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Mr Shon Fletcher  
Committee Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Email: [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au)

Dear Mr Fletcher,

**FURTHER SUPPLEMENTARY SUBMISSION TO THE INQUIRY INTO THE: -**

- **CORPORATIONS AMENDMENT (FUTURE OF FINANCIAL ADVICE) BILL 2011**
- **CORPORATIONS AMENDMENT (FURTHER FUTURE OF FINANCIAL ADVICE MEASURES) BILL 2011**

Further to our supplementary submission of 23 December 2011 and our initial submission of 25 November 2011, the Association of Superannuation Funds of Australia (ASFA) would like to provide this further supplementary submission in relation to the inquiry into the *Corporations Amendment (Future of Financial Advice) Bill 2011* ("the Bill"), and the *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* ("Further Measures Bill"), collectively "The Bills".

**About ASFA**

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. We focus on the issues that affect the entire superannuation industry. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

**Importance of Scaled Advice**

As indicated in our initial and supplementary submissions, ASFA is supportive of the Future of Financial Advice ("FOFA") reforms and of the enhanced ASIC powers proposed in the Bill.

Our primary interest is to ensure that the development of the FOFA legislation does not have the unintended consequence of precluding superannuation fund members from having access to assistance and advice with respect to their retirement savings. This assistance should be able to be provided by, or on behalf of, the trustee of their fund or their superannuation product provider, whether the assistance amounts to factual information, general advice or personal advice.

### **Application of Best Interests Duty to Scaled Advice**

As mentioned in our supplementary submission our fundamental concern is that financial advisers be able to provide “scaled” advice on single issues or simple scenarios.

In order for advisers to be able to do this there needs to be a degree of certainty as to what “best interests” means in the context of scaled advice. It is important that providers are not deterred from providing, and fund members are protected when seeking, scaled advice.

As such, the legislation needs to give appropriate certainty for advisers to enable them to provide scaled advice in an efficient and cost effective manner.

Concern has been expressed by some of our members, however, with respect to two aspects of sub-section 961B(2), which provides a type of “safe harbour” regarding the best interests duty.

#### **1. Adviser required to identify subject matter – need to allow agreement**

We indicated in our supplementary submission that we were testing scenarios as to whether scaled advice would be possible with the best interests duty as currently drafted. This testing has determined that paragraph 961B(2)(b) potentially does impede the provision of scaled advice.

Paragraph 961B(2)(b) requires the adviser to: -

*“(b) identify[y]:*

- (i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and*
- (ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the **client’s relevant circumstances**)”.*

Paragraph 961B(2)(b) effectively places the obligation upon the adviser to determine the subject matter of the advice.

While this is appropriate with respect to full or holistic advice, concern has been expressed in the context of scaled advice. Specifically, it is unclear as to what an adviser is to do in circumstances where it appears there is a discrepancy between the (scaled) subject matter of the advice which has been sought (for example on a single issue) and the subject matter indicated by the client’s objectives, financial situation and needs.

We agree that, where a client has sought advice on a specific matter and the adviser becomes aware of some aspect of the client’s objectives, financial circumstances or needs which indicates that advice on additional matters should be sought, the adviser should disclose this to the member. It would appear, however, that paragraph 961B(2)(b) may effectively place an obligation upon the adviser to determine that – irrespective of the advice sought by the client – the subject matter of the advice must now be broadened to include those additional matters.

This may be significantly wider than the client wants or for which the client is prepared to pay.

This is especially the case where single issue advice is being sought from a superannuation fund, where a member contacts the fund for advice with respect to one or more specific aspects of their superannuation. In this circumstance the member does not have the same relationship with the adviser as a client who has sought holistic advice from an adviser and generally will want to confine the advice to the single issue, not being interested in more holistic advice at that point.

### **Example of potential application of Best Interests Duty to Scaled Advice**

By way of example, a member of a superannuation fund may request scaled advice about rolling-over into a fund, saying “I’m just looking for some advice about rolling-over my super”.

Sub-paragraph 961B(2)(b)(i) means the provider should identify that the subject matter not only includes how to roll-over (explicit) but should extend to whether the client may lose insurance and the existence \ quantum of any exit fees in the rolling-out fund (implicit - client may be unaware of these potential consequences and so not ask explicitly about them). On the face of it, the scope of the subject matter of the advice could include insurance (in both funds); exit fees in the rolling-out fund and the process to roll-over from the rolling-out fund to the rolling-in fund.

Accordingly, the provider has to identify the objectives, financial situation and needs of the client as they pertain to whether the level of insurance in the rolling-out fund should be maintained, either by retaining it in the rolling-out fund or by obtaining or increasing insurance in the rolling-in fund. Clearly the adviser has to provide advice on the insurance cover held by the client in the rolling-out fund and the insurance held and available to them in the rolling-in fund.

The critical question appears to be, in the circumstance of scaled advice about rolling-over, the extent to which the adviser is required to provide advice with respect to the adequacy of the client's insurance arrangements overall? Even if there were no "prima facie" obligation to do so, it is unclear whether the position may be different if the client were to volunteer additional information – say that this was their only insurance and they had a minor child – which may serve to indicate, on the face of it, that the client may be significantly under - insured.

Given the current drafting of sub-paragraph 961B(2)(b)(i) it is unclear as to how far the adviser would then need to go in providing advice on insurance in this example.

While the adviser clearly needs to provide advice with respect to insurance within both the rolling-out and rolling-in fund, it is arguable that the adviser must identify that the subject matter of the advice must now encompass the overall adequacy of the client's insurance. As such, the adviser will need to identify quite a few facts about the client (dependants \ health \ income \ expenses \ assets \ liabilities \ cash-flow etc).

If this were the case, it is not clear what the position of the adviser would be if the client were to state “I don't want any advice as to the adequacy of my insurance at this time – I just want advice about rolling-over my super and my insurance in Fund X (rolling-over fund)”. It is arguable that, in the absence of an explicit ability to agree subject material, under sub-paragraph 961B(2)(b)(i) the adviser would be compelled to determine that the subject matter of the advice must include the adequacy of the client's insurance.

As such the adviser could either: -

- attempt to provide advice on adequacy - this would involve enquiring as to the client's circumstances, which - given their request to confine the subject matter to rolling-over their super - the member may be reluctant or even refuse to provide. This would result in a longer, potentially more expensive, and possibly futile, process if the client does not provide the requested information; or
- decline to give any advice at all in these circumstances.

In the case of the former - while it is likely that the adviser may be able to rely upon section 961H to provide what effectively will be "limited" advice, together with appropriate warnings, the client may well be upset at being asked what they consider to be unnecessarily intrusive, personal questions not relevant to rolling-over their superannuation. This can result in a disengagement from, or distrust of, the adviser or the advice process, especially in the circumstances, common in scaled advice, where the member may not have an pre - existing relationship with the adviser.

In the case of the latter – this is obviously deleterious to the provision of scaled advice.

### **Suggested Amendment**

Accordingly, in order for advisers to be able to deliver scaled advice, the Further Measures Bill should be amended to enable the client and the adviser jointly to determine the subject matter of the advice. Any such ability should, of course, be subject to relevant warnings where the adviser identifies that the subject matter could potentially be broader than that which has been agreed and would be documented in the Statement of Advice.

Given the asymmetry of knowledge between the adviser and client a balance will need to be struck between facilitating scaled advice and protecting the interests of the clients. It appears as though the solution may be to permit the client and the adviser jointly to determine the **nature** of the advice to be given but not, for example, the **products** to be advised upon (other than in the context of intra fund advice).

Once the (scaled) subject matter of the advice has been determined then the legislation should make it clear that paragraph 961B(2)(b)(ii) operates only to the extent of the agreed subject matter of the advice.

### **2. Adviser to take any further steps – needs to be relevant to subject matter**

Paragraph 961B(2)(g) states as follows: -

*"(2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:*

*.....*

*(g) taken **any other step** that would reasonably be regarded as being in the best interests of the client, given the **client's relevant circumstances**" (emphasis added).*

The reference to the "client's relevant circumstances" poses a similar difficulty to that outlined above with respect to sub-paragraph 961B(2)(b)(ii) in that it would compel the adviser to take any step which is reasonably indicated by the client's circumstances, irrespective of the (scaled) subject matter of the advice.

## Suggested Amendment

In order to facilitate the provision of scaled advice, paragraph 961B(2)(g) of the Further Measures Bill should be amended to confirm that the adviser should take any other step which would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances **and the (agreed) subject matter of the advice.**

For the avoidance of doubt it may be worth specifying that, in the context of scaled advice, either:

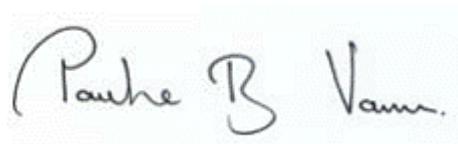
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- generally - the adviser will be taken to have met the best interests duty if the adviser performs the steps in subsection 961B(2) to the extent required to provide the scaled advice; or
- specifically - that the requirement under paragraph 961B(2)(g) to take any other reasonable step does not require the adviser to provide any further advice beyond the (scaled) subject matter.

\* \* \* \*

If you have any queries or comments regarding the contents of our submission, please contact me on (02) 8079 - 4021 \ 0805 or 0433 169 342 or via e-mail to [pvamos@superannuation.asn.au](mailto:pvamos@superannuation.asn.au).

Yours sincerely



Pauline Vamos  
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