

Submission to the Quality of Advice Review

Name/Organisation: Phil Turner, Gilbert + Tobin

About me: I am a partner in Gilbert + Tobin. I have over 20 years' experience specialising in superannuation law and financial services regulation. My practice includes investment work for superannuation trustees, M&A transactions, successor fund transfers and superannuation litigation.

Questions

Intended outcomes

1. Do you agree that advisers and product issuers should be able to provide to personal advice to their customers without having to comply with all of the obligations that currently apply to the provision of personal advice?

Not answered

What should be regulated?

2. In your view, are the proposed changes to the definition of 'personal advice' likely to:
 - a) reduce regulatory uncertainty?
 - b) facilitate the provision of more personal advice to consumers?
 - c) improve the ability of financial institutions to help their clients?

a)
In my view, the proposed changes to the definition of 'personal advice' are unlikely to reduce regulatory uncertainty as much as they could, for the reasons set out below. I suggest a further change to the definition of 'personal advice' to avoid unintended consequences.

The Proposals Paper for the Quality of Advice Review (**Paper**) proposes to broaden the existing definition of 'personal advice' so that it is clear that it applies whenever a recommendation or opinion is provided to a client about a financial product (or class of financial product) and, at the time the advice is provided, the provider has or holds information about the client's objectives, needs or any aspect of the client's financial situation.

The Paper notes that the changes to the definition of 'personal advice':

would mean that, in very large part, **all personal conversations and interactions** between a customer and their bank, superannuation fund or insurer would be personal advice conversations and interactions *if* they include a recommendation or opinion which is intended to influence the customer to make a decision about a financial product or a class of financial product, or if they could reasonably be regarded as being intended to do so. (emphasis added)

The Paper continues by stating that the changes would not change conversations which merely provide information, even tailored information, into personal advice. However, the Paper recognises that there will be cases in which it will be difficult to determine whether information that is tailored to a customer might contain a recommendation or opinion and therefore whether it would meet the definition of personal advice.

Relevantly, in Regulatory Guide 36: *Licensing: Financial product advice and dealing (RG 36)*, ASIC states that where factual information is presented in a manner that may reasonably be regarded as **suggesting or implying a recommendation** to buy, sell or hold a particular financial product or class of financial products, the communication may constitute financial product advice (e.g. where the features of two financial products are described in such a manner as to suggest that one compares more favourably than the other). RG 36 states that ASIC will not treat factual information as advice if:

- a) you clarify at the outset that you are giving the client factual information where there is a reasonable likelihood of doubt; and
- b) the information is not intended to imply any recommendation or opinion about a financial product.

It appears that you did not intend for advertisements or seminars to be regulated as personal advice. Part 1.8 of the Paper includes:

while a financial services provider that recommended a financial product to consumers in an advertisement or seminar would not be providing a financial service, ...

I agree that advertisements and seminars should not be regulated as personal advice. I am concerned that the proposed changes to the definition of personal advice will have the unintended consequence of making some mass communications personal advice, as explained below.

Effective advertisements for financial products are likely to include:

- a) a recommendation or opinion which is intended to influence the customer to make a decision about a financial product or a class of financial product; or
- b) information that is intended to imply a recommendation or opinion about a financial product.

Consequently, having regard to RG 36, effectively advertising financial products typically involves giving financial product advice.

It is possible that a consumer will be an existing client of a financial services provider at the point in time when an advertisement reaches them. Consequently, the provider will have or hold information about an aspect of the consumer's financial situation. Under the proposed change to the definition of personal advice, this would mean that an advertisement with a recommendation or opinion would be personal advice. In the case of a large bank, superannuation fund or insurer, their large client bases and the information they hold means that this risk would be very real. While the paper has other proposals to make it easier to provide personal advice, an advertisement might not meet the proposed good advice standard.

For example, consider Cameo 4 in the Paper – Personal advice provided by a digital advice provider. If we changed the facts so that Stefan already had \$1,000 invested with 123 Investment Managers, the advertising that Stefan saw for 123 Investment Managers on social media would have contained financial product advice if it included a recommendation or opinion which was intended to influence him to make a decision about a financial product or a class of financial product. As 123 Investment Managers has information about an aspect of Stefan's financial situation, any financial product advice would be personal advice under the proposed changes.

Change the facts in Cameo 4 further so that Stefan did **not** use the digital advice service on 123 Investment Managers' website and used his \$5,000 to invest in a high growth managed fund based on 123 Investment Managers' advertising. The advertisement which recommended investing in 123 Investment Managers' managed investment funds is unlikely to meet the good advice standard because Stefan has \$2,000 in outstanding debt on a high interest credit card. The advertising was about 123 Managers' managed investment funds generally. Even though Stefan would likely be within the target market for those products, the advertisement was not prepared having regard to Stefan's financial situation.

By contrast, the recommendation in the advertisement would not be personal advice under the current law because 123 Investment Managers did not consider Stefan's objectives, financial situation or needs in making the recommendation in the advertisement, and a reasonable person would not have expected 123 Investment Managers to have done so.

The Paper proposes removing the personalised element of personal advice which is a provider considering, or a client reasonably expecting consideration of, the client's circumstances. Consequently, all financial product advice would be personal advice if the provider has or holds information about the client's objectives, needs or any aspect of the client's financial situation. Mass communications would be personal advice for some consumers but not for others, based upon whether the advice provider had information about the recipient. However, as referred to above, the intention expressed in the Paper is that a financial services provider that recommended a financial product to consumers in an advertisement or seminar would not be providing a financial service, rather than providing personal advice.

To address this, I submit that the proposed definition of 'personal advice' be changed further to clarify that personal advice does not include giving financial product advice to the public, or a section of the public, in the manner prescribed by regulations made for the purposes of subsection 941C(4) of the Corporations Act. Subregulation 7.7.02(2) of the Corporations Regulations provides for subsection 941C(4) of the Corporations Act that:

- a) providing general advice to the public, or a section of the public, at an event organised by or for financial services licensees to which retail clients are invited is prescribed; and
- b) a broadcast of general advice to the public, or a section of the public, that may be viewed or heard by any person is prescribed; and
- c) distributing or displaying promotional material that:
 - (i) provides general advice to the public, or a section of the public; and
 - (ii) is available in a place that is accessible to the public is prescribed.

The examples provided in regulation 7.7.02 are:

- a) television or radio broadcasts;
- b) distributing promotional material contained in newspapers and magazines;
- c) sending a broadcast via an Internet website or webcast; and
- d) giving a public lecture or seminar for retail clients, including employees of a workplace.

I submit that the proposed changes to the definition of 'personal advice' in combination with the additional change that I proposed above would be likely to reduce regulatory uncertainty.

b)
Not answered

c)
Not answered

3. In relation to the proposed de-regulation of 'general advice' - are the general consumer protections (such as the prohibition against engaging in misleading or deceptive conduct) a sufficient safeguard for consumers?

a) If not, what additional safeguards do you think would be required?

Not answered

How should personal advice be regulated?

4. In your view, what impact does the replacement of the best interest obligations with the obligation to provide 'good advice' have on:

a) the quality of financial advice provided to consumers?

b) the time and cost required to produce advice?

Not answered

5. Does the replacement of the best interest obligations with the obligation to provide 'good advice' make it easier for advisers and institutions to:

a) provide limited advice to consumers?

b) provide advice to consumers using technological solutions (e.g. digital advice)?

Not answered

6. What else (if anything) is required to better facilitate the provision of:

- a) limited advice?
- b) digital advice?

Not answered

7. In your view, what impact will the proposed changes to the application of the professional standards (the requirement to be a relevant provider) have on:

- a) the quality of financial advice?
- b) the affordability and accessibility of financial advice?

Not answered

8. In the absence of the professional standards, are the licensing obligations which require licensees to ensure that their representatives are adequately trained and competent to provide financial services sufficient to ensure the quality of advice provided to consumers?

- a) If not, what additional requirements should apply to providers of personal advice who are not required to be relevant providers?

Not answered

Superannuation funds and intra-fund advice

9. Will the proposed changes to superannuation trustee obligations (including the removal of the restriction on collective charging):

- a) make it easier for superannuation trustees to provide personal advice to their members?
- b) make it easier for members to access the advice they need at the time they need it?

Not answered

Disclosure documents

10. Do the streamlined disclosure requirements for ongoing fee arrangements:

- a) reduce regulatory burden and the cost of providing advice, and if so, to what extent?
- b) negatively impact consumers, and if so, how and to what extent?

Not answered

11. Will removing the requirement to give clients a statement of advice:

- a) reduce the cost of providing advice, and if so, to what extent?
- b) negatively impact consumers, and if so, to what extent?

Not answered

12. In your view, will the proposed change for giving a financial services guide:

- a) reduce regulatory burden for advisers and licensees, and if so, to what extent?
- b) negatively impact consumers, and if so, to what extent?

Not answered

Design and distribution obligations

13. What impact are the proposed amendments to the reporting requirements under the design and distribution obligations likely to have on:

- a) the design and development of financial products?
- b) target market determinations?

Not answered

Transition and enforcement

14. What transitional arrangements are necessary to implement these reforms?

Not answered

General

15. Do you have any other comments or feedback?

I broadly support the proposed changes, subject to the issue that I raised above regarding the definition of 'personal advice'.