



*Senate Economics Legislation Committee*

*Further Inquiry into the provisions of the Corporations Amendment  
(Streamlining of Future of Financial Advice) Bill 2014*

**Supplementary Submission**

18 September 2014

This Supplementary Submission expands on one aspect of our Submission to the Inquiry dated 15 September 2014, upon further consideration of the third reading of the *Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014* (the '**Bill**'), and its Revised Explanatory Memorandum.

The matter which we wish to raise relates to the new requirements in the Bill for the **signing of Statements of Advice** (SOAs) and **further or varied advice** in section 946A, and their impact on existing law on **further advice**.

A **solution** is proposed, which we believe would be consistent with the intention of these amendments, while preserving investor protection.

## **Further or Varied Advice v. Further Advice**

In our Submission to the Inquiry of 15 September, we raised concerns about the possible effects of the new measures on the existing provisions in the *Corporations Act 2001* regarding Time-critical SOAs and Further Advice. Our comments are set out as follows:

### **Issue 1: Effect on Time-Critical SOAs and Further Advice**

In stockbroking, in contrast to financial planning, much business is transacted over the telephone. Clients want real-time market and stock information and advice, and want to take action immediately, based on that advice. In relation to Statements of Advice, the law already acknowledges this, by permitting SOAs to be sent to clients up to **5 days after** the service is given, in time-critical situations<sup>1</sup>. This allows shares to be bought or sold straight away based on advice so as not to risk market movements during the time it would otherwise take to produce and send the SOA to the client. The current provision is sensible and facilitates timely advice to clients, with no loss of consumer protection. If clients need to sign and return all SOAs prior to trading, it may be contrary to the client's best interests. Moreover, such restrictions could significantly reduce trading volumes in a market whose volumes are already low.

The same can be said about the **further advice** provisions of section 946B<sup>2</sup>, which provide that an SOA need not be given, where there has been no significant change in the client's circumstances or the basis of advice, since the last SOA was given.

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<sup>1</sup> *Corporations Act 2001* section 946C Timing of giving Statement of Advice

...  
Time critical cases  
(3) If:  
(a) the client expressly instructs that they require a further financial service that arises out of, or is connected with, the advice to be provided immediately, or by a specified time; and  
(b) it is not reasonably practicable to give the Statement of Advice to the client before that further service is provided as so instructed;  
the providing entity must give the client the Statement of Advice:  
(c) unless paragraph (d) applies [*cooling off period – not applicable to listed securities*] —within 5 days after providing that further service, or sooner if practicable...

<sup>2</sup> As amended by *Corporations Regulation* 7.7.10AE (20 Dec 2005):

#### **7.7.10AE Situations in which Statement of Advice not required**

For paragraph 951C(1)(c) of the Act, Part 7.7 of the Act applies as if section 946B of the Act were omitted and the following section were substituted:

#### **“946B Situations in which a Statement of Advice is not required**

First situation: further advice

- (1) The providing entity does not have to give the client a Statement of Advice for particular advice (the **further advice**) if subsection (2) or (2A) applies.
- (2) This subsection applies if:
  - (a) the providing entity has previously given the client a Statement of Advice that set out the client's relevant personal circumstances in relation to the advice (the **previous advice**) set out in that Statement; and
  - (b) the client's relevant personal circumstances in relation to the further advice (determined having regard to the client's objectives, financial situation and needs as currently known to the providing entity) are not significantly different from the client's relevant personal circumstances in relation to the previous advice; and
  - (c) so far as the basis on which advice is given relates to other matters—the basis on which the further advice is given is not significantly different from the basis on which the previous advice was given.

These two provisions of the Act came into effect with the *Financial Services Reforms* in 2004. They have proven very effective for both advisers and their clients, especially those who invest in listed securities.

**We therefore strongly oppose any further measures that would detract from or interfere with the *time-critical* provisions of section 946C(3)(c), or the *further advice* provisions of section 946B, which have proven useful and effective in the provision of advice to retail clients for over 10 years.**

Unfortunately, having now considered the Third reading of the Bill and explanatory materials in more detail, it appears that the new provisions will significantly detract from and interfere with the operation of both the *time-critical* provisions of section 946C(3)(c), and the *further advice* provisions of section 946B. Indeed, we fear that the Bill will render them **unworkable**.

The new provisions on signing the Statement of Advice in the Bill state as follows:

**1A After subsection 946A(2)**

Insert:

(2A) The Statement of Advice must be signed by the providing entity, or an individual acting on behalf of the providing entity.

(2B) The client must acknowledge receipt of the Statement of Advice by signing the Statement of Advice as soon as is practicable after it is given to the client.

(2C) However:

(a) the client does not commit an offence if the client does not comply with subsection (2B); and

(b) the providing entity does not fail to give a Statement of Advice in accordance with this Subdivision, merely because receipt of the Statement of Advice by the client is not acknowledged as required under subsection (2B).

(2D) To avoid doubt, a retail client who is given a Statement of Advice may seek **further or varied advice** from the providing entity.

Note: This may be necessary if, for example, the client's relevant circumstances (within the meaning of section 961B) change.

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Note: Paragraphs 947B(2)(b) and 947C(2)(b) require a Statement of Advice to include information about the basis on which the advice is or was given, which may include the client's relevant personal circumstances, in which case paragraph (a) of this subsection would be satisfied.

(2A) This subsection applies if:

(a) the client had a relationship with the providing entity before:

(i) if the providing entity is a licensee—the day on which the providing entity obtained its Australian financial services Licence; or

(ii) if the providing entity is an authorised representative—the day on which the licensee on whose behalf the advice is provided obtained its Australian financial services Licence; and

(b) the providing entity gave the client advice (the *earlier advice*) of a kind that if it were given after the day the Australian financial services Licence was obtained would be considered to be personal advice; and

(c) the client's relevant personal circumstances in relation to the further advice are not significantly different from the client's investment objectives, financial situation and particular needs that were determined for the earlier advice; and

(d) so far as the basis on which advice is given relates to other matters—the basis on which the further advice is given is not significantly different from the basis on which the earlier advice was given.

(2E) If the client seeks **further or varied advice** from the providing entity, the providing entity must ensure that the instructions for that **further or varied advice** are documented in writing signed by the client (either before or after the advice is given).

(2F) However:

(a) the providing entity does not commit an offence if the client does not sign a written copy of the instructions for that **further or varied advice**; and

(b) the fact that the client does not sign a written copy of the instructions for that **further or varied advice** is not evidence that the instructions have not been given.

(2G) The providing entity, or an individual acting on behalf of the providing entity, must acknowledge receipt of instructions for **further or varied advice**.  
(*emphasis added*)

The issue is exacerbated by the **Revised Explanatory Memorandum** to the Bill. In relation to the new provisions on further or varied advice, it states:

### **Seeking further or varied advice**

4.11 The new law provides that, to avoid doubt, a retail client who is given the SOA may seek further or varied advice from the providing entity; such **further or varied advice** may be required if, for example, the client's relevant circumstances change. [*Schedule 1, item 1A, subsection 946A(2D)*]

4.12 If **further or varied advice** is sought, the providing entity must ensure that instructions from the client are: documented in writing; signed by the client; and acknowledged by the providing entity, or an individual acting on behalf of the providing entity. [*Schedule 1, item 1A, subsections 946A(2E) and (2G)*]

4.13 The instructions for **further or varied advice** can be documented in writing and signed by the client either before or after the advice is given. This allows for flexibility in time-critical situations. For example, **if the stock market crashes and a client seeks time-critical further advice that they subsequently want actioned immediately, the instructions for further or varied advice can be documented in writing and signed by the client after the advice has been given.**

4.14 The providing entity does not commit an offence if the client does not sign a written copy of the instructions for that further or varied advice. Also, the fact that the client does not sign a written copy of the instructions for that further or varied advice is not evidence that the instructions have not been given. As such, the providing entity is able to proceed with providing further or varied advice—particularly time-critical advice—even if the client has not yet signed. [*Schedule 1, item 1A, subsection 946A(2F)*]

4.15 To clarify: the changes outlined in this chapter will not alter any other existing requirements around the provision of personal advice, including the situations in which a Statement of Advice—or Record of Advice—is required.<sup>3</sup>  
(*emphasis added*)

In particular, the reference in paragraph 4.13 to time-critical advice and further or varied advice needing to be signed would require huge changes to stockbroking procedures, at great expense and inconvenience, and would result in no benefit to the client. Indeed, it may be worse for the client, as the increased costs to the broker may have to be passed on to the client in fees and charges.

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<sup>3</sup> *Corporations Amendment (Streamlining Of Future Of Financial Advice) Bill 2014* Revised Explanatory Memorandum, at page 45

The attempted 'clarification' in paragraph 4.15 of the Explanatory Memorandum does not achieve its purpose. The confusion over the use of the term *further advice* in this new context is the main concern. The reference to time-critical advice is also not helpful.

**The problem lies** with the use of the new term ***further or varied advice*** in paragraphs 2D to 2G of the new provisions. This new term is not defined. The new requirement to have further or varied advice documented and signed in 2E is extremely onerous, especially in stockbroking. Notwithstanding the *Note* to 2D, the reference to *further or varied advice* will certainly be confused with *further advice* under section 946B, as amended by Regulation 7.7.10AE. This will lead to problems in interpretation of the new provisions for advisers, clients and importantly, ASIC, complaints resolution schemes and the Courts.

*Further advice* is a very well established concept, especially in stockbroking, and means that clients are not burdened with lengthy and unnecessary paperwork, except when it is needed, for example when their financial circumstances change. There is no justification for changing the existing *further advice* provisions.

## **Solution**

To avoid confusion, ***further advice*** under section 946B, as amended by Regulation 7.7.10AE, **should be excluded from the new provisions** on signing SOAs in section 946A of the Bill as a matter of urgency. Consequential amendments to the Revised Explanatory Memorandum – particularly the deletion of paragraph 4.13 – should then be made.

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Although we realise the tight time restrictions under which the Committee is operating, **we urge the Committee to consider this additional matter**, which has important consequences for Statements of Advice, and has the potential to undermine an established regime which since 2004 has delivered efficient and cost-effective advice to investors.

Contrary to the intention of the FOFA Streamlining Amendments, the new provisions will considerably increase compliance costs to stockbrokers in the provision of advice to clients, for no consumer benefit, and possible detriment.

We would of course be happy to address the Committee further on any of the matters raised in this Submission. Should you require further information, please contact me, or Doug Clark, Policy Executive

**David W Horsfield**  
**Managing Director/CEO**  
**STOCKBROKERS ASSOCIATION OF AUSTRALIA**  
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