

The Hon Justice Mordecai Bromberg  
President  
Australian Law Reform Commission  
PO Box 12953  
George Street Post Shop  
QLD 4003

Email: [financial.services@alrc.gov.au](mailto:financial.services@alrc.gov.au)

Thursday 10 August 2023

Dear Justice Bromberg,

### **Superannuation and the Legislative Framework for Financial Services (FSL11)**

The Financial Advice Association of Australia<sup>1</sup> (FAAA) welcomes the opportunity to provide feedback on the Australian Law Reform Commission's (ALRC) Background Paper FSL11 – Superannuation and the Legislative Framework for Financial Services.

The FAAA's submission largely focuses on the following issues of concern to our members:

- The application of the wholesale/retail client definition and obligations in the provision of personal advice, particularly superannuation advice and SMSF advice
- Superannuation interests as financial products
- Intra-fund advice

#### Application of wholesale/retail client obligations to superannuation advice

Feedback at the FAAA's recent RoadShow series indicates that the vast majority of our members treat all clients, including those who qualify as wholesale, as retail clients. For those clients who might qualify as wholesale, this avoids the inefficiency, complexity and confusion of complying with different legal obligations for the superannuation component of the advice they provide, as opposed to the remainder. A significant number of larger financial advice licensees also do not permit authorised representatives to operate on a 'wholesale client only' basis.

As professionals, it's the duty of financial planners/advisers to understand the regulations and ensure clients are protected and can make informed financial decisions based on their circumstances. FAAA members have raised concerns about whether clients understand the difference between wholesale and retail client rights and requirements. Most importantly, there is concern that many wholesale clients may not be aware or do not understand that they lose all the protections of a retail client; that wholesale

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<sup>1</sup> The Financial Advice Association of Australia (FAAA) was formed in April 2023, out of a merger of the Financial Planning Association of Australia Limited (FPA) and the Association of Financial Advisers Limited (AFA), two of Australia's largest and longest-standing associations of financial planners and advisers. The FPA was a professional association formed in 1992 as a merger between The Australian Society of Investment and Financial Advisers and the International Association of Financial Planning. In 1999 the CFP Professional Education Program was launched. As Australia's largest professional association for financial planners, the FPA represented the interests of the public and (leading into the merger) over 10,000 members. Since its formation, the FPA worked towards changing the face of financial planning, from an industry to a profession that earned consumer confidence and trust, and advocated that better financial advice would positively influence the financial wellbeing of all Australians. The AFA was a professional association for financial advisers that dated back to 1946 (existing in various forms and under various names). The AFA was a national membership entity that operated in each state of Australia and across the full spectrum of advice types. The AFA had a long history of advocating for the best interests of financial advisers and their clients, through working with the government, regulators and other stakeholders. The AFA had a long legacy of operating in the life insurance sector, however substantially broadened its member base over a number of decades. The AFA had a strong focus on promoting the value of advice and recognising award winning advisers over many years. The AFA had strong foundations in believing in advocacy for members and creating events and other opportunities to enable members to grow and share best practice.

client status is promoted by some as better for clients as they can access more investments options. It would be very confusing for consumers to understand why and how different rules and obligations apply to the advice they are receiving depending on the product class the advice includes.

The FAAA agrees that the following policy rationale appears to be widely accepted:

*The Revised Explanatory Memorandum to the Financial Services Reform Bill 2001 (Cth) stated that because superannuation products are complex and long-term in nature, a person will always be deemed to be a retail client where the relevant financial product is a superannuation product or an RSA product to ensure that appropriate disclosure is provided. This policy rationale appears to be widely accepted.<sup>2</sup>*

While the FAAA agrees with Kit Legal's summation that "it does not make sense that a client can be treated as wholesale for advice on their investments within superannuation but then retail when they want to make a superannuation contribution"<sup>3</sup>, we do not support the law firm's suggestion that "the superannuation product exclusion....should be removed from all wholesale client tests".<sup>4</sup>

The FAAA recommends that it remains appropriate to retain the obligations to treat a client as a retail client for superannuation advice, to protect consumers' retirement savings.

While many financial planners/advisers apply the retail client obligations to all their clients and financial advice services, there may be a small number of financial planners/advisers who provide superannuation advice through the required SOA, however address additional advice needs through a wholesale client engagement, where appropriate.

However, FAAA's members are concerned about the potential for poor consumer outcomes from providers who rely on the wholesale client obligations and exemptions by excluding the client's superannuation needs from the scope of their wholesale client advice, because of the requirement in the Act to meet the retail client obligations when providing superannuation advice. This issue is significantly exacerbated by the out-of-date threshold for wholesale clients, and the potential misuse of this wholesale client pathway.

As discussed in the Financial Planning Association's (FPA) and Association of Financial Advisers' (AFA) (our predecessor organisations) submissions in response to the ALRC's Interim Report A, the distinction of clients between retail and wholesale has some very substantial implications for consumers, which raises the question of the appropriateness of the entire wholesale client regime.

The FAAA notes that the Government is currently considering this issue as part of its Review of the Regulatory Framework for managed investment schemes (MIS)<sup>5</sup>.

Treasury's consultation paper for the MIS review highlights the intent of the wholesale/retail definitions:

*"The retail and wholesale client distinction was introduced by the Financial Services Reform Act 2001 to assist in calibrating the regulatory framework by providing consumer protections for retail 'mum and dad' investors. It also allows those who are 'better informed and better able to*

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<sup>2</sup> FSL11, paragraph 67

<sup>3</sup> FSL11, paragraph 67

<sup>4</sup> FSL11, paragraph 69

<sup>5</sup> <https://treasury.gov.au/consultation/c2023-404702>

*assess the risks involved in financial transactions' to participate in wholesale markets under a lighter touch regulatory regime.*

*...Fewer regulatory obligations (and protections) apply to investors of unregistered schemes. Unregistered schemes are typically offered to wholesale clients such as institutional, sophisticated, and professional investors that meet relevant tests in the Corporations Act.*

*....the regulatory distinction between retail and wholesale clients is applicable to a range of circumstances in the financial services sector.<sup>6</sup>*

This overview of the retail/wholesale regime is relevant to the ALRC Inquiry as it highlights how these distinctions in client classification come with exemptions from key protection provisions across a range of parts within the legislation and are dependent on the client test that is applied. These provisions are currently scattered in multiple parts of the Act. The structure of the legislation and regulations, and the multiple client definitions, impacts the complexity and understanding of the regime.

The FAAA suggest the legislation structure be improved to enable the clear identification of the requirements applicable under the retail and wholesale client regime.

FAAA members have also raised concerns about the difference between thresholds for SMSF trustees and other clients. The ASIC 'no action position' published in its 2014 media release<sup>7</sup> has resulted in significant confusion. It is unclear who the guidance is being provided to - Trustees or members of the SMSF - and therefore who the 'no action position' applies to.

This stems from confusion about the test and its application in the law in relation to SMSFs. This is specifically related to uncertainty in terms of which circumstances advice to the trustees of an SMSF is considered to relate to a superannuation product or not. The ASIC 'no action position' is 9 years old and sets the requirement for determining the application of the law in classifying a client as a retail or wholesale client, and which protections should therefore be afforded to the client. However, any review of this Regulator position will not be subject to Parliamentary scrutiny. The ASIC media release also acknowledged that this 'no action position' will not affect any private right of actions that may be available to third parties. ASIC further stated that they support a review of the test to ensure that it is both clear and appropriate. It is important that this now takes place.

The FAAA recommends:

- the intent of the ASIC no action position be made clear.
- it be made clear as to the party the wholesale client test applies – the SMSF trustee or the SMSF member – and which threshold - the \$2.5million versus the \$10million threshold - and the associated tests and obligations for each party.
- It be made clear what should be considered as a financial service related to a superannuation product in the case of an SMSF.

<sup>6</sup> [https://treasury.gov.au/sites/default/files/2023-08/c2023-404702-cp\\_0.pdf](https://treasury.gov.au/sites/default/files/2023-08/c2023-404702-cp_0.pdf)

<sup>7</sup> <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2014-releases/14-191mr-statement-on-wholesale-and-retail-investors-and-smsfs/>

- the intent and effect of ASIC's no action position be clearly reflected in the primary legislation for the wholesale/retail client obligations. Consumers inappropriately classified as wholesale clients now have the ability to make a complaint to AFCA and take action against their provider. Equally, relevant providers are held to account under the Code of Ethics which only permits the classification of a client as a wholesale client if it is in the client's best interest to do so.

#### Superannuation interests as financial products

The ALRC Background paper highlights the confusion created by the meaning and application of the relevant definitions within the Corporations and SIS acts and their application to determining when a client has been issued a superannuation interest and the resulting Chapter 7 obligations that must be adhered to. For example:

*....uncertainties around the meaning of superannuation interest under the SIS Act may translate into problems under the Corporations Act.<sup>8</sup>*

The FAAA suggests that the legislation should be structured and framed to simply reflect the consumers' understanding of when they have been issued or invested in a superannuation interest, and which obligations apply to that investment.

#### Intra-fund advice

The ALRC acknowledges in FSL11, that the changes proposed by the Quality of Advice Review will potentially affect the way in which trustees provide intra-fund advice.

The FAAA supports the role that intra-fund advice plays in making advice more available and affordable to Australians. However, intra-fund advice should be simple advice only. We do not support any broadening of the intra-fund advice regime to more complex advice needs, such as retirement advice, that requires the services of a fully qualified financial adviser/planner.

We would welcome the opportunity to discuss with the ALRC the matters raised in our submission. If you have any questions, please contact me on (02) 9220 4500.

Yours sincerely,



**Phil Anderson**  
General Manager Policy and Advocacy  
Financial Advice Association of Australia

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<sup>8</sup> FSL11, paragraph 44