Appendix 3

Conflicted remuneration: technical amendments requested

Organisation and reference	Argument	Amendment requested
Financial Planning Association, *Submission 62*, p. 21. (discussed further below)	***Clarification on fee-for-service*** In order to provide clarification and certainty that all forms of 'fee-for-services' arrangements are permissible provided there is client consent, irrespective of how the payment is facilitated the FPA recommends that s963B(1)(d) is amended.	The benefit is given to the licensee or representative by, or with the agreement consent or authority of a retail client in relation to: i) The issue or sale of a financial product by the licensee or representative to the client; ii) Financial product advice given by the licensee or representative to the client;
Australian Bankers Association, *Submission 67*, p. 31. (discussed further below)	***Ensuring ADI carve-out applies to employees***	Section 963D should be amended to clarify that the carve-out relates to a benefit paid by a licensee or representative to their "employee". Additionally, the Explanatory Memorandum should be amended to clarify that "work carried out" relates to all forms of salary including wages and entitlements, either nondiscretionary or discretionary, as stipulated in the contract or agreement of the "employee".
Westpac Group, *Submission 64*, p. 28.	***Third party IT software will not be considered exempt*** In the case where a product manufacturer has a third party create software on their behalf, the software should be considered exempt from the bans on conflicted remuneration. Some product issuers do not have the relevant skills or expertise in IT, or may not be able to build the software as efficiently as an external supplier. So in some circumstances, outsourcing the software or IT support services may be more prudent.	The IT exemption be amended so that the exemption apply whether the product issuer builds the software itself or uses a third party supplier.

AMP Financial Services, *Submission 43*, pp 22-23; Financial Services Council, *Submission 58*, p. 81; Australian Bankers Association, *Submission 67*, p. 37.	***Licensees cannot directly provide software and support to their representatives*** The wording of the Bill seems to preclude licensees from providing IT support and services as a benefit to their representatives as the carve-out is limited only to the 'benefit provider'**.**	The Bill should be amended to remove 'by the benefit provider'. Additionally, paragraph 2.39 of the Explanatory Memorandum should be expanded to refer to "representatives" and not only "authorised representatives" in order to clarify that a licensee can provide professional development to all of its representatives without breaching the conflicted remuneration provisions.
Australian Institute of Superannuation Trustees, *Supplementary Submission 18*, p. 5.	***Licensee 'loophole'*** 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.	
Law Council of Australia, *Submission 5*, p. 9.	***Definition of conflicted remuneration too general*** Any fee or charge may be conflicted remuneration under the general definition in section 963(1) if the licensee or its representative provides financial product advice to a retail client which could have the necessary influence. For example, a product issuer who provides general financial product advice (for example in the form of a product disclosure statement), could be prohibited by the ban on conflicted remuneration from receiving a management fee as the fee could be interpreted as being capable of influencing its general advice to investors. It could also prevent trustees of superannuation funds paying fees based on assets under administration or the number of members to fund administrators.	Product and service fees accumulated as a result of general advice be specifically excluded from the definition of conflicted remuneration in the forthcoming regulations.

Westpac Group, *Submission 64*, p. 25; Financial Services Council, *Submission 58*, pp 60-61.	***Definition of Funds Manager*** The definition of "funds manager" includes any licensee or RSE licensee that deals in a financial product to which the platform is related. As a result "funds manager" includes, for example, both general and life risk insurers. In effect, the elements of the definition of "funds manager" in section 9641(1) are sufficiently broad to capture any financial services licensee or RSE licensee including for example an insurer. The definition would capture a licensee even if the licensee does not: • Issue the product; or • Manage the product. The definition would capture a licensee even if the product is not: • A managed fund; or • Any other kind of investment product. For example, the definition of "funds manager" would include a financial planner who is arranging for an insurance product to be issued to a client.	Westpac suggest a new definition of funds manager: "funds manager means a responsible entity of a registered scheme or an RSE licensee who issues their financial products to retail clients through the platform operator's custodial arrangement by having them available on the investment menu of the custodial arrangement." FSC recommend that s964 should define the terms used in s964A as follows: a) "funds manager" means the issuer or manager of an investment product available through a custodial arrangement, excluding an issuer or manager who is in the same wholly owned corporate group as the platform provider b) "funds manager's financial products" means financial products issued by the funds manager that are held by or through the custodial arrangement by or on behalf of retail clients .
MLC and National Australia Bank, *Submission 61*, pp 9-10.	***Individuals caught up in group life insurance*** The precise definition of 'group life policy' at s963B(2), could result in 'individual' arrangements being captured by the ban. It should be noted that the terms 'group insurance' and/or 'group life policy' are not explicitly defined in law. Thus, while they typically refer to an arrangement purchased for a group of persons (such as an employer group or an industry association), they may also refer to arrangements entered into with superannuation trustees which enable access for individual members to insurance benefits. For example, group life policies (or master policies) may be issued to the trustee for an individual member in the Fund.	A new section 963B(2A) be inserted: An insurance arrangement within a group life policy: a) that is an insurance interest issued in respect of an individual member at the request of that individual member; and b) that insurance interest is not part of or an increase to a benefit to the member referred to in 963B(3)(b), is deemed not to be a group life policy for members of a superannuation entity for the purposes of section 963B(1).

Law Council of Australia, *Submission 5*, p. 12.	***Unintended consequences for superannuation trustees*** A platform operator is defined by reference to custodial arrangement, many superannuation trustees will be deemed as platform operators under this definition. It appears that fund managers are not able to offer wholesale asset management fees to platform operators unless the difference between the wholesale rate and the "rack" rate paid by other investors can be justified as a reasonable assessment of the costs the fund manager will save by offering its product through the platform. As a consequence, this means that any rebates which have been negotiated by these superannuation trustees would be prohibited under the new legislation, especially if the amount of the rebate exceeds any efficiency savings of the kind referred to in section 964A(3)(b). In this regard, it is critical to note that some large superannuation funds are able to negotiate very favourable rebate arrangements which in some cases will far exceed mere efficiency savings. The crucial distinguishing factor in the context of superannuation funds (as opposed to other platform operators) is that superannuation trustees are required by law to hold all rebates for the benefit of their members and cannot retain those rebates for their personal benefit.	The Bill should specify that any discounts or rebates be passed on to the consumer and that trustees of superannuation funds be excluded from the definition of platform operators.
Financial Services Council, *Submission 58*, p. 62.	***General and life risk insurance caught in volume based shelf space fees*** Section 964(1) of the legislation has the potential to catch general insurance and life risk insurance payments which fit the broad definition of a volume based shelf space fees. This ban is contrary to announced policy in the April 2011 announcement where the Government stated that the ban on volume payments "will not apply to pure risk insurance".	The definition applicable to s964A be expressly narrowed to a fund manager and platform/custodial arrangement. Alternatively, life risk and general insurance should be carved-out from the ban on volume based shelf space fees (similar to the carve-out for conflicted remuneration).

Financial Services Council, *Submission 58*, p. 77.	***Additional or expanded exemptions for both monetary and non-monetary benefits*** Further clarity is required in the wording of the Bill	The ban on conflicted remuneration should expressly not apply to: a) Benefits that are: • not caught, • caught but exempt, or • caught but grandfathered. for example, fee for service amounts paid by the client based on funds under advice are not caught by the prohibition (nor should it be). However, a bonus scheme paid by the licensee or employer that was based on the aggregate of such fee for service revenues generated by the adviser would be banned because it depends in part on funds under advice. b) Exempt benefits: any advice about general insurance, basic banking products and exempt life insurance, regardless of who is giving the advice or paying the benefit. Currently, advice remuneration on these products is only exempt when the advice or the benefit is provided by the product issuer. There is no policy reason why these exemptions should not extend to where a benefit is paid by someone other than the product issuer in respect of general insurance or the specified life insurance – particularly given that those advisers are likely to be less conflicted than the product issuers themselves.

Financial Services Council, *Submission 58*, p. 79.	***Sale of a financial adviser business*** While the sale of a business is the sale of an asset, that asset includes a register of clients and their product holdings. The valuation therefore has a connection with the number of products held by those clients. Such connection should be divorced from application of the definition of conflicted remuneration by way of a specific exemption. A financial planner should be able to sell their business to their licensee without that sale and any subsequent sale by that licensee, being considered conflicted remuneration simply because the nature of the business involves financial products**.**	The purchase and sale of financial planning businesses as between licensee and its authorised representatives be specifically exempt from 963B.
Australian Bankers Association, *Submission 67*, pp 35-36.	***Fee-for-service arrangements do not include client to bank exchanges*** Subsection 963B(1)(d) aims to exempt payments agreed directly between a client and the adviser. The EM clarifies that the provision intends to exclude benefits "given" by: • A retail client directly; • By another party at the direction of the retail client; or • With the clear consent of the retail client. The expanded interpretation of "given" contained in the EM should be contained in the Bill. Additionally, where the "adviser" is employed by a bank, the payments will be made to the bank, not directly to the adviser. Therefore, the Bill should recognise that the benefits may be given by the client to the employee indirectly.	Subsection 963B(1)(d) should be amended to clarify that the benefits may be given by the client to the employee indirectly so that asset based fees are not conflicted remuneration even where the fees are paid through an investment facility. Specifically, the law should be redrafted as follows: "the benefit is given to the licensee or representative by, at the direction or with the clear consent of, a retail client..." Subsection 963B(1)(d) should be amended to clarify that the benefits may be given directly or indirectly to an "employee". Specifically, the law should be redrafted as follows: "the benefit is given to the licensee or representative by, at the direction or with the clear consent of, a retail client in relation to: the issue or sale of a financial product by the licensee or representative to the client; or financial product advice given, whether directly or indirectly, by the licensee or representative to the client."

Australian Bankers' Association, *Supplementary Submission 67*, p. 9	***Sophisticated businesses*** Many businesses which meet the requirements to be considered as a "retail client" often require products in order to facilitate day-to-day business operations (i.e. foreign exchange contracts, derivatives and commodity products within the agricultural industry and manufacturing industry). Therefore, these products are not investment products, and are not used for speculative purposes. Instead, these products are used by business customers for risk management and hedging purposes, e.g. managing a financial risk to their business which they may be exposed to as a result of undertaking the business (i.e. fluctuations in prices and interest rates).	For certainty a subsection should be inserted into section 963B to deem that a payment made in relation to a transaction for the purposes of hedging/risk management is not conflicted**.**
Australian Bankers Association, *Submission 67*, pp 34-35.	Business to business transactions: white-labelling White labelling, as a commercial arrangement, tends to relate to agreements that a bank may have with other providers – typically other banks or subsidiaries of other banks – to provide the system or infrastructure that underpins the provision of a financial product. prohibiting legitimate business-2-business payments that relate to the distribution of products and/or services via white labelling arrangements (internally within a conglomerate banking group and externally) is unnecessary. In the instances of these white labelling arrangements, such advice is unlikely to occur because the customer does not receive personal advice, the payment of fees is not related to the provision of personal advice, and the customer has a choice to use the system or facility, or not. The ABA is concerned this would likely result in these important services being remodelled or withdrawn given the restriction on such business-2-business payments.	The provisions should be drafted to exempt general advice given by way of general market information, such as marketing material, market reports and market data