Efficacy of certain provisions of the Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Act 2024 (Cth)

MEMORANDUM OF ADVICE

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A. Background and Purpose of Advice

1. My instructing solicitors act for the Association of Independently Owned Financial Professionals (**AIOFP**). AIOFP is a peak body established in 1998 to provide representation specifically for financial services professionals who conduct independently owned practices under their own Australian Financial Services Licenses as opposed to those operating within practices owned by financial institutions. One of the objectives of AIOFP is to represent the interests of its members in making representations to government and financial services industry regulators in relation to the regulatory environment and in respect of desirable or proposed law reform.

2. Purportedly in response to recommendations made in the Quality of Advice Review Final Report published in December 2022 (**Quality of Advice Report**), the Commonwealth government produced the Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024, described as "a Bill for an Act to amend the law relating to superannuation, taxation, corporations, financial services and multilateral development banks, and for related purposes" (the **Treasury Laws Bill**).

3. Amongst other things, the Treasury Laws Bill proposed the replacement of section 99FA of the *Superannuation Industry (Supervision) Act 1993* (Cth) (the **SIS Act**) to specify the circumstances in which a trustee of a regulated superannuation fund may charge against a member's interest in the fund the cost of providing financial product advice.

4. The initial form of the proposed amended section 99FA was controversial and concerns were raised by financial services industry representatives regarding, in particular, the compliance burdens that it would impose on superannuation trustees. This led to some amendments in the senate, notwithstanding the recommendation of the Senate Economics Legislation Committee that the Treasury Laws Bill be passed in its initial draft form.

5. I was briefed to consider the proposed section 99FA before the senate amendments, and advise AIOFP whether, in my opinion, those legislative

proposals were problematic from a regulatory or compliance perspective:

(a) having regard to their purported objective of addressing the relevant recommendation of the Quality of Advice Report, namely Recommendation 7 (**Recommendation 7**); and/or

(b) otherwise.

6. After I was briefed, but before I provided my advice, the Treasury Laws Bill was passed by both houses of parliament and received royal assent.[1] I am nevertheless asked to advise on the same questions in relation to the new section 99FA which was substituted by the *Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Act 2024* (Cth) (**Treasury Laws Act**).

7. I note that I am not asked to advise on the nature and effect of the changes made to the text of section 99FA in the senate, but rather to consider only the final form of section 99FA in the Treasury Laws Act, as this is the legislation which will affect the rights, obligations and interests of superannuation fund members and their financial advisers and fund trustees.

B. Summary of Advice

8. In summary, in my opinion, the new section 99FA remains problematic from a regulatory and compliance perspective. This is essentially because it fails to faithfully and clearly implement the relevant recommendation of the Quality of Advice Report, namely Recommendation 7, and will accordingly not achieve the central objective of that recommendation, which is to "provide superannuation trustees with more certainty about paying advice fees agreed between a member and their financial adviser from the member's superannuation account and ensure that advice fees are not paid in breach of the SIS Act and are not taxable benefits for members"[2]. That purpose in turn reflects the fundamental general policy objective underpinning all recommendations of the Quality of Advice Report of ensuring Australians have access to high quality, accessible and affordable financial advice, including in relation to superannuation. Recommendation 7 was that the law be *changed* so as to *enable* superannuation trustees to pay fees from a member's superannuation account to a financial adviser for personal advice provided to

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1 On 9 July 2024.
2 Quality of Advice Report, 105.

the member about the member's interest in the fund *on the direction of the member*. Recommendation 7 did not contemplate that such payments remain conditional upon anything other than a member's informed consent. In particular, it did not contemplate any compliance burden upon superannuation trustees as a condition of authorising payment other than ensuring that the member's consent had been obtained.

9. Notwithstanding the use by the legislature of the term "Recommendation 7 amendments" to describe the new section 99FA (see section 3(1) of Schedule 1 to the Treasury Laws Act), and the provision appearing under the Schedule 1 heading "Delivering better financial outcomes – reducing red tape", the form of the provision does not reflect the essence of Recommendation 7 or the objective of minimising red tape for superannuation trustees.

10. In particular, section 99FA is drafted as a general prohibition subject to a suite of exceptions rather than being expressed as permissive but subject to the single condition of informed consent. This leaves open the possibility that several of the paragraphs of the new section 99FA(1) and (2) may be construed by courts and regulators strictly so as to continue to require trustees to scrutinise aspects of the statements of advice provided by financial advisers to fund members. While this is not the only construction of the provision available, and in my view not the preferable one under applicable rules of statutory construction, the lack of clarity in this regard could only be fully addressed by legislative amendment which altered the form of the provision from prohibitive to permissive and expressed the power to pay personal advice fees to financial advisers from superannuation funds as being conditional only on the member's informed consent and the satisfaction of other purely "administrative" facts (such as an agreement between advise and member as to price) that could not on any view impose compliance burdens on trustees which involved scrutiny of the substance of personal advice.

11. Given the present lack of clarity in this regard, without clear and unambiguous direction or guidance from ASIC and/or APRA to the contrary, many prudent trustees may receive advice to, and will likely, take a conservative approach to the operation of the provision to minimise risk of contravention rather than focusing on facilitating payment requested by members for the timely provision of "good" advice by their financial advisers. A prudent trustee may wish to consider the content of the advice provided and

satisfy themselves, for example, that it constituted only personal advice. This is problematic not only because trustees may lack the training or experience to undertake any true analysis of statements of advice that cover matters beyond the affairs of the superannuation fund, but also because the burden will be to the detriment of the fund member seeking speedy personal advice payable from their superannuation fund account.

12. The ultimate effect of this conservative approach to the construction of section 99FA would potentially be to maintain the excessive compliance burdens or red tape which the Quality of Advice Report intended should be relaxed, rather than to facilitate, and remove disincentives against, the efficient provision to members of advice that they require payable from superannuation fund accounts.

13. Notwithstanding the concerns that I express above about the form of section 99FA and the potential adverse practical consequences if a conservative approach to construction is adopted, there are powerful reasons why regulators such as ASIC and APRA should construe the provision purposively so as to better effect the simplicity of Recommendation 7 and to issue guidance to superannuation trustees that would avoid the spectre of the risk-averse approach to compliance described above. The primary reason is simply that section 99FA was introduced for the express purposes of implementing Recommendation 7 and reducing red tape (presumably for superannuation trustees), and these purposes appear from the very provisions introducing the new section 99FA as well as extrinsic material. In my view, that approach would better accord with applicable principles of statutory construction than construing and applying section 99FA literally and dislocated from these purposes.

14. A further consideration that ought be afforded significant weight by regulators (and thus trustees) in considering the appropriate and reasonable approach to section 99FA compliance pending clarification of any uncertainties by courts or the legislature is the broader regulatory context into which section 99FA has been introduced. There exists a suite of powerful statutory and general law protections to financial advisers' clients' interests that provides critical context when considering the necessary and reasonable compliance burdens that should be urged upon or required of trustees before advice payments from superannuation funds are permissible. These include the

provisions in Division 3 of Part 7.6 of the Corporations Act ("Obligations of financial services licensees", including section 912A imposing "general obligations" upon financial services licensees to, for example, "do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly" and to "have in place adequate arrangements for the management of conflicts of interest"); the provisions contained in Part 7.7A of the Corporations Act ("Best interest obligations and remuneration", including sections 961B, 961G and 961J);[3] general law fiduciary duties owed by financial advisers to their clients that require them to act in their clients' best interests and avoid conflicts of interest; and the additional obligations contained in the *Financial Planners and Advisers' Code of Ethics* 2019 made under section 921U(2)(b) of the Corporations Act. It would seem unreasonable and unnecessary for regulators to place compliance burdens upon superannuation trustees beyond an administrative task of citing evidence of informed consent when they ought be able to assume compliance by advisers with the existing potent legal requirements designed to protect client interests.

15. A further sound reason for an approach by regulators (and hence trustees) which adopts a construction of section 99FA that does not require trustees to consider the content of statements of advice to members before releasing advice payments to fund members' advisers relates to legitimate privacy concerns. In the context of section 99FA, financial advice clients will also be a member of the relevant superannuation fund, so that the superannuation fund trustee will already have access to such of the confidential information of the client as is relevant to his or her interest in the fund. However, clients commonly seek financial advice that is more wholistic and relates to their broader financial position and affairs. They may also seek advice about other superannuation funds, non-superannuation investments, insurances and strategies. Such advice is likely to contain information that is personal and confidential to the client, unrelated to the affairs of the fund and to which the trustee does not have access. That information would also be irrelevant to the discharge of the trustee's obligations under section 99FA. This may in turn raise concerns about the potential breach by financial advisers of ethical

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3 See generally *Australian Securities and Investments Commission v NSG Services Pty Ltd* [2017] FCA 345 (**NSG Services**).

obligations owed to clients to maintain confidentiality over information and advice. While this concern may be diluted by obtaining informed consent from the client to production of advice to a trustee, this would be inefficient and intrusive for the client (who may prefer their non-superannuation affairs remain confidential) and would add an additional compliance step for the financial adviser. In my view, an approach to the construction of section 99FA that avoids these privacy concerns would be preferable, and regulators, and hence trustees, ought place weight upon this consideration.

C. The Quality of Advice Review

16. In response to some of the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the Commonwealth government undertook a review of the effectiveness of measures to improve the quality of financial advice (**Quality of Advice Review**). The Quality of Advice Review commenced on 11 March 2022 and was conducted by Michelle Levy. The outcomes were published in the Quality of Advice Report in December 2022 and contained 22 recommendations.

17. The stated purpose of the Quality of Advice Review was to "ensure Australians have access to high quality, accessible and affordable financial advice", reflecting the requirement in the terms of reference that the Quality of Advice Review consider how the regulatory framework could better enable the provision of high quality, accessible and affordable financial advice for retail clients.[4] One of the central findings in the Quality of Advice Report was that the existing regulatory framework does *not* achieve this objective in that "it makes it hard for institutions to give their customers simple personal advice and it makes it hard and expensive for financial advisers to give their clients the advice they want at a price they are willing to pay".[5]

18. In respect of superannuation in particular, the Quality of Advice Report recognised the need to address this regulatory defect:[6]

> "It is a financial product that might be held for many decades and the relationship between a member and their superannuation fund might be one of the longest relationships of their lives. Superannuation is complex and people will have better retirement incomes if they make good decisions in their own interests throughout their working lives and then into retirement. Superannuation fund trustees have obligations

4 Quality of Advice Report, 1.
5 Ibid.
6 Ibid 3.

> to act in their members' best financial interests and a specific duty to assist members with their retirement needs. In the main people trust their superannuation funds. The recommendations in this Report will help and encourage superannuation funds to give personal advice to their members. It also recommends some small changes to the regulatory framework to provide a firmer basis upon which the trustees of superannuation funds can exercise their powers in ways they decide are best able to serve the interests of their members."

19. As the Quality of Advice Report notes, as at June 2022 there were around 16 million Australians who had superannuation, holding an aggregate of $3.3 trillion in superannuation assets; and for individuals, superannuation is our second-largest asset (18 per cent of total household assets) after our homes.[7] The ability to access financial advice in respect of superannuation assets was thus identified by the Quality of Advice Report as extremely important both to individuals and broader economic interests. In respect of individual interests, the Quality of Advice Report recognised:[8]

> "Contribution and tax rules are complex; superannuation fund, investment and insurance choices matter; and, decisions about retirement products are difficult and important. Decisions about all of these matters have long-term implications for our standard of living in retirement, our entitlement to social security and even decisions about aged care."

20. In this context, one of the particular matters relevant to superannuation considered by the Quality of Advice Report was whether any changes should be made to the laws governing the circumstances in which a customer seeking financial advice from an independent financial adviser about their superannuation may have the cost of that advice paid from their share of the fund. The issue was of substantial practical importance - the Quality of Advice Report noted that its survey indicated that 88% of financial advisers provided retirement or pre-retirement advice and for 65% of advisers the majority of their business was retirement focused.[9]

21. The Quality of Advice Review identified several uncertainties, risks and disincentives that existed in respect of requests made of trustees for payments to financial advisers of advice fees.

22. **First**, the SIS Act prohibited the payment of monies from a fund other than to pay a superannuation benefit, an expense incurred by trustees in connection

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7 Ibid 106.
8 Ibid.
9 Ibid 115-116.

with the operation of a fund, or a trustee fee, and the only legal basis upon which an advice fee could be paid to an independent adviser was if it could be characterised as an expense connected with the operation of a fund. This requirement could only be satisfied if the trustee itself engaged an adviser to provide advice to a fund member about the member's interest in the fund where doing could be considered to be within the sole purpose test. However, the Quality of Advice Report noted that there could be no confidence that this reflected the contractual arrangements under which in practice advice was being provided to fund members by independent advisers.

23. **Secondly**, the consequences for a trustee and a member of paying money out of the fund for an advice fee to the member's adviser if the fee was not properly characterised as an expense properly incurred by the trustee were significant. The trustee would breach the SIS Act and the payment could be treated as a benefit paid to the member and taxable in the hands of the member. Accordingly, there were real and serious consequences of getting an advice fee arrangement wrong.

24. **Thirdly**, section 99FA of the SIS Act in its then form exacerbated the risks of paying adviser services fees from superannuation funds. That provision had been introduced into the SIS Act with effect from 1 July 2021 following recommendations made by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, and was intended to prevent advice fees being deducted from a member's superannuation account without their consent. It permitted an advice fee to be paid from a superannuation account only in accordance with the terms of an arrangement entered into by the member and the adviser. The member had to provide their consent to the trustee for the deduction of the fee the member had agreed with the adviser. The provision thus assumed the legality of a payment made in accordance with the consent. However, section 99FA did not expressly add to the three circumstances referred to above in which a trustee could lawfully pay monies from a superannuation fund; and nor did it convert the arrangement between the adviser and member into an arrangement between the adviser and trustee or the adviser, member and trustee with the result that it was difficult to reconcile the arrangement required by the section with the requirement that the legality of the payment depended upon it being properly characterised as an expense incurred by the trustee.

25. **Fourthly,** section 99FA had in practice produced inefficiencies and regulatory compliance costs for superannuation fund trustees to the detriment of fund members. Both the Australian Securities and Investments Commission (**ASIC)** and the Australian Prudential Regulation Authority (**APRA**) had written to trustees reminding them of their obligations to take steps under section 99FA to satisfy themselves that any advice paid for from the fund with the consent of the member was confined to advice about the member's own interest in the fund and that the cost of the advice was reasonable. This led to a heavy compliance burden and resulting costs for trustees for trustees and the imposition by trustees of caps on advice fees that could be paid from the fund.

26. These problems led the author of the Quality of Advice Report to conclude that section 99FA was "flawed and should be replaced" and that, "given the potentially serious consequences for trustees and members of getting the arrangements wrong", that should be done urgently.

D. Quality of Advice Report – Recommendations

27. The Quality of Advice Report contained recommendations relating to the regulation of financial advice generally, as well as some sector-specific recommendations including some relating to advice about superannuation. The Quality of Advice Report emphasised that the general recommendations in the report applied to superannuation funds as they did to other financial institutions. This means that the recommended changes to superannuation advice regulation must be assessed not in isolation but in the context of the other generally proposed regulatory changes.

28. One of the key themes underpinning all recommendations was the recognition (based on "lots of evidence"), that:[10]

> "Consumers want direct answers to their questions. Where it is relevant they want advice that takes into account their personal circumstances and when they are speaking to their financial institution they expect that the advice they are given does so…"

29. For this reason, a fundamental general recommendation was that more financial product advice be treated as "personal advice" under the law.[11] Specifically, Recommendation 1 was that the definition of personal advice in

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10 Ibid 3.
11 Ibid 3 and 5 (Recommendation 1).

the *Corporations Act* should be broadened so that all financial product advice will be personal advice if it is prepared or adjusted for, or directed to, a particular client and is given to a client in a personal interaction or personalised communication by a provider who has information about the client's financial situation, objectives or needs. Another fundamental general recommendation was that the personal advice must be "good advice", being advice which is "fit for the purpose for which it is given and is in all the circumstances good".[12]

30. Recommendation 5 was that the existing statutory best interests duties be replaced with a new statutory duty reflecting the general law fiduciary duty and removing any "safe harbour" carve out requiring certain steps to be taken to secure presumed compliance.

31. Recommendation 8 proposed the replacement of the provisions requiring an advice provider to give a fee disclosure statement to the client and obtain the client's agreement to renew an ongoing fee arrangement and the client's consent to deduct advice fees. It was proposed that annual consent for an ongoing fee arrangement should still be required, but via a single, simplified prescribed form.

32. Recommendation 9 proposed replacement of the requirement to provide a statement or record of advice with a requirement to retain a record of advice provided and provide written advice on request from a client.

33. Because the recommendations discussed so far apply to all financial institutions:[13]

> "Again, as for other financial institutions, the recommendations will also make it easier for superannuation funds to give personal advice to their members. There will be no safe harbour steps to follow and they will not have to give the member a statement of advice. That will improve the accessibility and affordability of financial advice."

34. There were three recommendations directed specifically to superannuation.

35. Recommendation 6 related to "Superannuation advice". It was that:

> "Superannuation fund trustees should be able to provide personal advice to their members about their interests in the fund, including when they are transitioning to retirement. In doing so, trustees will be required to take into account the member's personal circumstances,

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12 Ibid 3 (Recommendation 4).
13 Ibid 106.

> including their family situation and social security entitlements if that is relevant to the advice.
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> Superannuation fund trustees should have the power to decide how to charge members for personal advice they provide to members and the restrictions on collective charging of fees should be removed."

36. Recommendation 7 concerned "Deduction of adviser fees from superannuation" and was to the following effect:

> "Superannuation trustees should be able to pay a fee from a member's superannuation account to an adviser for personal advice provided to the member about the member's interest in the fund on the direction of the member."

37. Recommendation 13.2 complimented Recommendation 7 and was concerned with "Client directed payments from superannuation funds". It stated:

> "Remove the exception in section 963B(1)(d)(ii) and 963C(1)(e)(ii) of the Corporations Act and replace it with a specific exception that permits a superannuation fund trustee to pay an AFS licensee or its representative a fee for personal advice where the client directs the trustee to pay the advice fee from their superannuation account."

38. This advice is concerned with Recommendation 7 (and the related recommendation 13.2). These recommendations reflected the legal uncertainties and risks identified in the Quality of Advice Report that I describe in paragraphs [22]-[26] above.

E. New section 99FA

39. Schedule 1 of the Treasury Laws Act contains provisions concerned with "Delivering better financial outcomes – reducing red tape". Division 1 of Part 1 contains the provisions amending the *Superannuation Industry (Supervision) Act 1993* (Cth). The amendments in that Division are defined as "Recommendation 7 amendments", a reference to the Quality of Advice Report.[14]

40. Section 2 of Schedule 1 repeals section 99FA of that Act and substitutes the new section 99FA.

41. The new section 99FA is in the following terms:

> "(1) The trustee or the trustees of a regulated superannuation fund must not charge against a member's interest in the fund the cost of financial product advice provided to the member unless:

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[14] Section 3(1) of Schedule 1.

(a) the financial product advice is personal advice; and

(c) the trustee or trustees charge the cost in accordance with the terms of a written request or written consent of the member; and

(d) if the arrangement under which the advice is provided is an ongoing fee arrangement—any applicable requirements of Division 3 of Part 7.7A of the Corporations Act 2001 are met in relation to the arrangement and, if relevant, the deduction of ongoing fees; and

(e) if the arrangement under which the advice is provided is not an ongoing fee arrangement—the request or consent satisfies the requirements in subsection (2); and

(f) the trustee or trustees have the request or consent, or a copy of it.

Payment of advice fees under an arrangement other than an ongoing fee arrangement

(2) For the purposes of paragraph (1)(e), the written request or written consent must include the following:

(a) the name and contact details of the member;

(b) the name and contact details of the provider of the financial product advice;

(c) the name of the fund from which the cost of the advice is requested to be paid;

(d) a brief description of the services the member is entitled to receive under the arrangement;

(e) a request from, or consent by, the member for the cost of the advice to be paid by the trustee and charged against the member's interest in the fund;

(f) either:

(i) the amount to be paid for the advice; or

(ii) if the amount to be paid for the advice cannot be determined at the time the request is made, or the consent is given, a reasonable estimate of that amount and an explanation of the method used to work out the estimate;

(g) either:

(i) the amount to be charged against the member's interest in the fund; or

(ii) if the amount to be charged against the member's interest in the fund cannot be determined at the time the request is made, or the consent is given, a reasonable estimate of that amount and an explanation of the method used to work out the estimate;

(h) the member's signature;

(i) the date the request is made;

(j) any other information prescribed by the regulations.

(3) For the purposes of paragraph (2)(e), the Minister may, in writing, approve a form.

(4) If the Minister has approved a form under subsection (3), a request or consent for the purposes of paragraph (2)(e) must be in the approved form.

Collectively charged fees not covered

(5) Subsection (1) does not apply if the cost of providing financial product advice is shared between the member mentioned in subsection (1) and other members of the fund."

42. Section 3 of Schedule 1 concerns the application of the new section 99FA. It provides in sub-section (2) that the "Recommendation 7 amendments" (defined in sub-section (1) as "the amendments made by this Division") apply to costs charged on and after "the start day" (defined in sub-section (1) as "the day 6 months after the day this Division commences", being 6 months after 10 July 2024).[15] That is so regardless of when the arrangement under which the relevant financial product advice is provided.[16]

F. Regulatory Protections for Fund Members Seeking Advice

43. The new section 99FA purports to implement Recommendation 7 of the Quality of Advice Report and appears within a Division of provisions entitled "Delivering better financial outcomes – reducing red tape". However, it is clear from the language employed that the legislature was concerned to ensure that the circumstances in which a superannuation trustee will be permitted to charge against a fund member's interest in a superannuation fund the cost of financial advice would not be unlimited. In this sense, section 99FA may be seen as a balance struck between implementation of Recommendation 7 and removal of red tape on the one hand, and protection of fund member's interests on the other. In order to evaluate whether the balance has been appropriately struck, or whether the obligations upon trustees and financial advisers are necessary and reasonable or excessive, it is important to identify

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15 See Item 2 in the table in section 2 of the Treasury Laws Act.

16 Exceptions to this are provided for by section 3(3) of Schedule 1 in cases where, before the start day, there is in force an arrangement with a member of a regulated superannuation fund under which financial product advice is provided, and a written consent of the member complying with the old section 99FA is in place. In such cases, the existing written consent is taken to satisfy the requirements of the new section 99FA for a prescribed period.

other legal protections afforded against abuses of fund member's interests.

44. In Australia, the financial services industry and the superannuation industry are highly regulated. There are numerous statutory and general law protections available to superannuation fund members against conduct by financial advisers and fund trustees that may be adverse to members' interests. Indeed, the entire regulatory regime pursuant to which financial services professionals operate (for example Part 7.6 of the Corporations Act 2001 – "Licensing of providers of financial services" and Part 7.7 – "Financial Services Disclosure") constitutes a detailed scheme protective of consumers, including superannuation fund members; and the entire regulatory regime under which superannuation trustees operate is intended to be protective of fund members. It is neither necessary nor possible to describe those regimes in detail. For the purposes of the present advice it is necessary only to identify some of the most important and directly relevant legal protections.

45. Division 3 of Part 7.6 of the Corporations Act prescribes "Obligations of financial services licensees". Section 912A imposes "general obligations" upon financial services licensees to, for example, "do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly" and to "have in place adequate arrangements for the management of conflicts of interest".

46. As I note above, Recommendation 5 of the Quality of Advice Report was that the existing statutory best interests duties be replaced with a new statutory duty reflecting the general law fiduciary duty and removing any "safe harbour" carve out requiring certain steps to be taken to secure presumed compliance. This has not yet been done. The reference to the best interests duties is to the provisions contained in Part 7.7A of the Corporations Act ("Best interest obligations and remuneration").[17] The provisions apply to the provision of any personal advice to retail clients. Section 961B(1) obliges a provider to act "in the best interests of the client" in relation to the provision of advice. Section 961B(2) creates safe harbour provisions so that a provider may know what steps to take in order to secure a presumption of compliance. Section 961G only permits the provision of advice to a client if it would be reasonable to conclude "that the advice is appropriate to the client" had the bests interest

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17 See generally *NSG Services*.

obligation been satisfied. Section 961J requires an adviser to give priority to the client's interests when giving advice where the provider knows or ought reasonably to have known of a conflict between the client's interests and those of the provider or another.

47. Of course, financial advisers also owe general law fiduciary duties to their clients that require them to act in their clients' best interests and avoid conflicts of interest.

48. Financial advisers are also subject to the *Financial Planners and Advisers' Code of Ethics* 2019, prescribing 5 paramount values and 12 ethical standards. The Code of Ethics is a legislative instrument made under section 921U(2)(b) of the Corporations Act. Pursuant to section 921E of the Corporations Act all financial advisers are required to comply with it. The Code of Conduct imposes ethical duties "that go above the requirements in the law".

49. Financial advisers must always act in a way that "demonstrates, realises and promotes" paramount values that include "trustworthiness". Standard 1 requires an adviser to "act in accordance with all laws … and try not to avoid or circumvent their intent". Standard 2 requires an adviser to "act with integrity and in the best interests of each of your clients".

50. These various statutory and general law protections would in my view preclude a financial adviser from recommending to any client that they pay for personal advice from their share of a superannuation fund in circumstances where such payment was not in the client's best interests or without disclosing and explaining any potential conflict of interest.

51. This suite of existing protections provides important context when considering whether additional protections for clients are necessary before advice payments from superannuation funds are permissible. It would seem unreasonable and unnecessary to place any additional compliance burden upon superannuation trustees when they ought be able to assume compliance by advisers with the existing potent legal requirements designed to protect client interests.

52. While this broader regulatory context may not assist greatly in *construing* section 99FA in the face of uncertainties arising from its drafting (which I discuss below), in my view it ought be taken into account as a factor relevant

to the assessment by ASIC and APRA of the appropriate guidance to superannuation trustees regarding the compliance burdens that section 99FA imposes. If an available construction of section 99FA would require trustees to consider the content of statements of advice to fund members, but the better view is that this compliance burden is not required by the provision, then clear direction from regulators that the latter approach should guide trustees' compliance practices could be more safely be given having regard to the protective regulatory safety net. In other words an "abundance of caution" approach to regulatory guidance would not be warranted.

G. Assessment of New Section 99FA

Inconsistency with Recommendation 7 and objective of red tape minimisation

53. Notwithstanding the use by the legislature of the term "Recommendation 7 amendments" to describe the new section 99FA (see section 3(1) of Schedule 1 to the Treasury Laws Act), and the provision appearing under the Schedule 1 heading "Delivering better financial outcomes – reducing red tape", the form of the provision does not best reflect the essence of Recommendation 7 of the Quality of Advice Report or the objective of minimising red tape for superannuation trustees.

54. Section 99FA is drafted as a general prohibition subject to exceptions rather than being expressed as permissive but subject to conditions. In this sense, section 99FA adopts the model of recommendation 13.2 (substitution of the exceptions in sections 963B(1)(d)(ii) and 963C(1)(e)(ii) of the Corporations Act with a specific exception to the prohibition against a superannuation fund trustee paying an adviser for personal advice from their clients superannuation account upon the clients direction) rather than the model of Recommendation 7 (permitting superannuation trustees to pay a fee from a member's superannuation account to an adviser for personal advice to the member about the members fund interest on the direction of the member).

55. This may seem to be a semantic point to the layperson. However, it is of great potential legal significance in that it could make a difference to the way in which a court will construe the provision, and thus possibly the way in which regulators will approach compliance requirements and enforcement. This would become relevant in the context of any dispute between a client or a regulator and a trustee as to whether the cost of personal advice was lawfully

charged against a member's interest in the fund. In the event of such a dispute a court may be urged to construe a general prohibition with exceptions strictly and in accordance with the purpose of protecting fund members, rather than, as Recommendation 7 intended, so as to better facilitate or encourage the provision of advice promptly and efficiently when required by a client with minimal red tape barriers.

56. The availability of a stringent construction of the provision in turn has the potential to lead to an approach by regulators that insists on strict technical compliance with subsection (2) to the detriment of the fund member seeking speedy personal advice because trustees and advisers will be concerned about technical compliance rather than the timely provision of "good" advice. One can easily conceive of scenarios where that compliance-focussed approach may have consequences contrary to the intention of Recommendation 7. For example, in the case of an arrangement which is not an ongoing fee arrangement, there must be a written request or consent to charge the members interest in the fund for personal advice (section 99FA (1)(e) and (2). There are requirements in subsection (2) that must be satisfied in order for that request or consent to be valid. On a strict and technical approach to subsection 99FA(1)(e) and (2), an error or omission in the name or contact details of the member or advice provider or the fund (subsection (2)(a),(b),(c)) or a minor misdescription of the services to be provided (subsection (2)(d)) or any minor error in cost estimation methodology (subsection (2)(f) or (g)) or absence of signature or date (subsection (2)(h) or (i)), will have the result that the charge to members interest will be positively unlawful - that is, section 99FA will have been contravened. That will be so regardless of whether the member desired or benefited from the advice and regardless of whether any unfairness or injustice arises from the member being charged for that advice by impost upon the members fund share. There is a real potential for disgruntled members to complain about the impost and seek to avoid it on technical grounds (for example if they did not like the content of the advice), even if they did in fact consent to it. And there is also potential for regulators to criticise instances of technical non-compliance even where no concerns have been raised by the consenting member.

57. On the other hand, had the new section 99FA been expressed permissively, reflecting Recommendation 7, it could unambiguously be construed as being

intended to enable fund members to easily seek and receive personal advice and have the cost charged against their fund interest without that desire being thwarted or delayed by trustees' fears of technical non-compliance. If that model of legislative drafting had been adopted, in my view trustees and advisers could more readily and efficiently respond to requests for advice without fear that accusations of semantic or technical noncompliance would render their conduct unlawful.

58. The ultimate effect of a conservative approach to the construction of section 99FA would thus potentially be to maintain the excessive compliance burdens or red tape which the Quality of Advice Report intended should be relaxed, rather than to facilitate, and remove disincentives against, the efficient provision to members of advice that they require payable from superannuation fund accounts.

Excessive compliance burdens upon superannuation trustees

59. If the more literal construction that I discuss above is adopted by courts or required by guidance from ASIC or APRA then the new section 99FA in practice will potentially impose significant compliance burdens upon superannuation trustees.

60. Subsection 99FA imposes a statutory prohibition upon the trustee of a regulated superannuation fund against charging against a member's interest in the fund the cost of financial product advice unless the conditions set out in paragraph 99FA are satisfied. In particular, the trustee is obliged to ensure that the financial product advice is "personal advice" (subsection (1)(a)); that the cost proposed to be charged is "in accordance with the terms of a written request or written consent of the member" (subsection (1)(b)); and, for arrangements other than ongoing fee arrangements, that the request or consent satisfies the requirements in subsection 2 (subsection (1)(e)).

61. In relation to subsection (1)(a), the obligation is not merely to ensure that the advice sought, as generally identified or described in the written request or consent, is "personal advice". Rather, it is to ensure that "the financial product advice provided to the member" is personal advice. While different trustees may take different views about the lengths that they must go to in order to satisfy themselves of this matter, there would be risk involved in assuming that the financial product advice provided reflected precisely the

advice requested or consented to. To be certain of complying with subsection (1)(a) a prudent trustee would thus have to consider the content of the advice provided and satisfy themselves that it constituted only personal advice.

62. While it may well be that the expansion of the definition of personal advice simplifies this task, the parameters of that term have not yet been considered by courts, and the reality is that many trustees may not be trained or qualified to review financial product advice and ensure that it is wholly personal advice. Financial advice in this context may well cover a range of complex and areas requiring specialised knowledge, such as splitting contributions between spouses, strategies to maximise Centrelink entitlements, redemption and withdrawal strategies to reduce tax within the superannuation fund, estate planning, death benefit nominations, "catch-up" contributions and strategies to optimise "bring-forward contributions". While a financial planner may have confidence in concluding that advice tailored to a client's individual circumstances will be personal advice, a trustee is less likely to have the same confidence. And yet the new section 99FA requires them to reach a view about that or risk contravention.

63. Subsection (1)(c) is less problematic, but still holds uncertainty and thus the potential to create compliance risk for trustees. The condition requires the trustee to "charge the cost in accordance with the terms of a written request or written consent". The more natural meaning of the language employed is that it simply permits the trustee to charge against the member's interest the cost consented to or a cost calculated in accordance with the estimate or methodology consented to. On that view, the trustee would only have to consider the request or consent and the proposed professional fees and not ask whether the advice provided was that which was sought. However, a broader construction of the words "in accordance with" would require a trustee to analyse the advice itself and form a view that it was sufficiently aligned with the advice requested or consented to (in terms of subject matter and scope) and only charge the cost appropriate for the extent of the conformance between what was requested and what was provided. In other words, the trustee would be in the position of policing the responsiveness and quality of advice provided.

64. I make the same observation about this compliance burden as I do about that imposed by subsection (1)(a). Many trustees simply will not have the

expertise, experience or resources to discharge an obligation of this nature if the view is taken by the regulator that this is what is required.

65. Subsection (1)(e) requires a trustee to undertake an analysis of the request or consent form to ensure that it includes the matters prescribed by subsection (2). Most of those are straightforward administrative details that could be easily checked by a trustee, especially in the case of a prescribed form of request or consent as contemplated by subsection (3). However, there is one notable exception that may be problematic for trustees, depending upon the construction adopted by regulators and courts. Subsection (2)(f) and (g) require a written request and consent to include either the amount to be paid for advice sought and the amount to be charged against the member's interest in the fund, or if those amounts cannot be determined at the time of request or consent, "a reasonable estimate" of those amounts and an explanation of the methodology used to reach the estimates. It may be thought that all that is required to satisfy this provision is the presence of some apparently rational methodology and an estimate that is not so open-ended as to be meaningless. However, the trustee is obliged to satisfy itself that any estimate is "reasonable". On one view this requires the exercise of judgement as to whether the estimates provided sufficient guidance as to the likely cost of the advice or services *and* as to whether that estimated cost is reasonable having regard to the advice or services sought. That construction of the provision would not be far-fetched, as it would reflect an intention that that the member's request or consent was provided upon a sufficiently informed basis. Trustees are not financial advisers. It will be difficult for them to assess whether a proposed cost estimate is "reasonable" having regard to the services requested. If the provision is construed as imposing that burden, it would be unfairly burdensome for trustees.

66. I am instructed that, before the introduction of the new section 99FA, superannuation trustees had inconsistent practices in relation to the demands placed upon financial advisers to provide statements of advice for scrutiny before approving the payment of advice fees from fund shares. Some trustees required provision of only a sample of statements of advice before approving fee payment, while others checked each and every statement of advice before payment approval. I am instructed that in some cases trustees made direct and sometimes detailed enquiries of financial advisers to clarify

the content of advice provided in order to ascertain whether approval for payment from funds should be given.

67. These instructions demonstrate that many trustees are likely to take a risk-averse and technical approach to the requirements imposed by the new section 99FA unless courts or regulators provide them comfort that this is not how the provision will be construed and applied. In my view, until clarification by regulators and courts is provided, residual uncertainty arising from the language of the new section 99FA will be likely to perpetuate this diversity of views about compliance and risk requirements. Without guidance from the courts or the regulators as to the precise scope of the obligations imposed on trustees by section 99FA, this has the potential to increase compliance costs for both trustees and advisers, and render the provision of advice less speedy, less efficient and more expensive. This was not the intention of Recommendation 7.

Legal and ethical concerns for financial advisers

68. I observed above that upon a strict construction it may be necessary for superannuation trustees to be provided with financial advice the cost of which is proposed to be charged to their superannuation fund share in order at least to ensure that the advice is personal advice. Assuming this to be the case, or even that some trustees consider it to be the case, financial advisers may be asked by trustees to provide statements of advice to them for scrutiny.

69. In the context of section 99FA, financial advice clients will also be a member of the relevant superannuation fund, so that the superannuation fund trustee will already have access to such of the confidential information of the client as is relevant to his or her interest in the fund. However, clients commonly seek financial advice that is more wholistic and relates to their broader financial position and affairs. They may also seek advice about other superannuation funds, non-superannuation investments, insurances and strategies. Such advice is likely to contain information that is personal and confidential to the client, unrelated to the affairs of the fund and to which the trustee does not have access. That information would also be irrelevant to the discharge of the trustee's obligations under section 99FA. This may in turn raise concerns about the potential breach by financial advisers of ethical obligations owed to clients to maintain confidentiality over information and advice.

70. As I note above, the *Financial Planners and Advisers' Code of Ethics* 2019, prescribing 5 paramount values and 12 ethical standards, is a legislative instrument made under section 921U(2)(b) of the Corporations Act. Pursuant to section 921E of the Corporations Act all financial advisers are required to comply with it. The Code of Ethics requires financial advisers to always act in a way that "demonstrates, realises and promotes" paramount values that include "trustworthiness". Standard 1 requires an adviser to "act in accordance with all laws … and try not to avoid or circumvent their intent". Standard 2 requires an adviser to "act with integrity and in the best interests of each of your clients".

71. While none of the standards or values expressly address respect for client privacy and confidentiality, there is no doubt that these are capable falling under the banner of "trustworthiness" and adherence to the intent of the laws concerned with protection of privacy and confidential information.

72. Accordingly, I am instructed that the prospect that some trustees may require provision of statements of advice will give rise to concerns for many financial advisers that this may be inconsistent with obligations to maintain privacy and confidentiality of client information.

73. Ultimately, while this might be a concern felt by financial advisers, I observe that it may be practically addressed by ensuring clients are aware of the potential for advice sharing with trustees at the time of the request or consent for the cost to be charged to a superannuation fund share. However, this would be undesirable for clients who are sensitive to intrusions upon their privacy and would seem to be inconsistent with the rationale for Recommendation 7 of facilitating straightforward access to advice.

<u>The correct construction of section 99FA</u>

74. I have set out above the adverse consequences that may arise from the unfortunate disconformity between Recommendation 7 and the drafting of the new section 99FA if a conservative view of the requirements of the provision is adopted. This is something that can only be rectified with certainty by the legislature. However, in this section I address the prospect that these adverse consequences may be avoided if courts and regulators construe the provision correctly by application of principles of statutory construction.

75. The starting point for any consideration of the practical obligations imposed

by section 99FA upon superannuation trustees involves the proper construction of provision. As the High Court emphasised in *Thiess v Collector of Customs*, '[s]tatutory construction involves attribution of meaning to statutory text'.[18] The Court reiterated and endorsed its earlier observations in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*[19] about the task of statutory construction:

> "'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text.' So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text."[20]

76. Further, the Court said:

> "Objective discernment of statutory purpose is integral to contextual construction. The requirement of s 15AA of the *Acts Interpretation Act 1901* (Cth) that 'the interpretation that would best achieve the purpose of [an] Act (whether or not that purpose or object is expressly stated …) is to be preferred to each other interpretation' is in that respect a particular statutory reflection of a general systemic principle."[21]

77. Application of these uncontroversial principles reveals that the construction of section 99FA that best reflects Recommendation 7 is more legally sound than one which is focussed on risk and compliance obligations that are not expressly set out. The primary reason is simply that section 99FA was introduced for the express purposes of implementing Recommendation 7 and reducing red tape (presumably for superannuation trustees), and these purposes appear from the very provisions introducing the new section 99FA. In my view, that approach would better accord with applicable principles of statutory construction than construing and applying section 99FA literally and dislocated from these purposes.

78. Accordingly, notwithstanding the concerns that I express above about the form of section 99FA and its potential practical consequences if a conservative approach to construction is adopted, there is a strong imperative for courts, as well as regulators such as ASIC and APRA, to construe the provision purposively and in legislative context so as to better effect the essence of

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18 (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).
19 (2012) 250 CLR 503, 519 [39].
20 (2014) 250 CLR 664, 671 [22].
21 Ibid, 672 [23]. The Victorian counterpart to s 15AA is s 35(a) of the *Interpretation of Legislation Act 1984*.

Recommendation 7.

79. In the case of the regulators, it may be hoped that, in the absence of any judicial consideration of the provision, they will adopt the correct constructional analysis of section 99FA and issue guidance to superannuation trustees that would avoid the spectre of the risk-averse approach described above.

H. Conclusion

80. For the reasons explained above, in my opinion the new section 99FA remains problematic from a regulatory and compliance perspective. This is essentially because it fails to faithfully implement the relevant recommendation of the Quality of Advice Report, namely Recommendation 7, and may accordingly not achieve the objective of that recommendation, which reflects the fundamental policy objective underpinning all recommendations of the Quality of Advice Report of ensuring Australians have access to high quality, accessible and affordable financial advice, including in relation to superannuation.

81. I have detailed in this memorandum several reasons for, and potential consequences of, the conclusion expressed in the previous paragraph. These are summarised under the heading "Summary of Advice" in Part B above.

82. Ultimately, whether the poor drafting of section 99FA results in outcomes for superannuation trustees, fund members and financial advisers which are inconsistent with the Recommendations of the Quality of Advice Report will depend upon the construction of the provision adopted by the courts, and, in the interim, the guidance given about, and approach taken to, compliance by regulators such as ASIC and APRA. A correct approach to statutory construction should ensure that such guidance does not impose upon superannuation trustees any burden of considering the substance of statements of advice from financial advisers to fund members.

83. I would be happy to elaborate upon any aspect of my advice in conference if that would assist.

2 August 2024

B F Quinn KC