

Response to Quality of Advice Review

Name/Organisation: MinterEllison

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?

Yes. The obligations that apply to the process of giving personal advice under the current regime are perceived by advisers and issuers to be an impediment which adds unnecessary layers of cost and complexity. From a consumer protection perspective, we feel that the consumer should be provided with some evidence of each recommendation made (and ideally a summary of the likely benefits expected to be produced by following the advice) however we do not consider it necessary to be prescriptive as to the form this should take.

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?

The approach adopted in the proposed new "personal advice" definition is to establish a clear distinction based on a simple factual test. Although the proposed definition broadens the ambit of personal advice quite significantly, we recognise that the definition offers greater certainty than the current definition which requires a judgment to be made about the extent to which a reasonable person might consider the provider to have considered their circumstances.

That said, an immediate issue raised by the proposed definition is that it is unclear how 'have' and 'hold' are to be interpreted. In particular, is the test to be applied by reference to the person or entity giving the advice or would it also extend to all companies in a corporate group or entities operating under the same brand?

The proposed new definition is also built on the same foundational concepts (a "recommendation" or "statement of opinion") as the existing financial product advice definition. This implies that the same uncertainties that currently exist concerning the distinction between advice and information will remain. These uncertainties have led to ASIC seeking to impose an informal regulatory regime on those developing calculators and retirement projections on the grounds that they may cross the line into advice territory, even though many tools of this type do not provide the user with an opinion or recommendation and ought not be regulated as if they constituted advice.

We urge the Review to consider what more could be done to clarify this distinction and assist participants and consumers to be confident in knowing when regulated advice is being provided and when it is not.

We also think that fresh consideration will need to be given to what exemptions should be enacted. In particular, in our view, it will be important for the current exemptions to be retained and perhaps expanded. For example, we see a continuing role for the following exemptions and as the proposed new definition is broader than the current definition, it may be that additional exemptions are required:

1. the exemption in section 766B (1A) for giving a person an exempt document;
2. the exemption in section 766B (5) for advice given by lawyers and tax agents; and
3. the exemption in Regulation 7.1.33A for advice on asset allocation (although in our view, this exemption requires significant amendment to make it useful in practice).

It is hard to say whether the change will facilitate the provision of more personal advice to consumers. From a purely definitional perspective, it appears that more advice would be captured because the definition is broader in scope. We expect that product manufacturers will either:

1. embrace the new regime and commit more fully to providing personal advice to their customers (including by obtaining the required additional personal advice authorisation); or
2. retreat further from providing advice to customers if they choose not to obtain the necessary licence authorisation. Those in this category may currently take great lengths to limit any advice provided to general advice. Under the new regime, without the option of giving general advice, they may adopt strenuous efforts so as to avoid giving any advice at all.

Another way to encourage the availability of more advice, particularly simple advice, may be to broadly exempt issuers from key elements of the personal advice regime where they are advising existing customers. Issuers could be exempt from the licensing and record keeping obligations and would not be subject to the Code of Ethics, but still be required to give good advice having regard to information about the client available to the issuer at the time the advice is provided.

The fact that the concept of holding information is embedded in the definition may create an expectation that for any piece of personal advice, no matter how simple or confined the issue, the provider would need to gather and consider all information held about the client. This may create a practical impediment, depending on how readily one part of the organisation can obtain all information that the organisation holds.

Even once the information has been gathered, additional effort may be required in order to ensure that the information is accurate and up-to-date. We note that unfavourable outcomes could be caused by the provision of personal advice based on information that no longer accurately reflects a consumer's circumstances or financial standing.

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?

The prohibition against misleading and deceptive conduct is not directed toward the quality of advice provided. Poor advice will not necessarily contravene the prohibition.

While a provider may have general law obligations to the client, for example, under principles of negligence, we consider that reliance on general law is not a practical way of protecting consumers from harmful advice.

- (a) We consider that the proposals could be enhanced by including some codification of a quality standard for general advice. This could be as simple as including a requirement that financial product advice that is not personal advice must also be "good", using the same test as for personal advice.

We think this is an important measure when considering the influence of providers such as ratings agencies, whose recommendations could be relied upon by a significant number of consumers but would not be subject to any quality standards if general advice is de-regulated in the manner proposed.

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?

We agree that the best interests duty and its associated "safe harbour" are flawed concepts which are not achieving their intended purpose. We think that replacing these with a duty to provide good advice should lead to better quality advice and a more streamlined approach to providing advice (which should allow advice to be produced more quickly and cost-effectively).

We propose that the regime could be further improved if the 'good advice' standard were amended to expressly acknowledge the important role of scoping in defining the task to be performed by the adviser and hence, the degree of effort and cost. In particular, the assessment of whether the advice is "good" or not should not take place in a vacuum but should reflect all relevant circumstances (such as the customer's instructions and preferences, the agreed scope of the advice and the matters that are to be taken into consideration by the adviser). For example, this could take the form of the following bolded inserts:

'Good advice' is advice which is reasonably likely to benefit the client, having regard to the circumstances in which the advice is given, including the advice sought by the client, the information that is reasonably available to the provider at the time the advice is provided and which it is appropriate for the provider to consider having regard to the advice sought.

In the absence of such an acknowledgement, there is a risk that the adviser would need to consider all information held or potentially available to the adviser at the time of providing the advice.

We also recommend that the Review consider (if it has not already) the approach to scoping taken in the equivalent legislation in New Zealand. Following the Financial Services Legislation Amendment Act 2019, advisers in New Zealand can provide scoped advice under a duty to ensure that the consumer understands that the advice is scoped and the ramifications of this constriction.¹ Advisers are also required to consider the suitability of the advice having regard to the nature and scope of the advice at the time the advice is given.² We believe the ability to provide scoped advice would create consumer benefit and allow the regime to cater for consumers wishing to be advised under narrow conditions, such as in relation to single issue advice.

¹ Section 431J of the *Financial Markets Conduct Act 2013*.

² *Code of Professional Conduct for Financial Advice Services* p 3.

As discussed in our response to question 1 above, we also consider there may be merit however in drawing an explicit distinction between personal advice provided by product issuers in relation to their own products (**Institutional Advice**) and personal advice provided by independent professional financial advisers (**Professional Advice**).

Institutional Advice is inherently limited in nature and scope because it will only ever consider the products offered by the provider. In addition to any warnings or scoping used to draw this limitation to the attention of the consumer, we can see some merit in applying a specific label to advice of this kind to emphasise the difference between Institutional Advice and Professional Advice, and to operate as a simple, easily understood kind of scoping.

As discussed in our response to question 3 above, we believe that the proposals could be enhanced by including some codification of the obligations for providing advice as reliance on general law is not a practical way of protecting consumers from harmful advice and creates uncertainty and impediments to providing advice.

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)?

We think it will be important to more explicitly recognise the importance of allowing advice to be scoped and for the scoping to be taken into account in determining whether the advice is good. This is addressed in our previous comment.

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

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

We have made suggestions in our previous answers which address this question.

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?

In terms of the aim of achieving improved advice quality while increasing the affordability and accessibility of advice, we consider the recommendations generally strike an appropriate balance in terms of identifying the circumstances where the requirement to have a relevant provider involved should apply.

From a quality perspective, consideration could be given to including a requirement in relation to digital advice for a relevant provider to have oversight of the digital advice engine, particularly if the user pays a fee for the advice provided by the digital adviser (or a commission is payable to the operator or if it forms part of an ongoing arrangement).

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?

Yes.

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?

These changes will create flexibility for superannuation trustees to determine how to provide advice and how to charge members for advice. This flexibility should assist trustees to structure their fund's advice offerings in various ways. We expect that these changes may lead to more trustees obtaining authorisation to provide personal advice however some may prefer to refer members to a dedicated advice service.

Some areas that we think could be pursued in order to further enhance the role played by superannuation in the provision of advice to consumers include:

1. creating a specific condition of release allowing for modest withdrawals from a member's superannuation account to meet the cost of obtaining financial advice. This approach would do away with the need to ensure that advice paid for using superannuation money is strictly limited to advice in relation to the fund (and eliminate lingering concerns about the potential application of the sole purpose test). The current need to quarantine advice paid for from superannuation (which the proposals envisage being maintained) is problematic because ideally, advice should be provided that is holistic and takes account of all of the person's circumstances. It also adds an unwelcome and potentially costly burden to the system due to the obligation imposed on the trustee to monitor the kind of advice being provided to members;
2. recommending that the anti-hawking regime is amended as necessary to ensure that it does not create an impediment to superannuation trustees who wish to proactively advise members of options that may be beneficial to them. A superannuation trustee should be able to contact a member in the accumulation phase who the trustee knows is over retirement age and has ceased receiving contributions (and who is therefore likely to be retired) to alert them to the option (if eligible) of transferring to an account-based pension. Unfortunately, the anti-hawking regime would treat such an interaction as unlawful because even though the trustee and member are already in a relationship (i.e. because the person is a member of the fund), a pension product is treated as a separate product from the accumulation product and proactive contact by the trustee would be treated as unsolicited; and
3. considering removing the ban on payment of ongoing advice fees from MySuper accounts. The ban could create a perverse incentive for an adviser to recommend that a member switch out of the MySuper option.

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?

- (a) Yes. These reforms should have a significant positive impact in terms of reduction in costs.
- (b) No. We don't believe these reforms are likely to have any significant negative impacts on consumers.

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?

We welcome the proposed changes to remove prescriptive obligations as they relate to a statement of advice (**SoA**). There is no doubt that the way in which the SoA requirements are generally complied with is overly cumbersome.

We do believe that clients would generally benefit from having a written statement such as a record of advice which includes a summary of the personal advice provided and the reasons that the particular advice was given. At a minimum, we believe clients should be notified they can obtain a copy. Ideally, noting it is not an onerous obligation, we are minded to believe that a copy of this record should be provided to the client whether it is asked for or not. We note that this would also provide protection for the adviser.

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?

We support the proposed changes for giving a financial services guide (**FSG**). We believe it is not essential for an FSG to be provided in hard copy (unless specifically requested by the consumer) and believe the information in an FSG could be provided in a more flexible way. We believe that FSG information could simply be provided on the adviser's website in one easily accessible and navigable place.

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?

We agree with the proposed amendments to the design and distribution obligations (**DDO**) proposed by the Review. We believe consideration should be given to whether changes to the definition of personal advice should have any implications for the personal advice distribution exemption under the DDO regime.

Transition and enforcement

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

We would be supportive of a 2 year transitional period with an ability to opt-in to the regime before this date.

To facilitate transition to the new regime, we recommend that consideration be given to a simple opt-in process for conferring personal advice licence authorisations to enable personal advice to be given by product manufacturers in relation to their own products.

General

15. Do you have any other comments or feedback?

We appreciate the opportunity to make a submission in relation to the *Quality of Advice Review Consultation paper – Proposals for Reform* released on 29 August 2022.

MinterEllison is a leading Australian law firm. We advise major financial institutions, including banks, insurance companies and superannuation funds, as well as specialist fund managers, platform operators, financial advice firms, stockbrokers, and other financial intermediaries in Australia and overseas.

The views expressed in our submission are ours alone and do not necessarily reflect the views of our clients.

We agree that the regulatory framework applying to financial product advice is unnecessarily complex and would benefit from reform. It is encouraging that Treasury initiated the Review and is willing to consider a proposed reform. Central to this reform should be improvements to the accessibility and affordability of financial advice.

We support the following key proposals made in the Review, namely:

- (a) replacing the 'best interests' duty with an obligation to provide 'good advice'; and
- (b) doing away with the prescriptive disclosure requirements that currently apply when giving personal financial product advice.

In our previous submissions in response to the proposals and questions raised in the Review, we have highlighted potential refinements for consideration.

Given the importance of the policy reflected in the Review's terms of reference of enhancing both the availability and quality of financial advice, we would encourage consideration of legislative reform to oblige ASIC to consider these purposes in the administration and enforcement of the law. We note that this approach was adopted in New Zealand to ensure that the Financial Markets Authority would be guided by these principles.³

We look forward to continuing to engage with Treasury as it develops a new legislative framework for financial product advice. Please contact us if you have any questions about any aspect of our submission. We would be very happy to participate on any discussions on proposals or recommendations for changing the framework.

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³ Section 431B of the *Financial Markets Conduct Act 2013*.