Law Council
OF AUSTRALIA

Curbing lead generation activity

The Treasury

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Introduction

1. The Law Council of Australia welcomes the opportunity to provide input to the Treasury's Consultation Paper titled '*Curbing lead generation activity*'. This submission reflects input from the Consumer Law Committee and Superannuation Committee of the Law Council's Legal Practice Section, and the Financial Services Committee of the Law Council's Business Law Section (the **Committees**).

2. The Consultation Paper seeks feedback on options to curb high-pressure sales practices associated with cold calling and lead generation activities, particularly in relation to superannuation, as well as other financial products. The Consultation Paper is part of a wider suite of options on which the Government is consulting in response to the collapses of Shield Master Fund (**Shield**) and First Guardian Master Funds (**First Guardian**).

3. This submission commences with preliminary observations before addressing consultation questions 1–8,10–13 and 25–28, and provides comments generally on extending anti-hawking requirements (consultation questions 14–19) and targeting remuneration structures that may incentivise poor conduct (consultation questions 20–24). Where appropriate, views are attributed to the relevant Committees at the opening of each paragraph.

4. The collapses of Shield and First Guardian have led to a range of regulatory reform proposals. The Committees believe it would be beneficial for Treasury to produce a comprehensive roadmap of all the law reform proposals intended to address the misconduct which occurred in Shield and First Guardian, to ensure a holistic and coordinated rather piecemeal and fragmented response is delivered.

5. The Committees welcome the opportunity to have further involvement in the design and development of any future law reforms in this area.

Preliminary observations

6. The Committees share Treasury's concern about the risks of lead generation in relation to financial products and services. These products and services can be complex, and inappropriate practices can lead to significant financial and other consequences for affected consumers.

7. As noted in the Consultation Paper, this is particularly true for superannuation, which is typically a person's most significant asset other than the family home.[1] It is also true of other financial products such as life insurance, where direct like-for-like comparisons are difficult, and a typical consumer may not be in a position to assess their own needs without expert assistance. However, not all lead generation is inappropriate, such as lead generation activities that inform consumers by providing tools and information that those consumers may not be able to otherwise access at a reasonable cost.

[1] The Treasury, *Curbing lead generation activity* (Consultation Paper, April 2026) 6.

8. The Australian Law Reform Commission (**ALRC**) inquiry into the simplification of the legislative framework for corporations and financial services regulation found that "the legislation governing Australia's financial services industry is a tangled mess—difficult to navigate, costly to comply with, and unnecessarily difficult to enforce".[2] Responses to the most recent failures should be careful not to exacerbate the challenges of enforcement that already exist by creating more offences that duplicate existing measures, which in many cases remain unused.

9. In the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Commissioner Hayne noted that, while primary responsibility for misconduct in the financial services industry lay with the entities concerned and those who managed and controlled them,[3] the law had also not been enforced effectively.[4] The impetus for change that existed at the time of the release of the Final Report has faded, but the need to learn the lessons articulated in the recommendations of the Royal Commission, including for regulators to enforce the current law, has been shown by Shield and First Guardian to remain as relevant now as it was in 2019.

10. The Committees also note that, when Chapter 7 of the *Corporations Act 2001* (Cth) was introduced,[5] many of the digital communication methods that are now used (including social media advertising) did not exist. While the financial services laws profess to be technologically neutral, it is appropriate to review them to assess whether they remain fit for purpose having regard to current and emerging technologies.

Referral exemptions from financial services and credit licensing

11. The Financial Services Committee highlights the current referrals exemptions from the requirement to hold an Australian financial services licence (**AFSL**) or Australian Credit Licence (**ACL**). Notably, under paragraph 911A(2)(k) of the Corporations Act, a person does not need to hold an AFSL for a financial service they provide in circumstances where "the provision of the service is covered by an exemption prescribed by regulations" made for the purposes of paragraph 911A(2)(k).

12. Regulation 7.6.01(1) of the *Corporations Regulations 2001* (Cth) has been made for the purposes of paragraph 911A(2)(k). There are two exemptions under this regulation that appear to be relevant to lead generation, yet they are not referenced in the Consultation Paper. These are Regulations 7.6.01(1)(e) and 7.6.01(1)(ea):

> ***7.6.01 Need for Australian financial services licence: general***
>
> *(1) For paragraph 911A(2)(k) of the Act, the provision of the following services is covered by an exemption from the requirement to hold an Australian financial services licence:*
>
> *…*

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2 Australian Law Reform Commission, *ALRC recommends confronting complexity in corporations and financial services legislation (Media Release, 18 January 2024).*

3 Kenneth Hayne, *Final Report: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Commonwealth of Australia, February 2019) 4.

4 Ibid 11.

5 Chapter 7 of the *Corporations Act 2001* (Cth) commenced on 11 March 2002, introduced as part of the *Financial Services Reform Act 2001* (Cth).

*(e) a financial service provided by a person (**person 1**) in the following circumstances:*

(i) the service consists only of:

*(A) informing a person (**person 2**) that a financial services licensee, or a representative of the financial services licensee, is able to provide a particular financial service, or a class of financial services; and*

(B) giving person 2 information about how person 2 may contact the financial services licensee or representative;

(ii) person 1 is not a representative of the financial service licensee, or of a related body corporate of the financial services licensee;

(iii) person 1 discloses to person 2, when the service is provided:

(A) any benefits (including commission) that person 1, or an associate of person 1, may receive in respect of the service; and

(B) any benefits (including commission) that person 1, or an associate of person 1, may receive that are attributable to the service;

(iv) the disclosure mentioned in subparagraph (iii) is provided in the same form as the information mentioned in subparagraph (i).

*(ea) a financial service provided by a person (**person 1**) in the following circumstances:*

(i) the service consists only of:

*(A) informing a person (**person 2**) that a financial services licensee, or a representative of the financial services licensee, is able to provide a particular financial service, or a class of financial services; and*

(B) giving person 2 information about how person 2 may contact the financial services licensee or representative;

(ii) person 1 is a representative of the financial service licensee, or of a related body corporate of the financial services licensee.

13. Further, under paragraph 110(1)(b) of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**), regulations may exempt a person from the need to hold an ACL for a class of credit activities to which the NCCPA would otherwise apply. Under subsection 110(4), such an exemption may empower the Australian Securities and Investments Commission (**ASIC**) to make decisions about how the exemption starts or ceases to apply to a person or class of persons. Under the *National Consumer Credit Protection Regulations 2010* (Cth), regulations 25(2), (2A) and (5), a referrer may be exempt from the need to hold an ACL for 'mere referrals'.

14. We submit that Treasury should consider whether it is appropriate to preserve or amend these AFSL and ACL exemptions in light of the concerns about lead generation expressed in the Consultation Paper.

15. It is also important to note that secret commissions are regulated by state Crimes Act legislation in all state jurisdictions, as well as under the common law. The extent to which payment of fees to lead generators without disclosure to the end consumer is already prohibited by existing law should also be taken into account.

16. The Financial Services Committee emphasises that increased regulation results in increased costs, which are typically passed on to consumers by businesses. Increased cost of offering financial products is likely to lower the potential returns to consumers. As noted above, the ALRC has previously documented the already undesirable level of complexity in Chapter 7 of the Corporations Act,[6] which should not be exacerbated. These considerations, and the adequacy of existing regulation to address the risks of harm raised by lead generation activities, need to be carefully balanced against the perceived need for further regulation.

Response to consultation questions

Policy problem

1. What types of lead generation activities within the financial services sector provide consumer benefit?

17. The Financial Services Committee and the Superannuation Committee consider that it is implicit in the question that there is a distinction between appropriate and inappropriate lead generation activities, with some activities being of benefit to consumers while others leading to harm. It is the view of the Financial Services Committee and the Superannuation Committee that any regulation in this area (as with any new regulations) should focus on deterring the potential for harm and being able to readily prosecute those that intentionally commit harm.

18. As noted in the Consultation Paper, factual information may be valuable for consumers to help them understand financial concepts or products.[7] Therefore it is important not to prevent the provision of factual information which is capable of benefiting consumers.

19. The ability to advertise through channels such as social media is helpful to new market entrants who do not have an established business or brand awareness. The availability of comparatively inexpensive promotion methods helps to inform consumers so as to understand their own needs, and to enhance competition and innovation in the financial services industry. In and of themselves, these tools are not problematic when provided and used responsibly.

20. On this basis, the Superannuation Committee recommends a distinction be made between lead generation by a product issuer, such as a superannuation trustee, and lead generation by a third party who is not a product issuer. This is because the Superannuation Committee considers that:

- lead generation by product issuers is already highly regulated;[8]

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6 Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (ALRC Report 141, November 2023).

7 Consultation Paper (above n 1) 14.

8 For example, the requirements to hold an AFSL and Registrational Superannuation Entity licence, section 912A and section 1018A Corporations Act obligations, *Superannuation Industry (Supervision) Act 1993* (Cth) section 52 trustee covenants, the general advice obligations, design and distribution obligations

- the issues raised in Shield and First Guardian arose because the lead generation activities of a third-party generating leads to a financial planner. The conduct in question was not undertaken by product issuers;
- Shield and First Guardian do not indicate that the advertising, promotion and distribution practices of superannuation trustees caused consumer harm; and
- any reforms in this area triggered by Shield and First Guardian should be focused on the areas of concern in this case.

21. The Superannuation Committee considers that lead generation activities by product issuers should not be subject to any further regulation, and that any reforms focus on those who are not product issuers.

22. If a product issuer's distribution methods include lead generation and the lead generation process is designed with a view to only promoting the product to consumers who appear to meet the relevant criteria to fall within the target market, then this would assist the product issuer to meet its obligation to take reasonable steps to prevent distribution outside the target market and produce the consumer benefit of steering consumers away from products that may not be appropriate to them.

23. Lead generation tools that are accurate and assist consumers to make decisions, such as by helping calculate superannuation or determine insurance needs or otherwise make complex financial products more accessible and assist understanding or a contact through whom they can obtain that understanding, provide a clear consumer benefit. Information must be provided in a balanced way, time must be allowed for consumers to consider their decision, including by obtaining other advice, and should not create a false sense of urgency or raise other concerns about unfair practices—all of which may well be addressed by existing consumer protection laws.

24. Transparency is critically important. If a lead generator is required to disclose the benefits they are receiving from third parties (which may be a product issuer or a financial adviser) to the consumer, then the consumer will be aware of the lead generator's conflict of interest and they are more likely to be wary that the lead generator could be motivated by their own self-interest when they engage in the relevant conduct.

25. While there is always a risk of vulnerable consumers being exploited by marketing campaigns, the Financial Services Committee notes that there is also a community cost when the barriers become so high that consumers cannot access reliable information about complex but valuable products and services that could improve their lives, at a reasonable cost.

(DDO) and *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) consumer protection laws.

2. How should lead generation activities be defined to target consumer harm without capturing legitimate marketing or information services?

26. The Financial Services Committee and the Superannuation Committee consider that the consumer harm caused by inappropriate lead generation is comparable to that caused by other unfair market practices such as bait advertising, and manipulative measures used to create a false sense of urgency and inducements or design elements that otherwise distort consumer decision-making.

27. Lead generation activities that are capable of causing distribution of a financial product to retail clients who fall outside the target market for that product should be discouraged. Product issuers who knowingly allow such conduct to occur would presumably not be meeting their existing obligation under the Corporations Act to do all things necessary to ensure that the financial services covered by their AFSL are provided efficiently, honestly and fairly, even if there is no technical breach of Part 7.8A of the Corporations Act. The Financial Services Committee considers that the current law does not permit product issuers to pay lead generators to promote their products in a way which could cause investors for whom the product is likely to be unsuitable to apply for the product.

28. The provision of factual information about financial products in a balanced, careful and responsible manner should not be prohibited. Existing guidance and case law as to the point at which factual information becomes financial product advice is relevant in determining where the boundaries lie.

29. With respect to “warm transfers”, it should be noted that the effect of subsection 766A(3) of the Corporations Act is that a person’s conduct is not the provision of a financial service if it is done in the course of work of a kind ordinarily done by clerks or cashiers. There is commentary about this in ASIC Regulatory Guide 36 *Licensing: Financial product advice and dealing*. Equally, in the regulation of credit, if the conduct is not of the nature of a credit service it is not regulated by the NCCPA.

30. If a lead generator behaves in a manner that falsely suggests they have expertise or qualifications that they do not possess, or that a particular fund or product offers features or performance that it does not possess, then they are likely to be engaging in misleading or deceptive conduct, which is prohibited by the existing law.

31. However, the Financial Services Committee suggests that there could be merit in preventing financial advisers and mortgage brokers from making payments to third parties who are not licensed or qualified to provide financial product advice or credit assistance in circumstances where the third party's eligibility to receive the payment depends upon an investor ultimately acquiring a particular financial or credit product (irrespective of whether the lead generator expressly mentions the relevant product to the investor).

3. Does the business model used in the Shield and First Guardian cases raise any potential for unintended consequences in relation to any aspect of the Delivering Better Financial Outcomes reform package?

32. The Financial Services Committee notes that this question may not be framed correctly, suggesting that the Consultation Paper seeks feedback on any unintended consequences of the interaction between the reforms proposed in the Consultation Paper and the reforms of the Delivering Better Financial Outcomes (**DBFO**) reform package, rather than interaction between the Shield and First Guardian business model and the DBFO reform package.

33. If this understanding is correct, it is difficult to fully comment on this question in the absence of understanding the Government's current position on the DBFO reform package as it has not released detailed information about its "Tranche 2B" reforms and has not provided a response to its consultation on the "Tranche 2A" reforms.

34. The Financial Services Committee and the Superannuation Committee recommend that the lead generation legislation be developed in conjunction with the DBFO legislation to minimise the likelihood of unintended consequences and also facilitate the benefits that the DBFO legislation could bring.

35. The harms caused by lead generation are not related to whether or not the activity happens to be a financial service. In Shield and First Guardian, consumers were misled as to the performance of failing funds. If the relevant conduct is not caught by the financial services laws, it should, in principle, be caught by the more general consumer protection regime.

36. In relation to financial products and financial services, Division 2 of Part 2 of the ASIC Act prohibits, among other things, misleading or deceptive conduct,[9] false or misleading representations[10] and unconscionable conduct,[11] rather than the ACL,[12] which does not apply to financial products or financial services.[13] To the extent the relevant conduct is not in relation to a financial product or financial service, the ACL and State and Territory fair trading laws may apply.

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9 *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA.
10 Ibid s 12DB.
11 Ibid s 12CA and s 12CB.
12 The *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010*).
13 See *Competition and Consumer Act 2010* (Cth) s 131A.

Enhance accountability for the conduct of lead generators

Licensing

4. Would reforms to require licensing for certain lead generation activities be an effective and proportionate way to curb harmful lead generation activities?

37. As noted in the Consultation Paper and above, some lead generators are already captured under the existing regulatory framework that applies to financial services providers under the Corporations Act, depending on the activities undertaken.[14] Specifically, by influencing a person's decision to acquire a financial product or arranging for a person to apply for or acquire a financial product, lead generators may be advising or dealing in financial products and if the conduct is not within a relevant exemption therefore be conducting a financial services business and subject to the licensing and conduct obligations associated with that status.

38. As follows from this analysis, the Financial Services Committee and the Superannuation Committee consider that the activities of many lead generators are already within the scope of the licensing regime in the Corporations Act. These two Committees also note that many lead generation activities that cause consumer harm are likely within the scope of Division 2 of Part 2 of the ASIC Act.

39. These Committees, however, acknowledge there may be difficulties in applying the law to the activities of lead generators, and in lead generators understanding the application of the regime to their activities given the principles-based nature of these laws and lack of regulatory guidance. In particular, the concept of "arranging to deal",[15] while defined, is considered ambiguous and can be difficult to apply, even by those with significant expertise in the law of financial services. Whilst ASIC guidance suggests a broad interpretation of this term, there may be scope for lead generators to argue that their business activities fall outside the scope of "dealing" under the Corporations Act. Specific examples or other guidance from ASIC identifying the point at which the activities of lead generators become "arranging" would narrow this uncertainty.

40. The Financial Services Committee considers that, to the extent that lead generators consider themselves to be marketers and not financial services providers (i.e. they do not believe they are providing general financial product advice or arranging for the issue of financial products), guidance to clarify the application of the existing law to lead generation activities which includes an explanation as how lead generation activities can amount to the provision of financial services could be an effective and proportionate way to curb harmful lead generation activities, assuming those obligations were then consistently enforced.

41. The Superannuation Committee acknowledges that lead generation activities resulting in referral to a financial service provider who is not a product issuer, such as a financial adviser, are unlikely to be covered by the arranging or financial product advice definitions and so may be an area for reform.

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[14] Consultation Paper (above n 1) 17.
[15] *Corporations Act 2001* (Cth), ss 766C(2).

5. What is the scope of activities that should be captured under the licensing reform? Should this be limited to activities in relation to superannuation?

42. The Financial Services Committee submits that there is no basis to extend the licensing regime beyond the current concepts of general advice and dealing in the AFSL regime, and credit assistance in the ACL regime. The complexities of the existing regime create significant risks of unintended and perverse consequences if any regulatory reform is limited to particular products. Any reform should be product agnostic. The same risk of harm exists in the insurance and credit markets as it does in the superannuation market.

43. The Superannuation Committee considers that there could be scope for licensing reform where the activities involve the generation of leads for (i.e. referrals to) financial advisers (i.e. not to product issuers).

6. How should lead generation activities be defined to target consumer harm without capturing legitimate marketing or information services?

44. The Financial Services Committee considers that an appropriate definition already exists in the concepts of financial services advice and "dealing" in a financial product which are appropriately tailored by an extensive suite of exemptions to permit legitimate marketing and information services. The application of the existing law to these lead generation activities will adequately target consumer harm arising from those activities.

45. The Superannuation Committee agrees with the Financial Services Committee insofar as the lead generation activities involve referrals to a product issuer, and that there is no case for reform in relation to these activities. Instead, additional regulatory guidance is the better response to avoid overlap with existing laws and unintended consequences. However, the Superannuation Committee acknowledges that there is a range of other activities that could constitute inappropriate lead generation activities and so recommends:

- lead generation reform only focusses on the generation of leads in order to refer clients to a financial services provider who is not a product issuer (eg financial adviser);
- lead generation activities of product issuers and their associates be excluded; and
- licensing and regulation should focus on lead generation activities involving retail clients only.

7. What would be the implication of banning all unlicensed communication about superannuation for commercial purpose? What exceptions or carve-outs would be required?

46. The Financial Services Committee and the Superannuation Committee note that the implications of this proposal would be to limit the ability of consumers to obtain independent information or advice about superannuation products. There are many legitimate sources of this information and banning them would require an elaborate and extensive network of exceptions disproportionate to the nature of the harm it seeks to address.

Licensing accountability

8. Would reforms to impose additional obligations on AFS licensees using lead generators be an effective way to curb lead generation activities?

47. The Financial Services Committee regards lead generation as an application of existing techniques leveraging the power of the internet, and that it does not require the imposition of additional obligations. Such obligations would be limited in effectiveness to the extent that many of the activities are not driven by upstream issuers but rather by downstream brokers or other distributors.

48. The Superannuation Committee reiterates the comments at paragraph 45 above.

10. What penalties would be appropriate and effective in deterring misconduct?

49. The Financial Services Committee notes that deterrence requires timely and consistent enforcement. Inconsistent and uncertain consequences for actions render those consequences to be of little deterrent value.

Design and distribution obligations (DDO)

11. Would reforms to clarify and specifically extend the DDO obligations to lead generators be an effective way to curb lead generation activities?

50. The Financial Services Committee refers to the response to consultation question 2 above. Under the existing law, product issuers who are facilitating the incentivisation of distribution of their products to investors who are likely not to be within their target market are likely to not be meeting their Corporations Act section 912A obligation to do all things necessary to ensure that the financial services covered by their AFSL are provided efficiently, honestly and fairly (even if the lead generator conduct is not technically retail distribution conduct for the purposes of Part 7.8A of the Act).

51. The Superannuation Committee suggests that additional regulatory guidance by ASIC in this area may assist product issuers in their DDO compliance obligations.

12. What would be the implication of specifically extending the application of DDO to lead generators?

52. The Financial Services Committee notes, as per the response to consultation question 11 above, that this proposal may not be necessary to achieve the desired outcome when it comes to product issuer behaviour. DDO is directed at product issuers rather than advisers.

53. Given the role that inappropriate advice played in Shield and First Guardian, and that advisers were making payments to lead generators and giving inappropriate advice, the primary focus should be on preventing misconduct of this nature and focusing on the parties who engage in such misconduct.

13. What issues would arise from clarifying that certain lead generation activities constitute retail product distribution conduct for DDO purposes?

54. The Financial Services Committee notes that DDO is directed at product issuers and product distributors. Lead generation activity, which occurs between advisers and potential investors, should be regulated at the adviser level rather than at the product issuer level. As noted above, the application of secret commissions legislation with respect to undisclosed payments to lead generators should also be considered, and duplication of existing law should be avoided.

55. Whilst the Consumer Law Committee does not oppose the extension of the DDO regime to lead generation activities, it notes that such an approach would not provide protection or access to redress for individual consumers. This is because breaches of the DDO regime do not generally give an individual a cause of action to seek compensation. Furthermore, the distribution of a financial product to an individual outside the relevant target market in and of itself does not constitute a breach of the DDO regime.

Views of the Consumer Law Committee on reform options

56. The Consumer Law Committee supports a general ban on lead generation in superannuation in respect of retail and wholesale clients, given the harm that has resulted from these practices. Alternatively, the Consumer Law Committee supports Option 1A, which would bring lead generation activities into the regulatory framework by specifying that lead generation is captured by the definition of “dealing”. The Consumer Law Committee supports the broad proposed definition of lead generation on page 25 of the Consultation Paper.

57. The Consumer Law Committee considers that it is critical that the referral of individuals to financial advice providers, and the advertising or promotion of those services, in return for commercial benefit is captured by the regulatory framework—for both retail and wholesale clients. This is a particular weakness of the current

regulatory regime, as entities can generally advertise or promote financial advice services (as opposed to financial products) provided by third parties, and refer individuals to the providers of those services, without holding an AFSL.

58. Option 1B has been suggested as an alternative to Option 1A; the Consumer Law Committee supports these options being implemented concurrently. This is because Option 1A addresses only the "dealing" aspects of lead generation, whereas Option 1B addresses the provision of information about the superannuation product in return for commercial benefit.

59. Option 1B proposes a prohibition of "any unlicensed person from providing information to consumers about superannuation for a commercial benefit". Presumably, this means that a licensed person would be permitted to provide information to consumers about superannuation for a commercial benefit. As set out below, the Consumer Law Committee recommends that the potential conflicts of interests that could result from this approach could be dealt with by expanding the ban on conflicted remuneration to the provision of information in these circumstances.

60. Option 1C relates to creating an obligation for AFS licensees to take reasonable steps to ensure that any leads or referrals they obtain are sourced in compliance with the relevant regulatory and legal requirements. The Consumer Law Committee considers that this approach is likely to be ineffective without implementation of Options 1A and 1B. Leads or referrals could quite conceivably be sourced "in compliance with the relevant regulatory and legal requirements" in the absence of reforms to the regulatory framework for lead generation.

Views of the Superannuation Committee on reform options

61. Subject to one point, the Superannuation Committee agrees with the Consumer Law Committee. The Superannuation Committee's strong view is that product issuers and their associates should be excluded from the definition of a lead generator:

- for the reasons outlined above; and
- as the inclusion of product issuers could result in unintended consequences. For example, there are many situations where a product issuer may refer a client to a financial planner for a nil referral fee, but the product issuer may subsequently pay advice fees (consented to by the client) to the financial adviser.

Extend anti-hawking requirements

62. The Financial Services Committee considers that the anti-hawking provision in its current form is highly restrictive. As noted in the Consultation Paper,[16] the provision as currently drafted inhibits a provider's ability to initiate real-time contact with existing customers or potential customers in relation to alternate products that may provide the customer with a better financial outcome. That is the case even if the products concerned are simple financial products. Accordingly, the Financial Services Committee submits that any proposed change should be carefully

[16] Consultation paper, above n 1, 14.

considered to ensure it does not constrain conduct that is not adverse to consumers, and may be to their potential benefit.

63. In relation to the proposal under Option 2A to enhance consent requirements, there are existing protections relating to consent, including that consent must be, amongst other things, informed and voluntary. Those existing protections could be enforced, rather than introducing additional requirements.

64. Further, the Committees consider the proposal under Option 2A to enhance consent requirements is likely to be very difficult to enforce, given that often "real-time" contact occurs in person and it can be difficult to substantiate who initiated a conversation about a particular topic. Furthermore, the Committees consider that additional disclosure is unlikely to provide effective protections to consumers.

65. The Consumer Law Committee supports Option 2B to limit the exemption from the anti-hawking prohibition for financial advice. Financial advisers should not be prohibited from recommending particular products to clients, for example, in a Statement of Advice. However, it is important that the exemption is not exploited by lead generators or financial advice businesses that hawk financial products outside of a genuine personal financial advice process.

66. The Consumer Law Committee notes that the hawking prohibition only applies to retail clients. The Consumer Law Committee recommends that Treasury consider whether these protections need to be extended to wholesale clients in relation to superannuation, particularly given the uncertainty about the treatment of self-managed superannuation fund (**SMSF**) trustees as wholesale clients.[17]

67. The Financial Services Committee and the Superannuation Committee consider that, if the policy position is to treat the trustee of a SMSF with less than $10 million in net assets as a retail client for this purpose, then the hawking prohibition should be amended to expressly apply to them. However, the Financial Services Committee considers that extending the hawking prohibition (any other protection that currently applies only to retain clients) to wholesale clients more broadly would not be appropriate.

68. The Financial Services Committee submits that standards that are designed for superannuation should not be imposed across all financial products, including those that are inherently different to, and less complex than, superannuation. If that was to be done, it would risk imposing additional, unnecessary costs and inefficiencies in the system, particularly given the extensive existing protections relating to the giving of personal advice to retail clients. For that reason, if changes are to be made to the personal advice exemption, they should be limited to superannuation.

Target remuneration structures that may incentivise poor conduct

69. The Consumer Law Committee supports proposals to capture lead generators under the ban on conflicted remuneration. The Consumer Law Committee notes that the ban on conflicted remuneration only applies to the provision of advice (or, in some

[17] See ASIC, 'Statement on wholesale and retail investors and SMSFs' (Media Release 14-191MR, 8 August 2014); Australian Financial Complaints Authority, 'When can SMSFs be treated as wholesale? What financial advisers need to know' (Media Release, 25 June 2025).

circumstances, information) to retail clients. The Consumer Law Committee suggests that Treasury may wish to consider whether wholesale clients also require protection under the ban on conflicted remuneration, given that the thresholds to be treated as a wholesale client can be relatively low for some products.

70. The Consumer Law Committee also recommends that the provision of information about superannuation in return for a commercial benefit is covered by the ban on conflicted remuneration.

71. There is a similar prohibition relating to giving information about life risk insurance in return for a benefit contained in Regulation 7.7A.11B of the Corporation Regulations. This provision essentially deems benefits in these circumstances to be "conflicted remuneration", the giving and receiving of which is generally prohibited under the Act in respect of retail clients. Whilst the proposed ban on giving information in relation to superannuation in return for commercial benefit may need to be drafted in broader terms to capture lead generation, the Consumer Law Committee submits that Regulation 7.7A.11B offers a useful starting point.

72. The Financial Services Committee and the Superannuation Committee are supportive of proposals to capture lead generators under the ban on conflicted remuneration, which would follow from a response to Option 1 that involved creating a definition of "lead generation" and expressly categorised it as "financial product advice" under section 766B of the Corporations Act. However, the Financial Services Committee and the Superannuation Committee do not support the expansion of the ban on conflicted remuneration to apply with respect to wholesale clients.

73. The Financial Services Committee and the Superannuation Committee respectfully disagree with the Consumer Law Committee and consider that if the thresholds for treating an investor as a wholesale client are currently considered too low, then the thresholds should be increased, rather than introducing regulation for all wholesale clients. Some professional investor wholesale clients are very large and highly sophisticated institutions who do not require such a high level of protection, and it would therefore be inappropriate to impose additional compliance costs on the provision of financial services to them.

74. The Financial Services Committee does not support the proposal that the provision of information about superannuation in return for a commercial benefit is covered by a ban on conflicted remuneration. This is on the basis of that the potential broader impact that would impose a significant cost of compliance for superannuation trustees and reduce the availability of helpful information for consumers about superannuation. For example, such a law may capture an employer who puts information about superannuation and features of their default superannuation fund in their tearoom and is concurrently receiving the lawful benefit of that superannuation fund paying for a clearing house service to make it easier for employers to make superannuation contributions.

75. The Financial Services Committee supports narrowing the current exemption for benefits from clients. This could be implemented by limiting this exemption so that it does not apply in relation to a financial service or type of advice that is "lead generation" if that term is defined as part of these reforms. Alternatively, if lead generation is brought into the AFS licensing regime, the broad application of "benefit" could be illustrated in the context of lead generation through an ASIC regulatory guide.

Target advertisements for earlier intervention

25. Would requiring superannuation advertisements to display an AFS licence number be an effective way to curb lead generation and improve transparency for consumers?

76. The Financial Services Committee and the Superannuation Committee note that section 1018A of the Corporations Act already regulates the advertising of financial products which are available to retail clients, including the publication of a statement which is "reasonably likely to induce people to acquire the product". Certain statements must be made, including identifying who the product issuer is and making the recipient of the statement aware of the Product Disclosure Statement and the Target Market Determination.

77. The Financial Services Committee and the Superannuation Committee would not object to requiring the product issuer's AFSL number to also be included in the relevant advertisement (but questions whether it be of meaningful benefit given that their name is already required to be disclosed). This could be achieved by amending section 1018A. A separate obligation from section 1018A should not be created as this would add unnecessary complexity.

78. To the extent that lead generation material fails to satisfy the requirements of section 1018A, ASIC should be using the existing law to pursue the creators of the relevant material, noting that failure to comply with section 1018A constitutes the commission of an offence.

26. What practical implementation issues or costs would arise for advertisers, publishers and licensees?

79. The obligation to include an AFSL number in an advertisement, in addition to the existing section 1018A obligations, does not appear to be burdensome.

27. Would a broad prohibition on advertisements in relation to superannuation without an AFS licence unduly constrain legitimate advertising?

80. The Consumer Law Committee notes that advertising of superannuation products generally requires authorisation under an AFSL to provide general financial product advice. This is because the promotion of superannuation (whether as a class of

financial product or a particular superannuation product) will almost always be "intended to influence a person… in making a decision" in relation to the superannuation product or could reasonably be regarded as being intended to have such an influence.[18] Whether an advertisement constitutes general financial product advice will ultimately depend on the content of the particular advertisement.

81. The situation is less clear, however, where an advertisement promotes a third-party financial service provider, as opposed to a particular financial product or class of products, for example, where a lead generator promotes financial advice services provided by a third party. The Consumer Law Committee recommends that Treasury consider whether the regulatory regime should be expanded to capture advertisements of this nature

28. In relation to ASIC's stop order power, what threshold test would be appropriate to ensure that ASIC's stop order powers are exercised proportionately and do not unduly restrict legitimate advertising?

82. The Financial Services Committee considers that ASIC can achieve outcomes by enforcing existing laws with respect to advertising of financial products, DDO and providing financial services covered by an AFSL efficiently, honestly and fairly.

83. Further, before proposing any new stop order power for ASIC, the Financial Services Committee strongly recommends that Treasury carefully consider ASIC's product intervention powers under Part 7.9A of the Corporations Act, which are discussed in *ASIC Regulatory Guide 272 Product intervention power*. ASIC is able to use these powers, regardless of whether there has been a breach of the law, to prevent consumer detriment. The use of a product intervention power could be more powerful and effective than intervening with individual advertisements on a case-by-case basis.

84. The Consumer Law Committee is supportive of proposals to expand ASIC's stop order power to enable ASIC to direct an advertiser to immediately cease dissemination of a financial service promotion. The Consumer Law Committee agrees that ASIC's powers will need to be subject to an appropriate threshold and procedural fairness requirements, noting that the option is intended to support targeted, risk-based intervention rather than routine monitoring of advertisements.

85. The Superannuation Committee agrees with a stop order power that is limited to lead generators, subject to there being a definition of lead generator which excludes product issuers.

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18 *Corporations Act 2001* (Cth), s 766B(1).

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- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
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