

Inquiry into the provisions of the Corporations Amendment (Financial Advice) Bill 2014

Referral and conduct of the inquiry

1.1 On 5 March 2015, pursuant to the Selection of Bills Committee's report, the Senate referred the Corporations Amendment (Financial Advice) Bill 2014 (the bill) to the Economics Legislation Committee for inquiry and report by 11 August 2015.¹ The proposed legislation was a private senator's bill introduced into the Senate on 2 September 2014 by Senator Peter Whish-Wilson.²

1.2 The main reason for supporting the referral of this legislation to a parliamentary committee was because of the 'successive reports of misconduct in financial advice sector related, in part, to the provision of general advice' and because it was 'not yet clear if FOFA [the Future of Financial Advice legislation]—a relatively new piece of legislation—is adequately addressing issues related to general advice'.³

1.3 The committee decided on 5 March 2015 that the Senate Economics References Committee's inquiry into the Scrutiny of Financial Advice would be better placed to examine the matters raised by this bill. The references committee agreed with this view.

1.4 The committee advertised the inquiry on its website but did not call for submissions or hold public hearings, given the references committee's concurrence that it would be ideally placed to examine issues raised by the bill as part of its inquiry into the Scrutiny of Financial Advice.

Scope and structure of this report

1.5 To provide the context for the provisions of the bill, the committee first provides an overview of the current regulation of factual information, general advice and personal advice. The committee then considers the purpose of the bill and provides an overview of the relevant recommendations of other recent inquiries regarding the labelling and regulation of general advice.

Background to the bill

1.6 In March 2002, the *Financial Services Reform Act 2001* introduced a new regulatory regime for financial services. Since the enactment of this legislation, an individual or business providing financial product advice is taken to have provided a financial service and has been required to hold an Australian Financial Services Licence as well as satisfy a number of conduct and disclosure obligations.

1 Selection of Bills Committee, *Report No 2 of 2015*, 5 March 2015, [p. 3]; *Journals of the Senate*, 2013–15, no. 82 (5 March 2015), p. 2257.

2 *Senate Hansard*, 2 September 2014, pp. 6201–6203.

3 Appendix 3, Selection of Bills Committee, *Report No 2 of 2015*, 5 March 2015.

1.7 Subsection 766B(1) of the *Corporations Act 2001* (Corporations Act) provides the following definition of financial product advice:

...financial product advice means 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.

1.8 Financial product advice is divided into two types: personal advice and general advice.⁴

1.9 Personal advice is given in circumstances where the provider has, or should have, considered the person's objectives, financial situation and needs.⁵ Only one aspect of the person's relevant circumstances needs to have been considered for the advice to be personal advice.⁶ Examples of advice that is likely to be personal advice include strategic investment advice and advice on retirement income planning.⁷

1.10 General advice is advice that is not personal advice, that is a recommendation or opinion that does not consider a person's relevant circumstances.⁸ Examples of advice that is likely to be general advice include the advice provided at investment seminars and the advice in marketing brochures advertising a particular financial product or product range.⁹ ASIC makes the following distinction:

General advice about a financial product will not be personal advice if you clarify with the client at the outset that you are giving general advice, and you do not, in fact, take into account the client's objectives, financial situation or needs.¹⁰

1.11 Providers are required to warn clients that general advice does not take into account a person's objectives, financial situation or needs; this warning is known as the 'general advice warning'.¹¹

4 *Corporations Act 2001* (Corporations Act), subsection 766B(2).

5 Corporations Act, subsection 766B(3).

6 ASIC, Regulatory Guide 175, *Licensing: Financial product advisers – conduct and disclosure*, October 2013, paragraph RG 175.45.

7 ASIC, Regulatory Guide 244, *Giving information, general advice and scaled advice*, December 2012, p. 53.

8 Corporations Act, subsection 766B(4).

9 ASIC, Regulatory Guide 175, *Licensing: Financial product advisers – conduct and disclosure*, October 2013, p. 98.

10 ASIC, Regulatory Guide 244, *Giving information, general advice and scaled advice*, December 2012, paragraph RG 244.43.

11 Corporations Act, section 949A.

1.12 Communication that consists of only factual information is not financial product advice and, as such, is not regulated as a financial service under the Corporations Act. A person providing factual information is not required to hold an Australian Financial Services Licence or to meet the conduct and disclosure obligations required when providing personal advice or general advice.

1.13 In its regulatory guidance, ASIC defines factual information as 'objectively ascertainable information whose truth or accuracy cannot be reasonably questioned'.¹² Factual information can include information about the rights and obligations of people under relevant legislation or the cost of a financial product.¹³ A person can provide factual information to an individual even if that person knows personal information about the individual.¹⁴

1.14 Factual information may, however, be financial product advice if it is presented in a way that is 'intended to, or can reasonably suggest or imply an intention to, make a recommendation about what a client should do'.¹⁵

1.15 For example, in the circumstances where a client with \$10,000 to deposit went into a bank branch and asked a branch teller about the different interest rates on savings products—if the teller simply provided interest rates on the different products this would constitute the provision of factual information. However, if the teller added that there was an 'attractive special rate' available on term deposits for a six-month period this would likely constitute financial product advice because it is a matter of opinion and could reasonably be regarded as intending to influence the client to choose the term deposit product.¹⁶

1.16 The Future of Financial Advice (FOFA) reforms built on the distinction between the provision of personal advice and the provision of general advice when implementing the consumer protections that apply to retail clients receiving financial product advice. The objectives of the FOFA reforms were:

...to improve the quality of financial advice while building trust and confidence in the financial advice industry through enhanced standards which align the interests of the adviser with the client and reduce conflicts of interest.¹⁷

12 ASIC, Regulatory Guide 36, *Licensing: Financial product advice and dealing*, August 2013, paragraph RG 36.23.

13 ASIC, Regulatory Guide 36, *Licensing: Financial product advice and dealing*, August 2013, pp. 8-9.

14 ASIC, Regulatory Guide 244, *Giving information, general advice and scaled advice*, December 2012, paragraph RG 244.33.

15 ASIC, Regulatory Guide 244, *Giving information, general advice and scaled advice*, December 2012, paragraph RG 244.29.

16 ASIC, Regulatory Guide 36, *Licensing: Financial product advice and dealing*, August 2013, p. 9.

17 See Replacement Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, General Outline, p.3.

1.17 The FOFA amendments commenced, on an optional basis, from 1 July 2012, and became compulsory from 1 July 2013.¹⁸

1.18 Under the FOFA reforms in Part 7.7A of the Corporations Act, personal advice provided to retail clients is generally subject to higher consumer protections than general advice provided to retail clients. For example, the ban on conflicted remuneration, under Division 4 of Part 7.7A, applies to both general and personal advice given to retail clients but the best interests duty obligations, under Division 2 of Part 7.7A, only apply to retail clients who receive personal advice.

Purpose of the bill

1.19 The purpose of the bill is to ensure that the term 'advice' can only be used in reference to financial product advice that takes into account the personal circumstances of the consumer, that is personal advice.¹⁹

1.20 The Explanatory Memorandum of the bill states that this change 'will help ensure personal advice is differentiated from information that is provided to sell general financial products with little or no consideration of an individual's financial situation or needs'.²⁰

1.21 If enacted, the bill would amend the Corporations Act by:

- substituting the term 'information' for the term 'advice' in the phrase 'general advice'; that is, if enacted, 'general advice' would be termed 'general information'; and
- requiring the existing 'general advice warning' to clients under section 949A of the Corporations Act—that general information does not take into account of the client's objectives, financial situation or needs—to also include a warning that the general information is not advice.

1.22 The Explanatory Memorandum states that the proposed changes to the Corporations Act raise no human rights or freedom issues.²¹

1.23 The Senate Standing Committee for the Scrutiny of Bills had no comments in relation to the bill.²²

Recommendations made by previous inquiries

1.24 Questions have been raised as part of other recent inquiries—notably the committee's inquiry into the Corporations Amendment (Streamlining of Future Financial Advice) Bill 2014 and the Financial System Inquiry—about whether the

18 The Hon. Bill Shorten, MP, Minister for Financial Services and Superannuation, 'Smoothen transition for financial advice reforms', Media release 013, 14 March 2012.

19 Explanatory Memorandum, p. 2.

20 Explanatory Memorandum, p. 2.

21 Explanatory Memorandum, p. 3.

22 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 12 of 2014*, 24 September 2014, p. 2.

distinction between general advice and personal advice is well understood by consumers.

1.25 In particular, questions have been raised about whether the term 'general advice' best conveys the nature of, and obligations associated with, the provision of general advice.

Recommendations of the committee's inquiry into the Corporations Amendment (Streamlining of Future Financial Advice) Bill 2014

1.26 The committee's inquiry into the Corporations Amendment (Streamlining of Future Financial Advice) Bill 2014, which was tabled in the Senate on 16 June 2014, received submissions and testimony expressing concern that consumers were often not cognisant of the nature of general advice. For example, Mr Mark Rantall, CEO of the Financial Planning Association of Australia, noted that many consumers do not appreciate that general advice does not consider a person's relevant circumstances:

As long as the differences between general advice and personal advice are insufficiently clear to consumers, general advice will be perceived as a less costly form of personal advice.²³

1.27 Mr Alan Kirkland, CEO of CHOICE, took the view that it was unrealistic to expect all consumers to understand the differences in the regulation of general advice and personal advice:

We depend on consumers to work out, 'That's general advice, so there is a lower bar and I should be much more cautious.'... It is just not realistic to expect the consumer to understand that distinction between personal and general advice.²⁴

1.28 Noting the concerns about the possible misuse or misunderstanding of the term general advice, the committee recommended that the:

...government give consideration to the terminology used in the Explanatory Memorandum and legislation (for example, section 766B), such as information, general advice and personal advice, with a view to making the distinction between them much sharper and more applicable in a practical sense when it comes to allowing exemptions from conflicted remuneration.²⁵

Recommendations of the Financial System Inquiry

1.29 The Australian Government's Financial System Inquiry noted the committee's recommendation about making the distinction between general advice and personal advice clearer to consumers as part of its interim report, which was released in July 2014.

23 Committee Hansard, 22 May 2014, p. 19.

24 Committee Hansard, 22 May 2014, p. 17.

25 Senate Economics Legislation Committee, *Corporations Amendment (Streamlining of Future of Financial Advice Bill 2014 [Provisions])*, June 2014, p. 77.

1.30 The interim report requested submissions on the idea of renaming general advice as 'sales' or 'product information', and mandating that the term 'advice' can only be used in relation to personal advice.²⁶

One issue with general advice is whether it is properly labelled. Some submissions argue that some of the conduct regulated as general advice could more accurately be described as sales information, advertising or guidance. The aim of this relabelling would be to give consumers a clearer indication of what is involved.²⁷

1.31 In the second round of submissions to the Financial System Inquiry, most stakeholders agreed that the term general advice is often confusing to consumers but there was no consensus on which term should be used instead of general advice. The Australian Bankers' Association stated that the industry 'acknowledges that general advice is not widely understood to be financial advice by consumers'.²⁸

1.32 Some stakeholders rejected a term which included the words 'sales' or 'product' as not being an accurate characterisation of general advice. Westpac, for example, suggested general advice be renamed 'general financial information' and the term 'financial adviser' be restricted to those who provide personal advice.²⁹

1.33 In contrast, the Commonwealth Bank recommended that general advice be renamed as 'sales' or 'product information' and be removed from the regulatory framework for financial product advice.³⁰ In other words, general advice should be treated as factual information and provided by a person who does not hold an Australian Financial Services Licence. The Financial System Inquiry interim report noted that there had been a proposal in 2006 to exempt sales conduct from licensing but this was rejected due to consumer protection concerns and there was no case to further pursue deregulating general advice.³¹

26 Australian Government, Financial System Inquiry, *Interim Report*, July 2014, p. 3-74.

27 Australian Government, Financial System Inquiry, *Interim Report*, July 2014, p. 3-73.

28 Australian Bankers' Association, *Response to Interim Report*, Submission to the Financial System Inquiry, August 2014, p. 58,
http://fsi.gov.au/files/2014/08/Australian_Bankers_Association_2.pdf (accessed 10 July 2015).

29 Westpac, *Second Submission to the Financial System Inquiry*, Submission to the Financial System Inquiry, August 2014, p. 104, <http://fsi.gov.au/files/2014/08/Westpac.pdf> (accessed 10 July 2015).

30 Commonwealth Bank, *Wellbeing, Resilience and Prosperity for Australia: Financial System Inquiry Final Submission*, Submission to the Financial System Inquiry, August 2014, p. 30,
http://fsi.gov.au/files/2014/08/Commonwealth_Bank.pdf (accessed 10 July 2015).

31 Australian Government, Financial System Inquiry, *Interim Report*, July 2014, pp. 3-73 - 3-74.

1.34 The final report of the Financial System Inquiry, released in November 2014, found that:

...consumers may misinterpret or excessively rely on guidance, advertising, and promotional and sales material when it is described as 'general advice'. The use of the word 'advice' may cause consumers to believe the information is tailored to their needs. Behavioural economics literature and ASIC's financial literacy and consumer research suggests that terminology affects consumer understanding and perceptions.³²

1.35 The Financial System Inquiry's final report recommended 'renaming general advice' but did not suggest a particular term to replace general advice: instead, the final report recommended a more appropriate term be chosen through consumer testing.³³ It was considered that the benefits to consumers from the clearer distinction between general advice and personal advice outweighed the costs of consumer testing and the costs of updating existing disclosure documents.

1.36 As at 10 August 2015, the government was still considering its response to the Financial System Inquiry.

Committee view

1.37 The committee notes that most stakeholders agree that the term general advice is not well understood by consumers but there is no consensus on which term should be used instead. The committee also takes note of the Financial System Inquiry's recommendation to rename general advice and recognises that the government has not yet announced its response to the Financial System Inquiry.

1.38 In light of the government's forthcoming response to the Financial System Inquiry and the significant issues raised by the bill around the clarity of financial services regulation for all Australians, the committee considers that the Senate Economics References Committee's inquiry into the Scrutiny of Financial Advice is the appropriate mechanism through which to explore the issues raised by this bill.

1.39 The inquiry into the Scrutiny of Financial Advice is investigating the implications of financial advice reforms, including the current level of consumer protections and other regulatory or legislative reforms that would prevent misconduct in the financial advice space, among other related matters.

1.40 The committee considers that the inquiry should explore how to enhance the clarity of the terminology used in the legislation (for example, in section 766B of the Corporations Act) to improve consumer understanding and consumer confidence in financial advice. The objectives of this bill could be included as part of broader considerations into educating retail consumers and improving financial literacy.

32 Australian Government, Financial System Inquiry, *Final Report*, November 2014, p. 271.

33 Australian Government, Financial System Inquiry, *Final Report*, November 2014, Recommendation 40, pp. 271–272.

Recommendation

1.41 The committee believes that the Senate Economics References Committee is better placed to examine the matters raised by this bill, as part of its inquiry into the Scrutiny of Financial Advice, and recommends that the provisions of the bill be included as part of that inquiry.

Senator Sean Edwards
Chair