

14 December 2011

The Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Email: corporations.joint@aph.gov.au

RE: Inquiry: *Corporations Amendment (Further Future of Financial Advice) Bill 2011*

Dear Sir/Madam,

The Australian Institute of Superannuation Trustees (AIST) is an independent, not-for-profit professional body whose mission is to protect the interests of Australia's \$450 billion not-for-profit superannuation sector. AIST's members are the trustee directors and staff of industry, corporate and public-sector superannuation funds, who manage the superannuation accounts of two-thirds of the Australian workforce.

AIST has already made a previous submission in this inquiry regarding the *Corporations Amendment (Future of Financial Advice) Bill 2011* ("the previous Bill"). This submission relates to the subsequent *Corporations Amendment (Further Future of Financial Advice) Bill 2011* ("the Bill", "the proposed Bill") but should be read in conjunction with that.

In making its submissions to the Parliamentary Joint Committee on Corporations and Financial Services ("the Committee"), AIST confirms the following regarding the proposed Bill:

- AIST supports the best interests duty covered in the proposed section 961B however we believe that a principles-based approach to this duty would have been preferable.
- We support a new paradigm where financial advice is "the product" and where financial products are mere tools that assist with execution of the advice. We therefore agree that the measures must ensure that the best tools are selected and that the execution is not compromised by inappropriate remuneration arrangements.

AIST is supportive of the proposed reforms regarding ongoing fees for financial advice; however we have a few areas of concern in the Bill that we wish to raise. We also note that our understanding of the overall intent of this policy is to prevent clients being charged for ongoing advice that they do not receive.

Note to this submission

Unless otherwise indicated, please note that all section and subsection numbers referred to throughout this submission refer to those used to number the proposed new or amended sections of the *Corporations Act 2001* ("the Act") and not those of the Bill itself.

Focus on personal advice provided to retail clients

AIST supports the intent of this and the previous Bill. We broadly welcome the context of where these measures are to apply, and consider strongly that these measures constitute much needed consumer protection. However, we have long supported the provision of consumer-friendly measures such as these to all investors, not just retail clients. Whilst we are aware that the focus of the broader reforms is on providing a higher standard of consumer protection to retail clients, we are aware of no concrete reasons why arbitrary reasons such as larger sums of money should be a barrier to proper consumer protection.

AIST supports the focus of this Bill on the individual providing the advice, as well as being on the licensee or authorised representative. We are aware of the limitations that this has had on the industry in the past and agree that this will facilitate the aim of applying penalties to individuals where necessary.

AIST welcomes the inclusion of the proposed subsection 961(6) that takes into account the use of an application that could feasibly provide an investor with personal advice. Whilst we continue to maintain that a computer program, whether provided over the internet or otherwise, could never provide the same quality of service as a natural person, we support the aims of services provided by licensees whereby scaled advice might be provided by such a facility.

1. Best interests duty

Section 961B: Provider must act in the best interests of the client

AIST supports increasing the reach of financial advice to more Australians. We know that the increase in advice delivery to clients is a major goal of the reforms and we believe that the legislation should highlight the fact that advisers should take note of the most appropriate type of advice that will deliver the right outcome for the client. The proposed section 961B(2) identifies a good portion of what may be required, however this will not be the case in all instances.

AIST supports the creation of the best interests duty and agrees that the proposed section 961B is a vital step in the right direction. However, although we agree and support the intent of the proposed section 961B, we would have preferred that this duty was worded less prescriptively and that a principles-based approach was taken. Section 52(2)(c) of the *Superannuation Industry (Supervision) Act 1993* – the obligation for superannuation trustees to act in the best interests of super fund members – illustrates that such an approach is not only possible, but successful.

Section 961G: Resulting advice must be appropriate to client

It is the view of AIST that the ‘reasonable basis for advice’ provisions that are presently contained at section 945A of the Act are a better fit within this section, rather than within the proposed subsection 961B(2). The reasons that we consider this to be the case is because we believe that the ‘best interest’ provisions to be contained within a principles-based section 961B refer to an overall duty, however the ‘reasonable basis’ provisions represent a standard of care. We believe that these sit side by side of each other and cannot be combined.

Section 961H: Resulting advice still based on incomplete or inaccurate information

Similar to section 961G, we are unsure as to inclusion of this subsection as we believe that this ought to be covered in a principles-based section 961B. Further, if a provider felt that they had incomplete or inaccurate information then they should decline to give advice until sufficient information has been gathered.

We would also like to point out that there are different opinions that exist as to when items of information are considered to be incomplete and/or inaccurate and propose that a measure of materiality be included somewhere in this division.

2. Conflicted remuneration and other banned remuneration

Subsection 963C: The professional development exemption

AIST supports the exemption proposed at subsection 963C(c), where benefits with a genuine education or training purpose that is relevant to providing financial advice and compliant with the Regulations are not considered to be conflicted remuneration. We also agree with most of the planned restrictions on this exemption, including the proposed majority time requirement and the proposed expenses requirement that are cited in the second and third dot points of paragraph 2.33 of the EM.

However, to require that professional development must be provided in Australia or New Zealand precludes licensees or their representatives from learning about best practice and new developments in the global financial services industry. (First dot point, paragraph 2.33, the EM):

Example

Trang is an adviser with and representative of the Widget Industry Superannuation Trust (WIST), an AFS and RSE licensee. Trang provides a personal advice service to WIST's members, and only has the WIST product on her approved product list.

WIST would like to pay for and send Trang to a conference in the USA on new financial advice technologies and associated member services only available in the USA. However, after reading the Regulations, they realise that, unless the conference is held in Australia or New Zealand, such a conference may be considered to be conflicted remuneration. They are unable to send Trang or any of their advisers.

Subdivision C of Division 4 of Part 7.7A: Ban on conflicted remuneration and the 'licensee loophole'

AIST supports the bans contained in this subdivision on receipt of conflicted remuneration by licensees and representatives (including authorised representatives) however, we continue to have concerns regarding the fairness of the provisions, and the way that this information is being communicated.

We draw your attention to paragraph 2.7 of the EM and the statement that the Bill defines 'conflicted remuneration' and bans 'its receipt and payment in certain circumstances'.

Proposed bans on receipt notwithstanding, we identified in our original submission to Treasury that payments are only banned from being made when they flow from employer to employee, from licensee to authorised representative and from product issuers to licensees or representatives. Licensees who are not product issuers or sellers will still be able to pay conflicted remuneration (the ‘licensee loophole’) and this opens the way for artificial structuring of remuneration arrangements where an entity is interposed.

AIST supports the new paradigm where financial advice is “the product”, rather than financial products that are recommended to support the advice. We are concerned that this sort of careful wording is at odds to the original findings of the Ripoll report, and we believe it creates a way of continuing the present situation, where advice can be potentially compromised by inappropriate remuneration arrangements.

Section 964A: Platform operator must not accept volume-based shelf-space fees

Lastly, we note that it is proposed that platform operators must not accept shelf-space fees, however there is no ban on the *payment* of such amounts. For the same reasons as we considered above, we consider that there should be a ban on licensees paying shelf-space fees in the interests of fairness.

Subsection 964A(3)(b): The scale discount exemption

AIST supports genuine scale-based discounts or rebates that are provided in accordance with the proposed subsection 964A(3)(b) being passed on to customers in all instances. Doing otherwise raises questions about the nature and transparency of such arrangements.

We also consider that the criterion of ‘efficiencies’ as described in this subsection is vaguely defined and open to abuse and that this term must be tightly defined in this Bill, or in the Regulations.

Transition

AIST supports the proposed timetable in the Bill(s), particularly in light of the recent announcement from ASIC where they announced that they will adopt a facilitative compliance approach for the first 12 months of the implementation of the FoFA reforms, until 1 July 2013.¹ We believe that any further extension of the implementation time will allow licensees to avoid their duties and quarantine clients into 'grandfathered' arrangements.

Additional provisions

AIST supports all remaining provisions in this Bill.

If you have any further questions regarding this submission, please contact Tom Garcia.

Yours sincerely

Fiona Reynolds
Chief Executive Officer

¹ ASIC, 13 December 2011, <http://www.asic.gov.au/asic/asic.nsf/byHeadline/11-294AD%20ASIC%E2%80%99s%20plans%20for%20FoFA%20reforms?opendocument>