

xx September 2006

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Dear David

**SUPPLEMENTARY SUBMISSION – PERSONAL VS. GENERAL ADVICE
(ITEM 1.17 OF THE CORPORATE AND FINANCIAL SERVICES REVIEW)**

We refer to item 1.17 of the Consultation Paper in connection with the Corporate and Financial Services Review released in April 2006 and our submission of 29 May 2006 which addressed this item entitled ‘the scope of general advice’. We have indicated that we will provide a further supplementary submission with firmer and more detailed analysis and proposal for consideration. We hope our comments below are useful in the development of your proposals on the scope of the advice definition.

We would like to reiterate our view that the current definition of “personal advice” is too wide. Our members are now in broad agreement that a shift in thinking about regulating advice is necessary and that a return to the principles embraced by ASIC in the 1997 ‘Good Advice Handbook’ (PS122.34) in relation to what constituted a ‘Personal Securities Recommendation’ would be preferable. In particular we are not aware that these principles produced any adverse consumer outcomes. *In short, we recommend:*

- a. *that s766B should be amended such that the definition of “personal advice” may be substantially narrowed, thus enlarging the scope for giving “general advice”. We propose that this can be achieved by moving the emphasis away from what is being considered by an adviser, to a definition that focuses on what is said to and agreed with a client or a potential client; and*
- b. *that Division 3 of Part 7.7 of the Corporations Act should also be amended to make it clear that the obligations under the Statements of Advice regime must accommodate advice which is limited in its scope subject to sufficient warning and disclosures about its limitations and with agreement between the provider and the client regarding the ‘scope’ of the advice. This will further facilitate the provision of limited advice.*

This submission is divided into three parts dealing with:

1. our proposals for amendments to the advice definitions;

2. some examples and case studies about how the shift in approach differs to the current advice regime and how the new approach can apply in practice; and
3. suggestions on how greater clarity may be provided in the area of limited advice under the reasonable basis obligations of Division 3 of Part 7.7..

1. IFSA proposal to amend the definitions of personal and general advice

1.1 Definition of Personal Advice:

The current definition of personal advice is broad. Any statement that has the potential to influence a person in relation to a financial product has the potential to become personal advice the moment the statement is made in consideration of any one of the person's objectives, financial situation or needs.

The onerous disclosure obligations attached to personal advice means that a wide range of possible interactions between product issuers and advisers, and their clients are uneconomical. Product issuers are deterred from providing people with educational tools like web calculators or basic information at call centres. Limited advice in the form of web calculators and simple guidance provided at call centre, for example, have been regulated to the brink of extinction while client's seeking advice on a limited range of products or limited personal circumstances struggle to find a provider given the regulatory uncertainty. Our advice regime has failed, in this regard, to empower many consumers to seek knowledge and guidance about their own financial situation.

For the reasons above, we propose the definition of "personal advice" should be substantially narrowed. We suggest the definition below and in 1.2 of this paper to replace the current definitions contained in Section 766B ("Financial Product Advice") for "personal advice" and "general advice":

We propose that the definition of "personal advice" should be as follows:

Section 766B(3) – For the purposes of this Chapter, a person (provider) gives personal advice if:

- (a) *the provider makes a statement that is a recommendation to a particular person that the person should deal in, or make a decision to increase, reduce or hold an interest in a particular financial product; and*
- (b) *a reasonable person under the circumstances would believe that the provider has made such a recommendation.*

For the avoidance of doubt, a recommendation is not personal advice if it is not a statement to which s766B(3) applies and the following requirements are met:

- (i) *the provider clearly and prominently states that the person should make their own decision whether the product is suitable for the person; and*
- (ii) *the statement in subparagraph (i) is made:*

(A) during the same meeting or telephone call; or

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- (B) in the same document; or*
(C) on the same page of an Internet site; or
(D) otherwise, at the same time,

as the recommendation.

As a result personal advice will no longer be triggered merely because a provider of advice has considered one or more of a person's objectives, financial situation and needs.

1.2 Definition of general advice

The narrowing of the "personal advice" definition will lead to a broadening of the definition of "general advice".

We propose that the definition of "general advice" should be as follows:

766B(4) For the purposes of this Chapter, general advice is financial product advice that is not personal advice because it is not a recommendation to a particular person that the person should deal in, or increase, reduce or hold an interest in a particular financial product

1.3 Regulatory impact of the IFSA proposed definition of personal and general advice

We believe the regulatory impact of the above definitions have the following advantages:

- i. The onus to ensure a statement falls either as personal or as general advice remains with the provider of advice.
- ii. The definition of personal advice becomes much narrower and enables the giver of advice more scope to make statements that are unambiguously general advice, while ensuring safeguards are in place such that statements made may be clear as to their limitations.
- iii. We believe that our new definition have been drafted to deter certain conduct and behaviours such as misselling or pressure selling. This is because where personal advice is not intended, it would be prudent for the provider of advice to avoid creating an impression (to a person that is reasonable) that personal advice has been provided, and to inform clients that they should make their own decisions in addition to any general advice warnings that may be appropriate. Any recommendation to deal in a particular financial product stands to be personal advice and will be subject to the more onerous disclosure obligations of SoA regime.
- iv. We believe consumers will ultimately benefit from the new definition as a result of improved ability to take responsibility for their financial future. This is because of the enhanced ability to gather information and to obtain advice that

is clear from more freely available sources. Freer flow of information between advisers and product issuers to consumers will also enhance competition, create more savvy investors and assist comparability between product issuers, while also giving clear disclosure of the limitations of advice that is provided.

- v. It is also easy to enforce. Anyone can call a customer service centre or access a web calculator.

Section 2 below provides examples and case studies of how our definition can work in practice, including with web calculators, in customer service centres, and asset allocation advice.

2. Current advice regime vs our new approach – examples and case studies

The following examples or case studies provide an illustration of the effect the current advice regime and the outcomes of our proposed new approach with the narrower personal advice definition:

2.1 Calculators and profilers

We define calculators and profilers to mean a facility that is made available to a person electronically (say on a website) or physically (eg. a brochure or CD Rom) that provide advice by processing or making calculations of input sought from a user that may include an amount, a figure or from a selection of choices.

Calculators and profilers are simple and easy to understand tools that enable investors to find out more about their financial situation and the products that are likely to meet their needs. They can be easily accessible on issuers' websites and they are educational and useful for investors to easily find out about different products from different issuers. Calculators are great for illustrating to consumers the issues they ought to consider when making a decision about investing or purchasing insurance and have rarely been the subject of complaints.

Effect of current advice regime:

Currently, it is possible to come to a view that any generic financial calculators that make numerical calculations relating to financial products, even where no advertising or promotion is evident, are providing personal advice, and must be subject to onerous Statement of Advice (SoA) requirements. ASIC has granted relief so that calculator providers do not need to issue a SoA to users. Relief is subject to some quite prescriptive conditions.

ASIC is rightfully apprehensive about giving broad SoA relief to providers of calculators since the SoA regime is designed to provide the necessary protection to investors when making investment decisions. Any relief that seeks to retain regulatory neutrality to support this fundamental policy position will understandably lead to conditions that are at least comparable to those of the SoA regime. Seen from this perspective, ASIC's relief may be regarded as a substantial easing of stated policy. The only problem is, if the full SoA obligations were to be imposed on providers of

calculators and profilers, no one will be providing these facilities. Seen from this other perspective, ASIC's relief provides only mild incentives to facilitate only very generic calculators.

Our new approach:

The policy governing the current advice regime while well intentioned, does not promote good disclosure or achieve good consumer outcomes. It does not, for example, take the context, warnings and disclaimers relating to the advice into account when making the distinction between personal and general advice, and therefore whether disclosure should be more or less onerous. IFSA believes a reasonable person using a web calculator to get an idea about a financial product for his or her financial situation is unlikely to form the conclusion that personal advice is provided because he or she is not paying for the privilege to use the calculators, would not expect a SoA to be provided, and did not ask for a SoA to be provided. On the contrary IFSA contends that the average consumer would view calculators as nothing more or less than a self help tool provided for the convenience of consumers to assist and educate them in making their own decisions about their financial circumstances and not as providing 'personal advice'.

Our proposed definition of general and personal advice would oblige a calculator or profiler provider to clarify that a calculator's or a profiler's outputs are not recommendations and should not be used to make decisions about a financial product or class of financial products.

2.2 Customer service centres

Customer service or call centres are important medium by which product issuers communicate directly with retail customers. They can also be important places where investors find out more about various financial products.

Current advice regime:

The current advice regime effectively restricts any advice which takes even one of the customer's personal objectives, financial situation and needs into consideration. There is very little scope for providing limited advice or any sort of guidance or suggestions to consumers. For example, the current regime would restrict the ability of licensed operators from the following:

- A person rings up, a customer service operator finds out that the person is nearing retirement by referring to a database or asking a few questions. The operator would be prevented from making general statements over the phone about the various pension and annuity products that may be suitable, even when queried.
- A lender who would know that the client has huge loan repayment obligations and a family to support is prevented from saying that income protection insurance may be a good idea for many people in similar situations.

- Call centre operator receives a phone call from a client who says she cannot afford her life insurance cover and would like to exit. The operator is currently prevented from suggesting a cheaper product or from mentioning the potential benefits that will be lost.

IFSA submits that product manufacturers should be able to give limited advice in the form of guidance and suggestions via their customer service or call centres based on a limited understanding of the client's circumstances without triggering all the expense and complexity of FSG's and SoA's.

Our new approach:

Our proposed new approach will make it possible to limit advice to persuasive statements without making them personal advice as long as the statements adhere to providing guidance, making suggestions, while avoiding recommendations.

Moreover, given the context of a query at a customer service centre, we believe it would be unlikely that a reasonable person will believe that personal advice is given. The new definition would oblige product manufacturers to ensure, additionally, that their customer service operators either make no recommendations to transact a financial product, or state or imply that a financial product is either suitable or not suitable for the person.

Using the examples above, the customer service operator could potentially:

- Refer to particular pension and annuity products and mention some of their benefits, but care will have to be taken to ensure that the person making the inquiry is aware that the service operator is not qualified to make a recommendation.
- The lender could suggest to the customer the benefits of income protection and/or life insurance particularly where there are dependents to support and that this is something that may need some consideration.
- If the client has already made the decision to exit the life policy the call centre operator will have to act on the instruction since any action to prevent the client from exiting is likely to constitute a recommendation to hold. The operator will not, however, be prevented from suggesting a cheaper product and discussing the benefits that may be lost from a lack of life cover. If the client has not made a decision to exit the life policy the operator may still suggest a lower cost cover and discuss benefits of the current policy and lower cost policy.

In all the cases above, the provider of advice will have to state clearly that the client or potential client will have to make their own decision about the financial products discussed.

2.3 Asset allocation advice

Asset allocation advice is not advice about dealing in, increasing or reducing an interest in a financial product. It is, however, advice about the different choices that a person could make when considering different investment options or strategies. For example, a cash fund, a balanced fund and a growth fund are different classes of asset allocation that could all be available under an employer sponsored super fund, a master trust or a super trust product. Asset allocation advice is commonly given to a customer in a corporate super environment where the money to invest is already available and no product advice relating to increase, hold or reduce is given, but that advice is nonetheless given in relation to the underlying options or investment strategy.

Current advice regime

All asset allocation advice is probably personal advice under the current advice regime. It would be financial product advice because it can influence a person in making a decision in relation to an interest in a particular product and personal advice because the advice will invariably involve considering at least one of the person's objectives, financial situation and needs. Accordingly, giving asset allocation advice will probably attract SoA obligations.

Our new approach

We submit that asset allocation advice should not be personal advice so long as the advice does not involve a recommendation to deal, increase, decrease or hold an interest in a financial product. The current personal advice definition is a blunt instrument, particularly in relation to members of Superannuation Guarantee Charge funds where the only contribution is the compulsory 9% by the employer, and appears to deter asset allocation advice even where:

- the person accepting the advice would not normally be paying the adviser anything for the advice; and
- the adviser has made it clear that the asset allocation advice does not represent advice to deal, increase, decrease or hold an interest in a financial product.

Our new approach would treat asset allocation advice as general advice so long as certain precautions are taken to ensure the person receiving the advice is aware that the advice may only be guidance, or not intended to influence the person to make a decision to buy, sell or hold the financial product and that a full financial plan may still be available if this is needed.

3. Scaleable Advice or limited (scope of) advice under Division 3 of Part 7.7 (reasonable basis obligation)

We have so far limited our submission to the boundaries between personal and general advice as per item 1.17. We would like to raise a related theme of scaleable advice where advice is unambiguously personal advice. We believe an adviser and their client must be allowed to determine the extent and coverage of personal advice. Advisers should be allowed to limit personal advice to products that the adviser is

allowed to advise on, such as those on an approved list, or to the client's specific personal circumstances.

3.1 Reasonable basis obligation

We recommend that Division 3 of Part 7.7 of the Corporations Act should be amended to allow limited personal advice or scaleable advice where personal advice is given. Scaleable or limited personal advice is personal advice limited to particular financial products or personal circumstances of the client.

The amendments will not affect other obligations relating to the personal advice regime. The provider will still be required to have a reasonable basis for the advice and have regard to a person's relevant personal circumstances and that the personal advice should be appropriate to the client (Section 945A).

Any amendments should require the adviser to set out clearly defined parameters or limitations such as what the advice is not designed to achieve. The issue of scaleable advice appears to have been contemplated in Part 2 ASIC's Guide on Super Switching, which allows advice limited to a 'to fund' only.

3.2 Switching advice

The absence of financial products on a licensee's approved product list often means that advisers cannot give advice on many 'from' funds in cases where a client may be contemplating a switch from one product to another. People could have many reasons to consider switching. Consolidating super funds is a common one and changing funds as circumstances change is another.

There are also many reasons why products may be excluded from a product list. For example:

- licensees will not give advice on products they are not qualified to advise on
- licensees do not wish to accept the liability of the large number of products
- literally thousands of products are very old to which information may be scarce
- circumstances simply do not warrant the consideration or research of all the products
- licensees are required to have adequate compensation arrangements (Section 912B). Many secure this with Professional Indemnity Insurance (PII) however many PII underwriters will only provide cover where advice and dealing is restricted to the licensee's Approved Product List (APL).

Recent enforcement action by ASIC appears to be undermining adviser's ability to limit the extent of personal advice that can be provided. For example,

- ASIC is prohibiting advisers from giving advice altogether in the case of a potential switch where the 'from' fund are not contained in an approved list of products.
- ASIC's actions are also mandating the inclusion of particular financial products in to approved product lists against the wishes of many licensees. We

feel strongly that licensees should be able to determine a list of products that they are comfortable and qualified to advise on.

That such views can be pursued demonstrates that the law contains significant ambiguity which must be addressed.

IFSA feels strongly that advisers cannot be obliged to give advice on financial products where they are not trained or qualified to give advice. Moreover, the 'from fund' trustee already has an obligation to provide the relevant 'from fund' information upon request under regulation 6.34 of the SIS Act. For these reasons, we urge that Treasury consider a new proposal to amend Division 3 of Part 7.7 of the Corporations Act to enshrine the scalability of personal advice in our legislation.

We have not provided possible drafting solutions but would be happy to consider one or facilitate any further discussion.

4. Summary and Conclusion

To summarise, we have provided a potential definition of personal advice and general advice. Our definition seeks to substantially narrow the definition of personal advice. It also seeks to emphasise what is being stated when considering advice and to increase the focus on context and the use of disclaimers.

We have provided examples about how the shift in approach about personal advice differs to the current advice regime and how the new approach can apply in practice without consumer detriment. We have focused particularly on web calculators, profilers and call centres. There are clearly other examples that can be explored such as in public forums and factual information. We are happy to explore these when the proposals are released if any of our recommendations are adopted.

Additionally, we have also requested for your consideration a further proposal to give greater clarity in the area of limited advice. We believe that there exists considerable ambiguity as to the extent of the personal advice obligations where it concerns switching scenarios, and in the role of approved product lists. We believe these should be clarified.

If you have any further queries relating to the matters raised above, please do not hesitate to contact either David O'Reilly or Li Chang at 02 9299 3022.

Yours sincerely

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