstances in which it is given:
>
> a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or
>
> b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.

Most relevantly, the ban on conflicted remuneration includes:

(a) a ban on AFS licensees and representatives accepting conflicted remuneration (see sections 963E, 963G and 963H of the Corporations Act); and

(b) a ban on a product issuer giving conflicted remuneration to an AFS licensee or representative (see section 963K of the Corporations Act).

4.2 Submission in relation to Proposals 3a and 3b

We agree that poor and conflicted remuneration arrangements give rise to harmful consumer outcomes, and support the regulation of such arrangements. However, the current prohibition on conflicted remuneration under Part 7.7A of the Corporations Act is already broad and we consider that further amendment is unnecessary. To the extent the Government implements Proposal 1a (i.e. to bring lead generation activities expressly into the regulated perimeter as a form of 'arranging' or 'providing financial product advice'), the issuer of a financial product would not be permitted to give conflicted benefits to a lead generator, as an AFS licensee or representative, and the lead generator itself would be prohibited from accepting any conflicted benefits.

While, under section 963B(1)(bb) of the Corporations Act, advice fees paid by superannuation trustees for the provision of personal financial product advice are exempt from consideration as conflicted remuneration, we highlight that the application of this exemption is subject to a high regulatory bar. In particular, in providing such advice fees, the trustee is required to comply with obligations under the *Superannuation Industry (Supervision) Act 1993* (Cth), including obtaining consent from the member for the payment of such a fee. ASIC Info Sheet 287 *Non-ongoing fee requests or consents* provides a number of prescriptive and onerous requirements for trustees in this regard.

Further, we consider it unnecessary to make any legislative amendment to the definition of 'benefit', as the existing regime already expressly covers non-monetary benefits as 'benefits' for the purposes of section 963A of the Corporations Act. To support this, section 9 of the Corporations Act defines 'benefit' to mean, relevantly, 'any benefit, whether by way of payment of cash or otherwise'. Given this, the concept of 'benefit' is sufficiently broad and malleable to be able to capture a wide range of potentially conflicted benefits. Accordingly, in our view, the existing ban on conflicted remuneration already captures client flows and referrals arising from lead generation arrangements between licensed product issuers and advice providers, to the extent that such flows could reasonably be expected to influence the financial advice provided to retail clients.

We also do not consider that there would be any regulatory benefit to removing the current exemption for client-directed benefits, which require express and specific authorisation from a client for the provision of a benefit. Removing the exemption would remove consumer agency and choice, and limit referrals for financial advice, without addressing the root cause of harmful lead generation activities. Such activities would, in our view, be better addressed through application and enforcement of the AFS licensing regime, conduct rules regulating misleading or deceptive conduct and pressure selling, and the conflicted remuneration regime.

5 Reform 4: Target advertisements for earlier intervention

Proposal 1a is to bring lead generation activities expressly into the regulated perimeter as a form of 'arranging' or 'providing financial product advice'.

To the extent the Government implements Proposal 1a, lead generators will be required to hold AFS licences or authorisations (as representatives) and will therefore be regulated persons for the purposes of Part 7.8A of the Corporations Act. On this basis, we in principle agree with the proposal to require promotions relating to superannuation to identify the AFS licence of the party responsible for the advertisement, as this will be an automatic by-product of the implementation of Proposal 1a.

That said, we note that a regulated person undertaking 'retail product distribution conduct' is defined in section 994A(1) of the Corporations Act to include dealing by arranging or providing financial product advice in relation to a financial product. By this definition, a lead generator would in many cases be subject to the DDO regime. As such, we do not consider that there would be any additional need to explicitly extend the stop order regime as set out in section 994J of the Corporations Act to lead generators as again, that outcome will arise as an automatic by-product of the implementation of Proposal 1a.

6 Conclusion

Thank you for providing us the opportunity to comment on the Consultation Paper. If you would like to discuss the matters raised in this submission, please contact any of us at the details below.

Yours sincerely

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