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**Corporations Amendment (Future of Financial Advice) Bill 2011 – Exposure Draft**

I refer the exposure draft of the Corporations Amendment (Future of Financial Advice) Bill 2011. The overall aim of the ‘best interests’ obligation appears to be to place legal obligations on the person actually providing the advice (and not merely the providing entity). These new legal obligations largely reflect the obligations currently imposed on providing entities under s945A of the *Corporations Act 2001*, although certain additional or more specific obligations are referred to in the list of matters set out in proposed s961C(2).

My recommendation in relation to the draft Bill is that a further specific obligation should be imposed on advisers under s961C(2), namely an obligation to take ‘reasonable steps’ to ensure that an adviser’s client can sufficiently comprehend the advice, and the basis for the advice, so that the client can make an informed decision about whether to accept the advice.

I recognize that the current law requires various *documents* to be provided to the client by the providing entity (not the person actually providing the advice), including a Statement of Advice (SOA), the broad purpose of which is to help the client to decide whether to accept the advice or not. As noted in the Explanatory Memorandum to the *Financial Services Reform Bill*, an SOA should:

canvass the consideration given to the client’s objectives, financial situation and needs and how the advice will address those objectives, financial situation and needs. It should illustrate how the recommendation made to the client addresses the request for advice originally made by the client, taking account of subsequent investigations and considerations on the part of the providing entity.<sup>1</sup>

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<sup>1</sup> Parliament of the Commonwealth of Australia, *Financial Services Reform Bill 2001 – Explanatory Memorandum* [12.53].

However, merely giving an SOA to the client will not ensure that the client is in a position to make an informed decision. In practice, whether a client will be able to make a fully informed decision about whether to accept personal advice he or she receives will depend on a range of matters, including whether the client actually reads the SOA, whether the client can understand the information in the SOA (which, in turn, will depend partly on the client's level of financial literacy), the quality of the disclosure in the SOA and, critically, the extent to which the adviser adequately explains the advice to the client and answers any questions the client may have about the advice.

Under the current law, there is no specific obligation on advisers or providing entities to take steps to ensure that the client understands the advice they have received. This may be contrasted with the position which applied in relation to life insurance advisers under the Life Code (which applied prior to the commencement of the *Financial Services Reform Act 2001*). Under clause 12(b) of the Life Code, an adviser was required to 'take reasonable steps to ensure that the customer can sufficiently comprehend the advice and the basis for the advice to place the customer in a position to make an informed choice.' In my view, an obligation similar to that contained in clause 12(b) of the Life Code should be specifically imposed on all advisers under the new best interests obligation by way of an amendment to s961C(2).

Interestingly, ASIC has recently acknowledged the important role that advisers can play in educating consumers. Specifically, ASIC has recommended that advisers should 'educate clients about risk and return so that their expectations are more realistic'.<sup>2</sup> In my view, such 'education' is merely as an aspect of the duty, which should be placed on all advisers, to take reasonable steps to ensure that an adviser's client can sufficiently comprehend the advice, and the basis for the advice, so that the client can make an informed decision about whether to accept the advice.

Please contact me if you wish to discuss these comments. My email address is [Andrew.Serpell@monash.edu](mailto:Andrew.Serpell@monash.edu).

Yours faithfully

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<sup>2</sup> ASIC *Review of financial advice industry practice*, Report 251 (September 2011), p.26.