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To Whom it May Concern,

RE: Draft FoFA Bill

We thank Treasury for the opportunity to provide feedback on the Corporations Amendment (Future of Financial Advice) Bill 2011 exposure draft.

The Australasian Securities Dealers Association (ASDA) congratulates Government on initiating positive steps towards enhancing consumer protection. We believe the overarching goals to be progressive and positive for consumers and the entire financial services industry.

ASDA also believes that there is an increasing disconnect between legislation, licensing and operations. We encourage Treasury and the Government to address the structural aspects of the financial services industry in Australia prior to enacting FoFA legislation to truly enhance consumer protection.

Whilst the intention of the bill is noble we believe that the exposure draft has components that require a bi-partisan and industry review if we are to promote competition and the efficient provision & supervision of financial services in Australia.

Please feel free to contact our association if you would like any further information on our submission or any other matter.

Yours sincerely

Jamie Coote

Submission on Exposure Draft

Corporations Amendment (Future of Financial Advice) Bill 2011



Australasian Securities Dealers Association

Registered Registered Body 152 970 548

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Preamble

In the following document, we will identify three portions of the exposure draft Corporations Amendment (Future of Financial Advice) Act 2011 (hereinafter referred to as “the Bill”) that have consequences for our membership base and Australia’s financial wellbeing. It is not an exhaustive list, however having read other submissions and briefings, we hope add value and substance to the consultation process.

Unfortunately some of the objectives stated by the Government in the explanatory memorandum seem to be contradicted in the draft legislation. The Bill seems to be pushing consumers away from advice and especially from specialised advice.

ASDA believes the objectives of the proposed legislation are to enhance consumer protection. We also believe that it aims to provide the regulator (ASIC) with the power to effectively and efficiently supervise Australian Financial Services Licence (AFSL) holders and remove unwanted behaviours and practices from the financial services industry.

Based on the stated beliefs and assumptions, of which we and our members are supportive, we would like to make the following comments before addressing the Bill specifically.

1. Our members & their clients should not be disadvantaged: The majority of ASDA members are highly experienced Stockbrokers that have moved on from ASX participant firms to establish their own AFSL;
2. Our members are specialists in their businesses and would like to see inappropriate behaviour by advisers and AFSL’s removed from the industry regardless of their size, status or persuasion; and,
3. We are supportive of suitable regulation that enhances the efficient provision and supervision of financial services to retail clients in Australia.

Retail consumer whilst not wanting to have to read an AFSL’s license conditions of an AFSL they seek advice from, we believe would like to know if they are being advised by someone that plans across their entire investment portfolio, or can someone that offers highly specialised advice within a product class. ASDA is supportive of full disclosure by AFSL’s and authorised representatives of the products and services that they offer.

ASDA members are interested in a solid consumer protection regime, where compliance costs are appropriate to an AFSL’s scale and complexity. A benchmarking exercise has not been conducted in Australia that provides relevant information on compliance costs across varying AFSL’s to be able to assess the impact of the proposed changes on competition and service provision.

ASDA is concerned that without some structural changes to licensing prior to the possible enactment of this legislation in its current form, nominal non-compliance will become a feature of financial services provision in Australia.

Issue 1 - Subdivision B - Provider must Act in the best interests of the client

It is ASDA's belief this enhanced version of [Subdivision B of Division 3 of Part 7.7](#) is for the most part well written and a progressive change. What we wish to avoid is nominal non-compliance by our members AFSL's and their Corporate Authorised Representatives (CAR's).

Part 7.7A - Section 961C(2)(f)

(f) assessing whether the client's objectives could be achieved, and needs met, through means other than the acquisition of financial products; and

It is our belief that if a client calls a stockbroker, or someone that works in an AFSL that performs the same role as stockbrokers and could nominally be called a securities adviser, then they expect to get advice on a class of products.

Indeed the majority of retail clients would be confused by a "stockbroker" according to the general perception of the term would be giving advice on anything other than Market Listed Securities (MLS). It would be the equivalent of going to a butcher and asking for bread or candles.

Media Release 127 of 29 August 2011 alluded to a carve out for stockbrokers, and whilst we do not know if any proposed carve out is considered in relation to 961C(2)f, we believe that it should. The highly specialised nature of these boutique advisers, referred to by ASIC as Indirect Market Participants, could make this a complicated issue.

ASDA supports a carve-out for brokers, however, we wish to raise with you our concerns relating to the potential application of this carve-out, based on our advice on the Bill, our understanding of the Indirect Market Participant AFSL's and the broader AFSL community.

Issue 1 - Possible Solution 1

Ask ASIC to introduce a "broad investment advice" license condition for AFSL's

Current AFSL Licensing arrangements allow for 53 different license conditions around the types of financial products they are able to advise on. We propose that it is possible to review these conditions and come up with a set of condition specific to businesses that provide broad investment advice that supports section 961C(2)(f).

We believe this will benefit retail consumers by them being able to select an AFSL or an adviser. If we are supportive of highly specialised advice to retail clients and competition within financial services provision, then an AFSL should be required to disclose their primary function(s) to their clients.

Additionally, if an AFSL does provide both broad wealth creations strategies (financial planning) and highly specialised services such as “stockbroking”, then it should be required to ring-fence those services and disclose referrals between those services.

The advent of sophisticated technologies, one of which ASIC uses to supervise the trading of market listed securities, should be the standard in the administration of an AFSL in the 21st century.

ASDA does not propose that a software system be mandatory, just that a system that is appropriate for the scale and complexity of the business be in place.

The benefit marrying the Bill with license conditions in our opinion will serve the intended purpose of section 961C(2)(f) of the exposure draft.

Issue 1 - Possible Solution 2

Provide Relief for advice on Market Listed Securities (MLS)

Whilst relief for MLS as proposed by the Stockbrokers Association of Australia (SAA) may be the simplest way to keep the current bill intact for a portion of the AFSL community, ASDA does not believe that this proposal will assist in meeting the Government's stated objectives of the Bill.

The problem with addressing the issue this way is the number of AFSL's licensed to advise on these products incorporates 2064 licensees, most of whom do provide broad investment advice beyond the MLS product class. This number is elaborated on in the supplementary information of this submission.

By excluding MLS the intention of the Bill is diluted somewhat in ASDA's opinion and a lesser solution to the first proposed although the first proposal requires a high level review that would help institute the changes that have been proposed as a result of the Johnson report.

Issue 2 - Subdivision F - 961P(3) Civil Action for Loss or Damage

(3) This section does not affect any liability that a person has under any other law.

Whilst ASDA believe that advisers and licensees that do not look after the best interests of their clients should remedy that client, we also believe that this portion of the Bill will drive clients away from advice.

It seems to promote a client being able to receive a FOS determination, a financial services licensee or adviser will complying with the FOS determination, and then retail consumer commencing civil action against the licensee or adviser.

We do not believe this is the intent however unfortunately, legal advice during this short exposure period indicates that there is little or no protection for advisers and licensees even if they do comply with the Bill.

Financial Ombudsmans Service (FOS) Terms of Reference (ToR) were approved by ASIC and published in July 2010. Section 8.8 of the ToR state;

8.8 Applicant acceptance of a Recommendation or Determination

In order to accept a Recommendation or a Determination, the Applicant must provide the Financial Services Provider (if the Financial Services Provider so requests) with a binding release of the Financial Services Provider from liability in respect of the matters resolved by the Recommendation or Determination. The release must be for the full value of the claim the subject of the Dispute, even if this amount exceeds the amount of the remedy decided upon by FOS. The release shall be effective from the date on which the Financial Services Provider fulfils all of its obligations under the Recommendation or Determination.

The intention of the s8.8 FOS ToR, and indeed FOS in some cases we believe was to relieve the courts of some financial services complaints and it seems that the Exposure Draft is promoting both FOS and legal action to clients.

The ongoing problem here is that compliance costs for highly specialised boutique AFSL's are growing at a disproportionate rate to larger financial institutions.

ASDA's boutique AFSL's are already governed by the multiple acts, Market Integrity Rules through their clearing and execution service provider, the participants contracts and their own

internal policies & procedures. In some way a balance has to be struck that promotes competition and consumer choice whilst enhancing consumer protection objectives.

Issue 2 - Possible Solutions

- 1. Amend 961P in the Bill to incorporate the regulators approved External Dispute Resolution (EDR) schemes determinations appropriately.**
- 2. Ask the regulator to amend the FOS determination waivers to make the client liable to repay the determination with interest and costs.**

Both of these solutions will remove any uncertainty around this portion of the Bill. Whilst consumer protection is important, we encourage Treasury to redraft the Bill so that licensees and advisers have appropriate protection from frivolous prosecution.

Case management of the courts and FOS will always go up during periods such as those experienced by markets over the last 4 years. With uncertainty still abounding, we hope that any enacted legislation will be supportive of:

1. Attracting & retaining professional people to the financial advice industry.
2. Promoting competition in financial services.
3. Supporting small business contribution to the Australian economy.

Once again, ASDA is fully supportive of appropriate consumer protections, especially for retail clients, however we hope that the Government takes into consideration that professional independent advice will greatly enhance consumer protection objectives.

Issue 3 – Schedule 1 - 920(1A) (d)

ASDA and its members have found ASIC to be engaging and diligent in its operations, especially since the McKinsey review into its structure and operations in 2008. Indeed we have found them most helpful in providing areas of focus for our members operations through the Markets and Supervision teams based in Sydney, Melbourne and Perth.

920 (1A) of the Bill states;

(1A) In considering whether, at a particular time, there is reason to believe that a person is not of good fame or character, ASIC must have regard to:

- (a) any conviction of the person, within 10 years before that time, for serious fraud; and
- (b) whether the person has held an Australian financial services licence that was suspended or cancelled; and
- (c) whether a banning order or disqualification order under Division 8 has previously been made against the person; and
- (d) any other matter ASIC considers relevant.

Whilst we understand that the Government may feel the need to give ASIC such sweeping powers, we are concerned that appropriate check and balances are not in place to prevent malicious pursuit of advisers or licensees under their supervision.

Most enforcement agencies throughout the developed world have an internal agency or overseeing body that has the ability to conduct investigations.

Banning orders, enforceable undertaking and disqualifications are handed out by ASIC and in most cases with good reason. We do however see that if such a malicious pursuit did occur under 920(1A)(d) then the tarnished image of the adviser or AFSL would be significant.

If that pursuit did occur and was unsuccessful, we imagine that the financial and public perception implications for the regulator would be equally significant.

We seek assurances from Treasury that safeguards are in place and have been further considered during the drafting of this legislation.

Supplementary Information

AFSL Statistics

In total there are approximately 5000 AFSL licensees in Australia and an additional 61,000 businesses or individuals providing financial products to Australian consumers as Corporate Authorised Representatives (CAR's) of the AFSL's.

The table below illustrates the weighting of popular license conditions in Australia.

| Type of Licence | Total in Australia |
|-----------------------------|--------------------|
| Securities Wholesale | 2869 |
| Securities Retail | 2064 |
| Insurance | 2749 |
| Retirement Savings Accounts | 1179 |
| Superannuation | 1705 |

There are 90 odd Participants of ASX of which 42 are referred to as full service brokers and are represented by the Stockbrokers Association of Australia (SAA).

There are an additional 480 AFSL holders that offer specialised retail securities advice with 2064 licences on issue that offer "broad" investment to advice as well as specialist MLS advice to retail clients.

About ASDA

The Australasian Securities Dealers Association (ASDA) is governed by its [committee of management](#) who come from our member firms. ASDA is committed to a well regulated & transparent market for financial products and works with Government, regulatory bodies and industry service providers on a wide range of issues.

Our [members charter](#) helps define what we feel a professional financial services firm should be. The 250+ businesses that we represent are engaged in providing advice and services to the AFSL's who provide the advice on pre-IPO and market listed securities to wholesale and retail client bases as well as broad investment planning activities. Our members run highly specialised businesses and that are predominantly not members of ASX.

ASDA believes that the ever increasing number of boutique AFSL's who are responsible for an increasing percentage trades occurring on the ASX and other execution venues globally deserve a low cost & efficient operating environment. Our members have high levels of daily interaction with their staff over compliance and operational issues, and have generally been trained by ASX member firms.

Our figures show that boutique AFSL's either led or played an active role in 43% of all IPOs in Financial Year 2011. Additionally numerous capital raisings have been facilitated by our members for Australian companies with over \$3.5 raised in FY10-11.

The significance of the boutique AFSL role is of course greater than just these statistics as non-ASX Participants are more likely to assist capital raising by small to medium business, the growth engine of the economy, and have far greater reach to retail investors.

Whilst many in the community and clients would recognise our members as "stockbrokers" (not understanding the technical differentiation) they are appreciative of the high level of client interaction that comes from dealing with a boutique AFSL.

More information on ASDA can be found at:

