

Question No: 021
Topic: Financial advice
Committee Member: Mr Falinski
Reference: Hansard pages 31 and 32

Question

Mr FALINSKI: Thank you, I'd appreciate it. Also at that other committee, IFS, the financial planner Industry Fund Services that's owned by Industry Super Holdings, indicated to us that they believe they're able to give general advice as financial planners and that ASIC has said that is okay. I can read from a transcript, here. They were asked:

How do you know that unless you've done a full assessment? If I talk to you and say, 'I just want some limited advice on my super,' how do you know, without doing a full assessment, that I only need advice on my super? Do you want to take that on notice?

Ms Bowtell, who is the CEO of IFS, said:

The issue has arisen in the context of the professional standards and the code of ethics and the obligation to take into account the member's long-term position and where the limited advice can sit within that. We take the view that the parliament has allowed for limited advice, the regulators have allowed for limited advice, and the parliament has also provided for a code of ethics, and it expects those two things to be able to work together, and that's how we try and reconcile it.

Is that your view, as the Chair of ASIC, that you can discharge your duties under the law in those circumstances?

Mr Shipton: We're going to have to take that on notice, because there's a lot in what was just said. If possible, can we take that on notice and come back with an assessment? It would be premature of me to do that on the fly.

Mr FALINSKI: If it were any other financial planning organisation that was saying that they can discharge their duties by just giving limited advice, you would rightly be saying to me, 'No, that doesn't comply with the law.' Why do you need to take this on advice?

Mr Shipton: What I'm saying is that the test on personal and general advice is to the extent personal information has been gathered and utilised. I take your point about the seriousness. I would just like to see it before me if possible and then respond very deliberately and clearly for you.

Answer

"Financial product advice" is a broad concept under the Corporations Act 2001. It is "a recommendation or a statement of opinion, or a report of either of those things, that:

- (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
- (b) could reasonably be regarded as being intended to have such an influence."

Financial product advice can be either personal advice or general advice.

Personal advice is financial product advice that is provided to a person in circumstances where the provider of the advice has considered the person's individual circumstances or a reasonable person might expect that the provider has considered the person's individual circumstances.

Retail clients rely on personal advice and may suffer significant loss if the advice is not of good quality. For this reason, there are specific legal obligations that apply to personal advice provided to retail clients. These specific obligations include the best interests duty and related obligations that is, the obligation:

- (a) to act in the best interests of the client when providing them with personal advice (s961B);
- (b) to provide the client with appropriate advice (s961G);
- (c) to warn the client if the advice is based on incomplete or inaccurate information (s961H); and
- (d) to prioritise the interests of the client (s961J).

Advice providers can give scaled advice (including intrafund advice) that is limited in scope that meets all these legal obligations. This is because what an advice provider must do to meet the legal requirements, including the best interests duty and related obligations, can be 'scaled up' or 'scaled down' depending on the nature of the advice.

When considering how the best interests duty and related obligations apply in the context of giving scaled advice, advice providers need to remember that:

- (a) all advice is scaled to some extent - advice is either less or more comprehensive in scope along a continuous spectrum (i.e. there are not two categories of advice: 'scaled' and 'comprehensive' advice); and
- (b) the same rules apply to all personal advice on the same topic, regardless of the scope of the advice. Scaled advice does not equate to lesser quality advice for clients or lower training standards for advice providers. All advice providers who give personal advice, whether scaled or more comprehensive, must meet the training requirements for financial product advisers.

Section 961B(1) requires that advice providers act in the best interests of their clients in relation to the advice given. Section 961B(2) provides a 'safe harbour' that advice providers may rely on to prove that they have complied with s961B(1). If an advice provider can show they have taken the steps in s961B(2), they are considered to have met the best interests duty.

Consumers who seek financial advice, including scaled advice, expect that the advice provided will leave them in a better position.

When assessing whether an advice provider has complied with the best interests duty, we will consider whether a reasonable advice provider would believe that the client is likely to be in a better position if the client follows the advice provided.

[ASIC Regulatory Guide 244 Giving information, general advice and scaled advice \(RG 244\)](#) includes guidance to assist advice providers to meet the requirements of the best interests duty and related obligations when giving scaled advice. Within RG 244, Table 2 sets out some issues that we think are important for advice providers to consider when they are giving scaled advice to clients as follows:

Table 2: What advice providers can do to help ensure they meet their legal obligations, including the best interests duty and related obligations, when giving scaled advice

As an advice provider, you will ...	What this means in summary	For further guidance
Use your judgement and training to decide whether, by limiting the scope of the advice, you can provide scaled advice that meets your legal obligations.	In many cases, you can give scaled advice that is more limited in scope (e.g. for certain advice about less complex issues and for clients with less complex relevant circumstances) and comply with your legal obligations, including the best interests duty and related obligations.	See RG 244.65–RG 244.68 and RG 175.261–RG 175.280

	<p>Either you or your client can suggest limiting or revising the subject matter of the advice. However, you (as the advice provider) must use your judgement when deciding on the scope of the advice. You must determine the scope of advice in a way that is consistent with the client's relevant circumstances and the subject matter of the advice they are seeking.</p>	
<p>Adjust the level of your inquiries to reflect the nature of the advice being provided.</p>	<p>To meet the safe harbour for the best interests duty, you must identify the client's relevant circumstances. You can adjust the fact-finding process (i.e. the inquiries you make about the client's relevant circumstances) to be either limited or expanded.</p> <p>For example, when a client's relevant circumstances are straightforward, the scale of your inquiries may be quite limited. In general, as the complexity of a client's relevant circumstances increases, it is likely that you will need to expand the scale of your inquiries.</p>	<p>See RG 244.69–RG 244.73 and RG 175.281–RG 175.297</p>
<p>Implement systems that will help you decide whether scaled advice can be provided to a client in a way that meets your legal obligations.</p>	<p>One approach you can use when deciding if you can provide a client with a limited scope of advice is to perform a 'triage' or filtering process.</p> <p>For example, we would expect you to ask a series of questions to determine how advice that is limited in scope can be provided to a client in a way that complies with your legal obligations, including the best interests duty and related obligations.</p>	<p>See RG 244.74–RG 244.80 and RG 175.236–</p>
<p>Communicate clearly to the client the type of advice service you are offering.</p>	<p>You must take reasonable steps to explain to a client the limited scope of the advice you are giving in a way that will be clear to the client.</p> <p>For example, this could involve explaining the scope of your advice to them, and that you will not be considering any other issues. This will help the client understand what advice they are</p>	<p>See Section E of RG 244</p>

	<p>getting and ensure there is no misunderstanding about what they are, and are not, being advised on.</p> <p>It is also good practice to give a simple and accurate explanation about why the scope of the advice has been limited.</p>	
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