



Stockbrokers

Association of Australia

Incorporating SDIA

Corporations Amendment (Future of Financial Advice) Bill 2011 ***Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011***

Supplementary Submission to the Parliamentary Joint Committee on Corporations and Financial Services

6 February 2012

Introduction

The Stockbrokers Association of Australia would like to make this Supplementary Submission to its submission dated 21 December 2011 to the Parliamentary Joint Committee on Corporations and Financial Services on the *Corporations Amendment (Future of Financial Advice) Bill* (the '**FOFA Bill**') and *Corporations Amendment (Further Future of Financial Advice Measures) Bill* (the '**Further Measures Bill**').

This Supplementary Submission clarifies our position on the **Best Interests Obligation** in proposed section 961B of the *Corporations Act* in order to facilitate *scaled advice*, and seeks specific amendments to proposed s961B(2)(g) in the *Further Measures Bill* in order to achieve it.

The Best Interests Obligation & Scaled Advice

In Stockbroking, clients often seek advice on a limited basis, for example, a brief inquiry as to which stock(s) to buy or sell. This is an excellent example of limited or '**scaled**' advice. Clients don't often require a full financial plan or advice on their entire circumstances or portfolio of investments.

In the Explanatory Memorandum to the *Further Measures Bill*, paragraph 1.34 states:

1.34 This process is designed to accommodate the provision of limited advice (also referred to as 'scaled advice') that only looks at a specific issue (for example, single issue advice on retirement planning) and 'holistic' advice that looks at all the financial circumstances of the client.

ASIC has also stated that it is working to facilitate tailored or scaled advice. In a recent Consultation Paper¹, ASIC sought to provide additional guidance on how to ‘scale’ advice. By way of background to the guidance, ASIC noted that a recent survey found that **one-third** of Australians prefer scaled or ‘piece-by-piece’ financial advice rather than comprehensive or ‘holistic’ advice.² (Our Members would suggest that if this survey were solely conducted in **stockbroking**, the figure would be significantly **higher** than one-third.)

Improvements have been made to earlier draft proposals in relation to scaled advice, as follows:

- a. *Restoring a concept akin to ‘Relevant Personal Circumstances’,* namely ‘Client’s Relevant Circumstances’ (s961B(2)(b)(ii));
- b. *Limited Product Investigations:* the concept of reasonable investigations into financial products under Section 961D, which specifically does not require investigations into all financial products available, and
- c. *Product investigations – no duty to warn of other products:* the removal of obligations which were earlier proposed which imposed a ‘negative’ duty to advise and warn on other products that may have been appropriate for the client (s961C2(d)&(f)), or special provisions where a product was being recommended in substitution for a product s961C(2)(h).

However, there remains an issue in relation to Client investigations.

Issue: Investigation into Client Circumstances

The Issue we would like to address in this supplementary submission involves the extent of the investigation into the Client’s relevant circumstances in order to satisfy the Best Interests obligation.

As currently drafted, s961B may have the unintended consequence that full details of the clients relevant personal circumstances are necessary *every time* a retail client receives advice. The problem lies with proposed s961B(2)(g), which requires that in order to satisfy the best interests obligation, the provider of advice must:

(g) take any other step that would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances.

This ‘catch-all’ provision may give rise to uncertainty for advisers, and their clients. It may also give rise to the need to complete a full investigation into the client’s personal circumstances every time they get advice. As ASIC and the Government have acknowledged, clients do not often require holistic, broad-ranging financial advice. This is particularly the case in stockbroking, where clients generally only require ‘scaled advice’.

¹ ASIC Consultation Paper 164 *Additional guidance on how to scale advice* July 2011 (‘CP164’). ASIC has announced that it will redraw this guidance to take FOFA into account: ASIC Advisory AD11-294 *ASIC’s plans for FOFA Reforms* 13 December 2011.

² CP164.1

Both the Government and ASIC have stated that in implementing the FOFA regime, they aim to facilitate the provision of ‘scaled advice’ to retail clients. To achieve this, the Act should be clear that a full ‘fact find’ of the client’s relevant circumstances should not be necessary for every piece of advice.

To achieve this, we would like to support the amendments to s961B – including s961B(2)(g) – proposed by the *Financial Services Council* in their submission to the Joint Committee dated 22 December 2011, Recommendation 19, which better refines the ‘catch-all’ obligation in proposed s961B(2)(g), to the context of the advice sought, and the circumstances in which it is sought. FSC’s Recommendation 19 is set out as follows:

FSC Recommendation 19

Proposed changes to Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011

1. Proposed s 961B(1):

“(1) The provider must act in the best interests of the client in relation to the advice.”

2. Proposed s 961B(2):

“(2) Subject to subsection (3), the provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:

(a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;

(b) Identified through instructions, so far as is reasonably possible in the circumstances existing at the time of the provision of the advice:

(i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and

*(ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the **client’s relevant circumstances**);*

(c) where it was reasonably apparent that information relating to the client’s relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;

(d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;

(e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:

(i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and

(ii) assessed the information gathered in the investigation.

“(3) The provider will not satisfy the duty in subsection (1), if the provider fails to:

(~~f~~ a) based all judgments in advising the client on the client’s relevant circumstances;

(~~g~~ b) take any other step that a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, exercising care and having regard to the client’s instructions, would reasonably be expected to have taken, be regarded as being in the best interests of the client, given the client’s relevant circumstances.”

We are once again grateful for the opportunity to raise these further matters with the Joint Committee in the process of the enactment of these important matters of law reform.

David W Horsfield
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STOCKBROKERS ASSOCIATION OF AUSTRALIA
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