

Chapter 4

Scaled advice

4.1 A key objective of the FOFA reforms was to facilitate access for retail clients to financial product advice, including 'scaled' advice; that is, personal advice that is limited in scope.¹ The Explanatory Memorandum notes that while the Corporations Act does not contain a definition of scaled advice, it is usually referred to in the industry as a 'targeted form of personal advice'.

4.2 ASIC research has shown that many Australian consumers would like more information and advice about investment issues and that a third of Australians were 'expressing a preference for piece-by-piece advice rather than holistic or comprehensive advice'.² When introducing the FOFA reforms, the previous government spoke of the need for limited advice:

The Government is taking further steps to ensure that financial advice will be within the reach of a wider range of Australians, by facilitating the expansion of a new form of advice called 'scaled advice'.³

4.3 In order to facilitate scaled advice, the government amended the existing reasonable basis for advice obligation in the Corporations Act to make it clear that this obligation was commensurate with and scalable to the client's needs when providing advice. It did so as part of the original FOFA reforms. At the time, this measure was intended to help address some concerns identified by industry that the provision of scaled advice was not consistent with their obligations under the Corporations Act.

4.4 In this chapter, the committee considers the proposed changes intended to facilitate better the provision of scaled advice.

Current provisions and proposed changes

4.5 The Explanatory Memorandum to the 2011 bill provided the following reasoning for introducing scaled advice:

...in some cases, particularly where the client has complex needs or objectives, it is recognised that clients may not be immediately able to identify the subject matter of the advice they are seeking. In these situations, it may be necessary for the provider to enter into a discussion

1 ASIC, Consultation Paper 18, *Giving information, general advice and scaled advice*, August 2012, p. 7.

2 ASIC, Consultation Paper 18, *Giving information, general advice and scaled advice*, August 2012, p. 7.

3 Future of Financial advice, Information Pack 28 April 2011, p. 13, <http://ministers.treasury.gov.au/Ministers/brs/Content/pressreleases/2011/attachments/064/064.pdf>

with the client about what subject matter of advice would be in their best interests. This can take into account considerations like how much the client is willing to spend on the advice. However, the provider cannot enter into a contract to be exempted from this obligation merely by seeking formal agreement from the client that the subject matter of the advice that has been given by the provider is what has been requested by the client and is therefore in the client's best interests.

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. In some situations, the client might prefer to receive more targeted advice on a matter that is particularly concerning them rather than comprehensive advice. As long as the provider acts reasonably in this process and bases the decision to narrow the subject matter of the advice on the interests of the client, the provider will not be in breach of their obligation to act in the client's best interests. The scaling of advice by the provider must itself be in the client's best interests, especially since the client's instructions may at times be unclear or not appropriate for his or her circumstances.⁴

4.6 Holistic personal advice can often be expensive. Scaled advice, with its limited scope, provides a cheaper option than more fulsome personal advice and hence is 'an affordable avenue for many consumers seeking personal advice'.⁵ For example, based on wide consultation with its members over the past four years, the IPA concluded that its members often found it difficult to refer 'mum and dad' clients for financial advice.⁶ In the view of the IPA, it was critical for 'competent financial advice' to be available to consumers who are 'not considered high net wealth individuals'. For this reason, it argued 'the cost of providing advice must be reasonable if this sector of the market is to be adequately serviced'.⁷

4.7 ASIC has provided guidance on the provision of scaled advice. It has advised that the inquiries made by advice providers as part of their client fact-finding process can be 'scaled up' or 'scaled down', depending on the nature of the advice being sought.⁸ In Regulatory Guide 244, ASIC indicated that advice is provided along a continuous spectrum and that all types of advice can be scaled, including advice about complex issues. It suggested that an advice provider's inquiries would need

4 Replacement Explanatory Memorandum, paragraphs 1.33–1.34.

5 Explanatory Memorandum, paragraph 1.20–1.21.

6 *Submission 16*, p. 4.

7 *Submission 16*, p. 4.

8 ASIC, ASIC, Regulatory Guide, 244, *Giving information, general advice and scaled advice*, December 2012, paragraph RG244.58
[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg-244-published-13-December-2012.pdf/\\$file/rg-244-published-13-December-2012.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg-244-published-13-December-2012.pdf/$file/rg-244-published-13-December-2012.pdf) (accessed 23 April 2014).

to reflect the nature of the matters the provider was considering. According to ASIC, some points an adviser needs to observe when giving scaled advice include:

- the rules that apply to 'scaled advice' and 'comprehensive advice' are identical;
- scaled advice can include advice on a single topic or advice on multiple topics;
- scaled advice is not lesser quality advice;
- scaled advice does not mean that the advice provider who gives the advice can have lower training standards; and
- while processes can be used to help advisers provide scaled advice, they need to use their expertise and skills as an advice provider to deliver good quality scaled advice.⁹

4.8 ASIC also cautioned providers when providing scaled advice to:

...ensure that you communicate clearly to clients the service you are providing (i.e. information or advice). If you are giving scaled advice, you need to communicate clearly the advice you are providing and the advice you are not providing, and the implications of this.

For example, when giving scaled advice, it should be very clear in your SOA [Statement of Advice] (if you are required to give one) what advice you have provided and what advice you have not provided, the implications of this, and why you have taken this approach.¹⁰

4.9 In its guidance, ASIC made plain that the same rules apply to all personal advice on a particular topic: that there are not two sets of rules—one for 'comprehensive' advice, and one for 'scaled' advice that is more limited in scope. In this regard, the best interests duty and related obligations apply to all personal advice on a particular topic, regardless of the scope of the advice. ASIC stated quite clearly that scaled advice would 'be unlikely to meet the best interests duty and related obligations if the client does not understand any of the significant limitations or qualifications that apply to it'.¹¹

9 ASIC, ASIC, Regulatory Guide, 244, *Giving information, general advice and scaled advice*, December 2012, [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg-244-published-13-December-2012.pdf/\\$file/rg-244-published-13-December-2012.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg-244-published-13-December-2012.pdf/$file/rg-244-published-13-December-2012.pdf) (accessed 23 April 2014).

10 ASIC, ASIC, Regulatory Guide, 244, *Giving information, general advice and scaled advice*, December 2012, p. 7, [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg-244-published-13-December-2012.pdf/\\$file/rg-244-published-13-December-2012.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg-244-published-13-December-2012.pdf/$file/rg-244-published-13-December-2012.pdf) (accessed 23 April 2014).

11 ASIC, Regulatory Guide, 244, *Giving information, general advice and scaled advice*, December 2012, pp 9 and 19.

Purpose of the proposed changes

4.10 According to the Explanatory Memorandum, the bill amends the best interests obligations to facilitate the provision of scaled advice. The intention of the changes to the legislation is to make clear that an advice provider and a client may agree on the scope of advice to be provided. As noted earlier, scaled advice is personal advice where the scope of the advice has been limited. The Explanatory Memorandum advises that providers need only investigate the objectives, financial situation and needs of their client that are relevant to the scaled advice to be provided.¹² According to the Explanatory Memorandum:

There is currently uncertainty over the amount of work that is required for providers to satisfy their best interests duty when providing scaled advice. There is also uncertainty over the ability for providers and clients to agree on the scope of scaled advice.¹³

4.11 There are two proposed amendments that are of particular relevance to scaled advice—the addition of subsection 961B(4A) and new paragraph 961B(2)(ba).

Subsection 961B(4A)—Client seeks scaled advice

4.12 After subsection 961B(4), the bill inserts subsection (4A) which would allow a client to seek scaled advice.¹⁴ It states:

To avoid doubt, nothing in this section [that is, provider must act in the best interests of the client] prevents the provider and a client from agreeing the subject matter of the advice sought by the client.

4.13 The bill provides an example of how this adjustment could proceed:

Example: A client approaches the provider intending to seek advice on a particular subject matter. As a result of discussion with the provider, the client decides to instead seek advice on a narrower subject matter. The provider and the client then agree the subject matter of the advice sought by the client. The obligations of this Division apply to the advice ultimately sought.¹⁵

4.14 According to Treasury, this change to the legislation was intended to address concerns expressed about the ability to actually provide scaled advice. Treasury informed the committee that some stakeholders indicated that there was not sufficient clarity on what advice would actually be provided.¹⁶ For example, the National

12 Explanatory Memorandum, p. 9.

13 Explanatory Memorandum, paragraph 1.5.

14 Item 13.

15 Item 13.

16 Mr Kevin Tee, *Proof Committee Hansard*, 22 May 2014, p. 89.

Insurance Brokers Association of Australia informed the committee about its concerns with aspects of the following current requirements:

- providers required to undertake a fulsome investigation into the client's objectives, financial situation and needs before any scaled advice can be provided; and
- uncertainty on whether clients and advisers can agree on the scope of the advice to be provided.¹⁷

4.15 Subsection 961B(4A) takes into account a situation where clients may go to an adviser but they do not really know what advice they want to obtain.¹⁸ Treasury explained further:

They may say to the adviser 'Could you give me advice on items A, B and C?'

The adviser says, 'Yeh, okay, but it's going to cost you \$5,000 for me to do a plan for that.' The client then says, 'Well, \$5,000 is too much. Can I get something less?' Then after a discussion between the adviser and the client they decide, okay, we will just get advice on item B and it will be much cheaper. They are scaling it down to just item B. 'It will be cheaper. You can afford it. Are you content with that?' That is what the change to scaled advice is trying to do.¹⁹

4.16 As explained in the example attached to (4A), the best interests obligations of Division 2 apply to scaled advice. In this context, the bill also re-orders the safe harbour steps in subsection 961B(2) by repealing paragraph 961B(2)(a), which states that the provider has 'identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions'.

4.17 In its place, the bill inserts new paragraph 961B(2)(ba), which would mean that to satisfy this step in the best interests duty, the provider should be able to prove that he/she has:

...identified the objectives, financial situation and needs of the client that are disclosed to the provider by the client.

4.18 The Explanatory Memorandum notes that:

Notwithstanding the fact that the steps in subsection 961B(2) do not need to be followed in the order as written, the position of the new paragraph (after paragraph 961B(2)(b)) should help alleviate concerns that an up-front full fact find is required to be performed ahead of any other steps.²⁰

17 *Submission 3*, p. 5.

18 *Proof Committee Hansard*, 22 May 2014, p. 89.

19 *Proof Committee Hansard*, 22 May 2014, p. 89.

20 Explanatory Memorandum, paragraph 1.38.

4.19 It should be noted that the Explanatory Memorandum to the earlier FOFA bill advised that the principle guiding the application of the best interests obligation was that 'meeting the objectives, financial situation and needs of the client must be the paramount consideration when going through the process of providing advice'.²¹

4.20 The bill also adds a sentence to the end of the note at subsection 961B(2).²² Currently the note reads:

The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought.

4.21 The proposed additional sentence reads:

The provider need not inquire into circumstances that would not reasonably be considered as relevant to the subject matter.²³

4.22 As noted in the previous chapter, the best interests duty operates in conjunction with the appropriate advice requirements set out in section 961G, which requires advice provided to be appropriate had the best interests duty been satisfied. The bill would amend this section to state:

...the provider must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, *having regard to section 961B*. (The italicised section to replace 'had the provider satisfied the duty under section 961B to act in the best interests of the client'.)²⁴

4.23 The Explanatory Memorandum underscores the importance of this provision:

To ensure the appropriateness requirement operates as a separate obligation, the Bill amends section 961G to provide that advisers must only provide advice to the client if it would be reasonable to conclude that the advice is appropriate to the client 'having regard to' section 961B.²⁵

Opposition to changes to the provision of scaled advice

4.24 A number of submitters opposed the amendments to the bill designed to facilitate a client and provider agreeing to limited advice.

21 Replacement Explanatory Memorandum, paragraph 1.22.

22 Item 11.

23 Item 11.

24 Item 15.

25 Explanatory Memorandum paragraph 1.42.

4.25 CHOICE did not object to clients being able to access limited advice but had reservations about the effect of the proposed changes:

Limited or scoped advice can be an affordable and appropriate option for some clients but the scope of advice must be built on a professional investigation of a client's relevant circumstances. Inadequate investigation of a client's circumstances is highly likely to lead to poor advice.²⁶

4.26 In CHOICE's view, the addition of subsection 961B(4A) would allow advisers in effect to 'contract out' of their duties to consumers by bypassing the full best interests obligation in defining the scope of advice. In its view, rather than 'addressing the information asymmetry in the client-adviser relationship, this change would allow the lack of knowledge a consumer has about finance to be exploited'.²⁷

4.27 CHOICE also referred to the proposal to repeal paragraph 961B(2)(a) and the insertion of the new safe harbour step (ba).²⁸ According to CHOICE removing paragraph 961B(2)(a) and replacing it with 961B(2)(ba) reorders the process a financial adviser can take to meet the best interests obligation. It noted that 'specifically, an adviser would be able to investigate a client's circumstances after agreeing on the scope of the advice, which would be extremely disadvantageous to consumers'.²⁹ CHOICE agreed with ASIC's assessment that 'Even for very limited advice, there were some topics that cannot reasonably be excluded from scope' such as income levels or existing debt.³⁰

4.28 Ms Turner, CHOICE, argued that removing (g), removing 961E, amending J and multiple changes to scaled advice renders the best interests duty largely ineffective.³¹ Overall, CHOICE warned that should the bill pass in its current form advisers would 'be able to scope advice in a manner that is not in their client's best interest'.³²

4.29 The Australian Institute of Superannuation Trustees (AIST) was strongly of the view that no changes should be made to accommodate a reduced scope of investigation of a client's circumstances.³³ It could not support the measure, indicating that:

The removal of 961B(2)(a) would remove the advisers' requirement to ask any questions outside those that are explicitly relevant to the scope of the

26 *Submission 7*, p. 8.

27 *Submission 7*, p. 8.

28 Items 7 and 8 which repeal paragraph 961B(2)(a).

29 *Submission 7*, p. 8.

30 *Submission 7*, p. 8.

31 *Proof Committee Hansard*, 22 May 2014, p. 13.

32 *Submission 7*, p. 8.

33 *Submission 22*, p. 7.

advice. We consider that such an approach to an adviser's investigation can only lead to an increase in poor advice.³⁴

4.30 It referred to the note at paragraph 1.19 of the Explanatory Memorandum, which makes clear that all personal advice is scaled or limited in scope to a degree—that 'advice is either less or more comprehensive in scope along a continuous spectrum'. AIST contended that it had long maintained that, regardless of whether the advice is 'holistic' or 'scaled', 'the same requirements apply to an adviser in terms of paperwork, disclosure and general compliance'.³⁵

4.31 AIST gave an example of where, in its view, a client may receive inappropriate advice because of the provisions around scaled advice:

Archie has recently changed jobs and will be earning significantly more than what he previously earned. He makes an appointment to see Bianca to get advice on salary sacrificing into superannuation. Bianca and Archie agree that, on this occasion, Archie will only require advice on salary sacrificing into superannuation, and Bianca limits her investigation accordingly, before recommending that Archie sacrifice an additional \$300 per fortnight into his super fund. However, Bianca's investigation did not and was not required to inquire about Archie's mortgage: Archie bought a house about three years ago, and still has about \$300,000 left to pay off. Had Bianca included this in her scope of investigation, she might have potentially considered that the additional contributions to superannuation may not have been in Archie's best interests.³⁶

4.32 In AIST's view, such agreements would mean that, in addition to being restricted to collecting information relevant only to the scope of advice, the adviser would not be able to advise on any apparent 'red flag' items that are obtained through this narrowed scope of investigation. Mr Webb, AIST, was particularly concerned about subsection (4A) arguing that if that provision were to go ahead, then 'any kind of scoped advice would be able to circumvent the rest of the provisions of the section'.³⁷ AIST believes that such arrangements were potentially subject to a variety of manipulation.³⁸

4.33 The Governance Institute of Australia noted that if the changes come into force, then 'once an adviser and their client agree upon the scope of the advice it will only have to be 'appropriate', rather than in the client's best interest'. It suggested that

34 *Submission 22*, p. 7.

35 *Submission 22*, p. 8.

36 *Submission 22*, p. 7.

37 *Proof Committee Hansard*, 22 May 2014, p. 53.

38 *Submission 22*, p. 8.

the amendment was 'contrary to ensuring that there remains an intention that any advice, even that limited by agreement, is provided in the client's best interests'.³⁹

4.34 A number of submitters considered the provision of scaled advice in the context of the removal of paragraph 961B(2)(g) and section 961E. National Seniors believed that it was essential for advisers when considering scaled advice to be acting in the best interests of their client. Dr Paul O'Shea was of the view that scaled advice would be appropriate if 'the best-interests duty included 961B(2)(g), the catch-all, and 961E, the other "step" definition'. National Seniors argued that the proposed scaled advice amendment together with the repeal of paragraph 961B(2)(g) removes the adviser's obligation and incentive to adhere to the best interests duty. In its view, the proposed amendments significantly compromise the quality of financial advice provided to consumers and would likely result in 'major financial detriment'.⁴⁰

4.35 National Seniors referred to the replacement paragraph 961B(2)(ba), which in its view, would push 'the responsibility back on to consumers'. It suggested that, should the changes come into effect, the process would then 'provide financial advisers with a convenient deferral of responsibility limiting the ability of consumers to claim for their investment losses'. In addition, section 961B(2)(g) currently allows the FOFA legislation not to be overly prescriptive. National Seniors argued that if section 961B(2)(g) were removed, additional steps would be required within the legislation to ensure that all possible actions were taken to ensure that advisers act in the best interests of their clients.⁴¹

4.36 Worried about the proposed replacement paragraph, National Seniors wanted advisers to be compelled to take into account their clients' individual circumstances when they provided scaled advice. It stated:

The proposed amendment to remove the obligation on advisers to take into account their client's individual circumstances when they deliver scaled advice shifts the responsibility from the adviser back to consumers to assess scaled advice in the light of their individual circumstances.⁴²

4.37 In its view, the amendment ignored the fact that consumers would 'always be the less powerful and less informed party when agreement is formed on the scope of any scaled advice'.⁴³ While National Seniors accepted that, in the short term, the changes may result in lower up-front cost for scaled advice, it argued, however, that:

...in the long term, scaled advice whose scope has been agreed to in ignorance and which does not consider all relevant financial information is more likely to result in negative investment outcomes. Consumers would

39 *Submission 11*, p. 3.

40 *Submission 24*, p. 8.

41 *Submission 24*, p. 7.

42 *Submission 24*, p. 7.

43 *Submission 24*, p. 7.

then pay a very high price for their discounted scaled advice through less than optimal investment returns and potentially significant financial losses.⁴⁴

4.38 COTA also held serious concerns about the practice of providing scaled advice. It believed that many people simply 'do not understand the implications of not obtaining comprehensive advice'. It argued:

The suggestion that scaled advice could be facilitated by allowing consumers and providers to agree on the scope of such advice assumes there is an equal understanding of the implications of receiving limited advice. This is probably not the case for many people who may accept being provided with scaled advice because it is cheaper or more readily available, rather than because they have made an objective assessment of their need for advice. Some examples of scaled advice underline our concerns, such as a couple agreeing to receive advice on planning for retirement, without reference to any debts, when they had two real estate mortgages.⁴⁵

4.39 Ms Root, COTA, noted that:

The issue, and our concern, about scaled advice is actually about where the best-interest test sits. We have had different interpretations of this presented to us from a number of places and in our own reading of the legislation. There seems to be a call in the legislation for the best-interest test to be different for scaled advice than for holistic personal advice...⁴⁶

4.40 Even so, COTA accepted that 'ultimately consumers should have the right to choose the type of the advice they are receiving'.⁴⁷ It stated further:

The requirement on the provider to clearly explain to the client the consequences of having scaled rather than holistic, comprehensive advice needs tightening up. It needs to include some measure that indicates the client has understood the information they have been given.⁴⁸

4.41 Ms Root concluded that 'until we have better financial literacy, better professional standards for financial advisers and we start to close the gap in knowledge and power, it is better not to have scaled advice'.⁴⁹ Likewise, Ms Campo, Industry Super Australia, expressed doubts about the proposal that would allow adviser and client to agree on the scope of advice. She stated:

44 *Submission 24*, p. 8.

45 *Submission 10*, p. 4.

46 *Proof Committee Hansard*, 22 May 2014, p. 70.

47 *Submission 10*, p. 4.

48 *Submission 10*, p. 4.

49 *Proof Committee Hansard*, 22 May 2014, p. 71.

We do not see this as facilitating scaled advice; we see it as facilitating sales advice.⁵⁰

4.42 To support her contention, Ms Compo cited the Explanatory Memorandum where it stated that 'this mechanism would be able to be used by a client and adviser to agree that only the products of a particular provider would be considered in the advice'. She then argued:

Given the disparity in knowledge between adviser and client, it is our view that the adviser must be responsible for ensuring that the scope of advice is in the client's best interests. We believe that this very important consumer protection would be removed by the addition of 4(A) in the best interests duty. Our view is that such agreement is not even possible in the legislation that existed before the FoFA legislation.⁵¹

4.43 In this regard, the committee notes the findings of an ASIC shadow shopping survey. Although the scope was limited in some way, ASIC, when reviewing the results, saw some evidence that the scope of advice was inappropriate. It noted that in several instances 'particular topics were excluded from the scope of the advice, to the potential benefit or convenience of the adviser, and to the significant detriment of the client'. As an example, ASIC's research found:

...some advice providers excluded the consideration of a client's debts from their retirement advice. However, if these debts were significant, retirement advice could not have been properly provided without taking this into consideration. In such a situation, a client might mistakenly think that the advice was comprehensive, and that all of their financial circumstances and needs had been taken into account.⁵²

4.44 ASIC outlined that 'even for advice on retirement planning that is very limited in scope, there are some issues that cannot reasonably be excluded from the scope' and provided the following example:

...it would be difficult for an advice provider to recommend significant extra salary sacrificing to superannuation without some understanding of the client's cash flow and other financial commitments.⁵³

4.45 The committee understands the potential that exists for providers, if they do not adhere to the best interests obligations, to provide deficient advice.

50 *Proof Committee Hansard*, 22 May 2014, p. 55.

51 *Proof Committee Hansard*, 22 May 2014, p. 55.

52 ASIC, Consultation Paper 183, *Giving information, general advice and scaled advice*, August 2012, paragraph 10, p. 9.

53 ASIC, Consultation Paper 183, *Giving information, general advice and scaled advice*, August 2012, paragraph 10.

Support for changes to the provision of scaled advice

4.46 The submitters arguing in favour of the proposed changes acknowledged that the provision of scaled advice was an important aspect of the FOFA reforms which would help extend the provision of financial advice to more Australians.⁵⁴ For example, in support of scaled advice, Menico Tuck Parrish Financial Services suggested that:

If we are to make any headway into providing cost effective advice, then scaled advice is at the heart of it. We tend to move to 'full advice' in fear of missing out something that the law says we should address.⁵⁵

4.47 Stockbrokers Association of Australia provided an example of the advantages in being able to obtain scaled advice:

In traditional stockbroking, clients often seek advice on a limited basis, for example, a brief inquiry as to which stock(s) to buy or sell. Clients don't often require a full financial plan or advice on their entire circumstances or portfolio of investments. We were therefore pleased to see further measures in the proposed reforms to accommodate clients and their limited requirements.⁵⁶

4.48 The association referred to ASIC's research that showed around one-third of Australians prefer scaled or 'piece-by-piece' financial advice rather than comprehensive or 'holistic' advice. In its view, the new provisions would allow greater certainty and the needs of the client would be better met by the adviser and client being able to agree to limit the scope of advice that is sought. It urged the Parliament to pass the new provisions on scaled advice in their entirety.⁵⁷

4.49 While supporting retaining the best interests provision intact, CPA Australia and the Institute of Chartered Accountants acknowledged the concern that the current requirements in subsection 961B(2) could prohibit the provision of scaled advice.⁵⁸ It stated that 'enabling the provision of scaled advice is important, as a client may only require, or importantly be able to afford, advice on limited or a single issue'. It understood that the rationale for repealing paragraph 961B(2)(a) was to facilitate an adviser to scale the advice they would provide to a limited or single issue. It noted:

However, what is relevant to the advice being provided will be determined by the nature of advice, which should not be either intentionally or unintentionally limited by legislation. Further, given the existing obligation to identify the client's relevant circumstances, we do not believe the

54 See for example, *Submission 21*, p. 7.

55 *Submission 19*, p. [2].

56 *Submission 4*, p. 3.

57 *Submission 4*, p. 3.

58 *Submission 14*, p. 3.

proposed amendment changes the enquiries an adviser would be required to make to discharge their duty.⁵⁹

4.50 The SMSF Professionals' Association also supported the proposed changes. It argued the removal of the best interests duty catch-all provision as well as section 961E would:

...help facilitate the provision of scaled advice by removing the uncertainty that these provisions created in regards to understanding a client's relevant circumstances.⁶⁰

4.51 Both Mr Elvy, Institute of Chartered Accountants, and his colleague from CPA, Mr Drum, agreed with the proposition that the act as amended would provide sufficient protection. In their view, the provisions in the act would place an obligation on a financial adviser to make sufficient inquiries to ensure that the advice on scaled advice would be appropriate to that particular client.⁶¹

4.52 Minter Ellison Lawyers welcomed the proposal to give explicit recognition to the ability of the client to agree on the scope of the advice. In their opinion, the proposed changes would ensure that clients can obtain the advice they require without having to pay for advice they do not want.⁶² Mr Batten, Minter Ellison, acknowledged that consumers were 'always at some level going to be disempowered to some extent, and it is important for the legislation to seek to redress the balance in an appropriate way'.⁶³ Even so, he supported increased availability of personal advice very strongly and hence saw the amendments as a significant improvement which provided important clarification from what currently existed.⁶⁴ In his view, one of the reasons to support explicit recognition of scaled advice was its contribution to delivering financial advice in 'the most cost-effective manner for consumers and with improved availability'.⁶⁵

4.53 Mr Batten suggested that the measures to improve and to reduce uncertainty around the provision of scaled advice would assist in enabling providers more effectively to give advice that the consumers actually need.⁶⁶ Indeed, he suggested that, possibly, there was further scope to improve the bill.

59 *Submission 14*, p. 3.

60 *Submission 21*, p. 7.

61 *Proof Committee Hansard*, 22 May 2014, p. 35.

62 *Submission 18*, p. 3.

63 *Proof Committee Hansard*, 22 May 2014, p. 44.

64 *Proof Committee Hansard*, 22 May 2014, p. 41.

65 *Proof Committee Hansard*, 22 May 2014, p. 45.

66 *Proof Committee Hansard*, 22 May 2014, p. 37

4.54 The Governance Institute of Australia also supported the proposal to allow the financial adviser and client to agree on the scope of the advice to be provided. In its opinion, such an approach would reduce red tape for financial advisers, and reduce uncertainty as to what type of advice was to be provided. This measure would also benefit clients by allowing them to ask for specific and targeted information more relevant to their needs, if they required it.⁶⁷ It believed, however, that it was essential that the customer clearly understood the scope of the advice provided. Furthermore, that the statement of scope should include both the subject matter and extent to which the advice is general or tailored to the client's specific circumstances.⁶⁸

4.55 The Institute of Public Accountants (IPA) was in favour of removing the catch-all provision from the list of steps. In its view, it was difficult to reconcile the provision of scaled advice with a best interests duty. The institute stated:

In practical terms, the more holistic seven step process to comply with the best interests duty would require more time and effort to be spent on behalf of the client for work which has not necessarily been approved or requested by the client. This would make the provision of advice more expensive than is necessary and it is unlikely that clients will agree to pay for work which they have not requested. In turn, this would be against the policy objective of FoFA which is to provide affordable and accessible financial advice to consumers. One of the main advantages of the FoFA reforms is to enable scaled advice which makes financial advice more affordable for consumers. Insisting on a 'catch all' in order to satisfy the best interests duty would undermine this policy objective.⁶⁹

4.56 The IPA firmly believed that the best interests obligations would not be diminished by limiting the duty to the scope of advice being provided.⁷⁰ It agreed that provision for scaled advice should be explicit in the legislation, with appropriate guidance from ASIC.⁷¹ It explained:

Further, while the IPA strongly believes in the concept of providing scaled advice, the practical implementation should be monitored by ASIC, industry and the profession (by bodies such as the IPA) to ensure that the policy objectives of consumer protection and the provision of competent, affordable and accessible advice to all consumer sectors, are fulfilled.⁷²

4.57 The FSC welcomed the intention to provide greater access to affordable advice for more Australians by amending the best interests duty to enable the subject

67 *Submission 11*, p. 4.

68 *Submission 11*, p. 4.

69 *Submission 16*, p. 3.

70 *Submission 16*, p. 4.

71 *Submission 16*, p. 4.

72 *Submission 16*, p. 4.

matter of the advice to be agreed between the client and the adviser.⁷³ It argued that 'consumers deserve to have a right to the advice they want and to be clear about the duty their adviser owes them'. It stated furthermore that the financial advice industry must be able to have confidence in the regulatory framework. It argued that the proposed changes would provide the clarity needed to enable clients 'to better select the advice level they desire and to better manage the cost which they will pay for advice'.⁷⁴ The FSC explained:

An ability to legally limit the scope of an adviser's investigations, without limiting nor contracting out their legal 'best interest' duty to their client, will ensure that more Australians are able to access advice. That is, the ability to access more affordable piece by piece advice from a financial adviser legally able to provide it.⁷⁵

4.58 According to FSC, the ability to scope the advice 'does not mean that an adviser will not have a conversation with the client to seek to understand what advice the client is seeking'. It stressed that 'the conversation to arrive at a "meeting of the minds" was critical'. In its view, this meeting of the minds conversation should 'not be required to be a "full fact find" as step 1 of the duty as is currently legislated'. It noted that subparagraph 961B(2)(b)(i) remains unchanged. This step requires the adviser 'to identify what advice the client is seeking whether implicitly or explicitly, which is achieved by having the qualifying conversation with the client'.⁷⁶

4.59 Overall, it believed that the best interests duty consumer protection mechanism would remain intact and not lead to a contracting out of the duty.⁷⁷

4.60 The FPA was in favour of efforts that would improve clarity for financial planners who wish to provide scaled advice. In its view, the additional changes to section 961B were necessary to maintain consumer protection and support the best interests duty.⁷⁸ It explained that the key policy objectives in providing a legislative framework for scaled advice were:

- creating certainty for advice providers regarding the matters which may reasonably be excluded from 'fact finds', financial strategy, and product recommendations;
- protecting consumers from unethical business practices, such as negotiating an inappropriate or suboptimal scope for financial advice and;

73 *Submission 27*, p. 26.

74 *Submission 27*, p. 26.

75 *Submission 27*, p. 26.

76 *Submission 27*, p. 27.

77 *Submission 27*, p. 27.

78 *Submission 15*, p. 5.

- facilitating more efficient and targeted forms of personal financial advice for retail clients, in order to improve access and engagement with our financial system.⁷⁹

4.61 In its assessment, the proposed amendments create certainty for financial planners and have the ability to facilitate scaled advice.⁸⁰ Mr De Gori, FPA, noted the need for clients to have the opportunity for scaled advice, but only if the best interests duty obligations still existed. In his assessment, the amendments being proposed would not reduce any best interests duty obligation on the provider. He referred to the proposed restructuring of the safe harbour steps from the first step and the second step being alternated and explained:

Firstly, we think that professional financial planners do not follow the safe harbour steps in a numbered order, as such, but those steps are there designed to help in the advice process. The obligation to actually identify the client's financial situation, needs and objectives is still paramount both in scaled advice and in holistic advice; there is no difference.⁸¹

4.62 His colleague, Mr Mark Rantall, agreed, noting that there were still requirements for advisers to make appropriate inquiries into the circumstances of the person coming in for that advice.⁸²

4.63 The FPA, however, was of the view that the repeal of paragraph 961B(2)(a) and insertion of (2)(ba) were unlikely to have 'any effect'.⁸³ In this regard, Minter Ellison Lawyers noted that it made more sense for an adviser to identify the subject matter of the advice sought before identifying the client's relevant circumstances. Therefore, they suggested that the re-ordering of the paragraphs was appropriate and for section 961B(2)(b) to be the first step.⁸⁴ They similarly observed, however, that:

...s 961 B(2)(b)(ii) already requires the adviser to identify the circumstances of the client relevant to advice sought on the subject matter of the advice sought. The proposed s 961B(2)(ba) seems in effect therefore to simply repeat 961B(2)(b)(ii). We submit that s 961B(2)(ba) is therefore unnecessary and could be removed from the Bill.⁸⁵

4.64 The Treasury highlighted the value to clients of being able to access scaled advice. Ms Quinn stated that it was of no assistance to consumers if they cannot access financial advice. So, in her view:

79 *Submission 15*, p. 5.

80 *Submission 15*, p. 5.

81 *Proof Committee Hansard*, 22 May 2014, p. 23.

82 *Proof Committee Hansard*, 22 May 2014, p. 23.

83 *Submission 15*, p. 5.

84 *Submission 18*, p. 3.

85 *Submission 18*, p. 3.

If the situation is that they see a financial adviser and ask for options on A, B, C and D and the adviser says, 'Well, that's a large amount of money,' and the person says, 'Well, I can't afford that,' and walks out the door, that is not a good outcome for the consumer. If in fact there was the ability for the adviser to say, 'Based on the information you've provided me and the conversation we've had, the order of priority that you might want to think about these things is D first, C, B A.' Then the consumer can say, 'Well, actually, okay, I'll have that first one, thanks,' as long as there is protections to make sure that that discussion is appropriate and to make sure that they are aware of what it is they are asking as an agreement. That is a better outcome than someone not getting any advice.⁸⁶

4.65 Ms Quinn explained further:

...the financial adviser has a duty to ensure that the information they provide is appropriate, and they need to have ascertained enough information for that to be reasonably judged to be appropriate. So, in the case of someone coming in and saying, 'I want to know about inheritance', the adviser would not be able to say anything unless they had some kind of conversation...⁸⁷

4.66 The Treasury informed the committee that it was not the intention of the legislation to undermine the best interests duty when a client seeks scaled advice. Mr Kevin Tee gave the following example:

...if the client is not receiving the advice on items A and C and just gets advice on item B, there needs to be a discussion. The adviser needs to clearly explain, 'Well, I'm giving you advice on item B. I'm not giving you advice on items A and C. There are consequences if you do not get advice on these things as well. You may want to do that at a later time when you can afford it.'⁸⁸

4.67 According to the Treasury officials, the example provided in the Explanatory Memorandum made it clear that best duty obligations applied. Mr Tee referred to the best interests duties found in Division 2 and cited, as discussed in the previous chapter, sections 961G (appropriate advice) and 961J (prioritise the client's interests). He also referred to section 961H which requires the adviser to provide a warning if there were any incomplete or inaccurate information and section 961L which requires the licensee to ensure that their representatives are complying with these sections.

4.68 He explained that while they are separate subsections, they 'work together to ensure that the advice is appropriate'.⁸⁹ Ms Quinn reinforced this argument, stating that Treasury understood that 'all the provisions together provide enough protection

86 *Proof Committee Hansard*, 22 May 2014, p. 90.

87 *Proof Committee Hansard*, 22 May 2014, p. 92.

88 *Proof Committee Hansard*, 22 May 2014, p. 89.

89 *Proof Committee Hansard*, 22 May 2014, p. 89.

for consumers such that it has to be appropriate, reasonable advice, and best-interest duty applies'.⁹⁰

Conclusion

4.69 There can be no doubt that the availability of scaled or limited advice is in the interests of consumers, whereby they are able to narrow the scope of advice so that the advice can be targeted to a specific need and hence at a lower fee.

4.70 The committee is particularly cognisant of the concerns raised by some submitters about the low levels of financial literacy and the potential for consumers not to understand fully the consequences of seeking limited advice. It notes the results of ASIC's survey which showed that advisers, although obliged to adhere to the best interests duty, could still fall short in the advice they provided. Even some of those who supported the bill underlined the need for the best interests duty to apply in full for scaled advice. The IPA recommended that ASIC, industry and the profession should monitor the practical implementation. In particular, the committee supports ASIC's shadow shopping surveys.

4.71 A number of witnesses referred to the importance of clients being made fully aware that they were receiving scaled advice and the consequences flowing from this limited advice. The committee believes that advisers, when providing scaled advice, should be under an explicit obligation to explain clearly to their clients what scaled advice entails and its limitations.

Recommendation 1

4.72 The committee recommends that the Explanatory Memorandum include a paragraph that clearly and unambiguously spells out the best interests obligations—961B(1) and (2), 961G, 961J and 961H—and the level of consumer protection they provide.

4.73 The committee recommends that the government consider closely how these separate obligations work together and whether any further strengthening is required to ensure that a provider cannot circumvent these best interests obligations.

90 *Proof Committee Hansard*, 22 May 2014, p. 92.