

## Appendix 1: Consultation template

**Name/Organisation:**

**Robert Oser BEc LLB FCPA**

**GPO Box 453**

**Sydney NSW 2001**

**Ph: +61 419 270 642**

[roboser0@gmail.com](mailto:roboser0@gmail.com)

### 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?

No, I do not agree – if the advice is provided to a retail client. The position would be otherwise for Sophisticated investors, should the distinction between the two be retained.

Proposal 1 should be adopted if there are no detriments.

Personal advice should be an umbrella over all categories of product advice, 'one-off' advice and financial planning. But if this means that the new definition of 'personal advice' would permit advice regardless of whether the adviser has actually considered the client's objectives, financial situation or needs, **assuming the adviser does have such information about the client**, that would be reversing the FOFA reforms.

If the adviser has no information, other than the inquiry, then the objective *reasonable person* test should be an obligation, **subject to further consultation**. Otherwise, there is risk of bad advice, under the amended financial advice scheme, inadvertently or negligently.

Perhaps, all that is required in an amended definition is to import the : *do all that is necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly*; test (section 912A(1)(a) of the *Corporations Act 2001*.

## 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?

Proposal 3 - '*Good advice*' is advice that would be reasonably likely to benefit the client, having regard to the information that is available to the provider at the time the advice is provided. **The proposal for 'good advice' has strong merit.**

- a) The proposal, if adopted, is unlikely to reduce uncertainty, **assuming uncertainty does exist**. In a new environment, regulatory uncertainty will increase until a transitional period is concluded and even longer, until unforeseen consequences are sorted out.

The advice will be 'good' if financial objectives agreed upon between provider and client are achieved within an agreed time frame, and importantly, if the adviser has the necessary skills, knowledge, and experience to provide the advice appropriate for the engagement. This includes appropriate product information. The quality is not a function of fee cost.

It is unclear whether the provider will have an obligation to collect all the relevant information. The *reasonably likely to benefit the client* test protects the adviser, not the client.

Whether advice is 'good' or 'bad' or in the middle, can be decided only by "**look back**". Generally, advisers and fact sheets from product managers recommend a time cycle for evaluation, lasting years or evasively called "long term". Whether a financial plan prepared, for example for a retiree, is or is not 'good advice', may not be known for years.

The Morningstar website comments: *It is far from straightforward what 'good advice' means. A person can visit five financial advisers and receive six opinions.*

- b) No - unlikely to make much difference. The issue is not "more" but whether it is adequate for the circumstances, of quality and at a reasonable cost to the consumer/investor. Nevertheless, the definitional changes should be capable of expanding access to quality advice. At this stage this is aspirational.

- c) No - The ability is unaffected. Advisers at financial institutions have varying degrees of skills and experience, operating in a hierarchy of corporate organisation. The institution will determine what type of service is offered within the regulatory framework and at what cost. Financial institutions will give all the help clients need, provided the service is profitable.

I have no comment on Proposal 4 – requirement to be a relevant provider.

**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 ‘general advice’ provisions are otiose from both consumer and provider standpoints. Proposal 2 should be implemented.

A consumer/investor is unlikely to have the resources to pursue legal remedies if there is harm from general advice. The consumer/investor who is a retail client and relies on a licensed adviser is unlikely to be in a position to engage legal advice to pursue any remaining breach of Chapter 7 of the *Corporations Act 2001* or the common law. I am unable to make a practical recommendation. The obligation to act *efficiently, honestly and fairly* would be a safeguard.

### 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?**

- a) “Quality” depends primarily on the provider and cannot be prescribed. Professional judgement has to be exercised.  
 b) This question defies a simple answer. What seems to a consumer a basic or simple question, is often incapable of a quick and cheap response irrespective of what the regulatory scheme demands. Providers are likely to over-estimate their costs in submissions to this review. “Financial advising” and “financial planning” are profitable businesses with high enterprise values.

**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)?

I do not have the competence to make the predictions asked for.

Regarding the proposal to remove the best interests obligation, and retain the safe harbour rule, the Hayne Royal Commission assessment is preferable for the reasons stated by the Commissioner. If a broad-based principles approach is the way to reform then, clearly, the best interests obligations should be retained and the safe harbour steps removed as redundant and in conflict with the principle primacy. The best interests obligations now underpins the whole scheme of consumer protection. Fiduciary-like obligations are appropriate. Removal of the best interests obligations is not in the public interest. ASIC has stated the best interests obligation is *high-level principle-based*.

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

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

a) The concept of "limited advice" invites uncertainty and confusion. Advice is advice and its contents will reveal its quality. An approach which may not have been considered is the maxim: *de minimis non curat lex*. This rule could be developed to introduce a value/\$ threshold which exempts financial advice from the full obligations of personal advice thus facilitating low cost, simple advice.

b) I do not have the expertise to comment. Advocates for digital advice, need to disclose how the advice will be charged. Annual and/or monthly subscriptions will not be welcomed by consumers.

**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?

I do not understand what is proposed.

**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?**

All professions, including law, accounting and medicine, impose quality standards which require continuing education and development following qualification and licensing. Any “watering down” of professional standards will be to the detriment of consumers. In the law and accounting professions, competent practitioners welcome the discipline of professional standards. This standard requires regular maintenance and is not a once only requirement.

Assuming the professional standards for financial advisers are, in effect, imposed by the Code of Ethics and section 912A, it is unclear what changes are recommended by the Review.

The Terms of reference states that the Review will not make recommendations on professional standards for advisers (6.1).

### **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?**

No comment.

## 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) A streamlining proposal will be of benefit to providers;
- b) Consumers will make a judgement whether they are receiving value for money and will have their own monitor of fees paid. For consumers, the outcome will be neutral.

### 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?

There seems to be misconception and/or misinformation about the costliness of SOA's. The set-up cost may be material but it is crucial for the establishment of a provider/client relationship. Updates are not a burden and help the adviser to think carefully and logically about circumstances elicited from the consumer/investor, and the advice already provided.

Whether SOA's are short or long, it is correct to say, as in the PP, that they will be templated and generic to the (maximum) extent the provider believes they comply. That is in itself a contradiction that they are costly to prepare.

Records of advice whether by ROA's or other forms are made by ethical and quality providers, even if not required by legislation or regulation. Therefore, there is no practical change or cost saving in substituting another legal obligation as in Proposal 9.

AFCA seems confused about file notes (paragraph 2.5 of PP). Such records (usually following phone conversations between the consumer/investor and its adviser), constitute records of advice, ROA's; they supplement the SOA's. In practice, file notes may not be made, intentionally or by neglect. If they do exist, there is no assurance they will be copied to the client or ASIC, if so requested. File notes may be made electronically, including as internal emails, or by hand.

**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?

*Consumers do not want lengthy documents..... (para 6.2 of PP); that is until they wish to seek remedies for what they regard as bad advice. Notwithstanding the above, FSG's do not serve any useful purpose in the hands of consumers unless they ask for it. Proposal 10 is uncontroversial.*

### **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?

No comment.

### **Transition and enforcement**

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

No comment.

## General

## 15. Do you have any other comments or feedback?

- Proposals for the new regime, especially the inchoate ‘good advice’ proposal, should be tested against a representative sample of FOS/AFCA Determinations. The testing will reveal whether the hypothetical outcome is different to the actual decision under the then current law and, if so, whether the new scheme is meeting the objectives set in the Review.
- It is not explained how the proposals will make it easier for consumers to get personal advice, re-badged as ‘good advice’. Will advisers continue to have to observe the licensing conditions in section 912A of the *Corporations Act* 2001; and related provisions, and the Code of Ethics (section 921E)? If the Best interests obligations are removed, a new Code of Ethics will need to be devised. All professions impose ethical conduct on members and this is in the public interest.
- “A new way to regulate advice” in the CP (page 7) **and:** --- *In my view, the current regulation is also the wrong way around – it purports to protect consumers from poor and harmful advice by regulating the conduct of the adviser giving the advice rather than regulating the content of the advice. This too appears to be an outworking of the view from the Ripoll Inquiry that all personal advice should be given by financial advisers with fiduciary-like (if not fiduciary) duties to their clients. The result of this is that the regime is poorly suited to financial institutions (banks, insurers and superannuation funds) that may want to and may be asked to give personal advice to customers (page 17): ---are commendable and are much wanted ideals which merit implementation but in its present conception are unrealistic. The law is not the means to achieve ‘good quality advice’. If this were possible, we would have had it by now in corporate law, commercial law, criminal law, income tax law, law of negligence and so on, not to mention medicine. **How is it proposed to regulate the content of advice?***
- The paper states “Consumers want good advice – not documents and processes.” I believe this statement puts a misleading emphasis on consumer expectations for good advice.

The current regime is an attempt to drive licensed advisers to give ‘good advice’. There is a risk of advisers becoming compliance driven but there is a natural tendency to overstate the “fear” of compliance breaches. The documents and processes are there to achieve the minimum quality. They are merely mechanisms. That is not to say, changes should never be made to reduce perceived complexity and excessive costs. The danger is to adopt changes which “throw out the baby with the bathwater”.



- In paragraph 1.4 of the PP: *In my view, a principles based approach to regulation would encourage providers to give personal advice by making it easier to do so, where that is appropriate, rather than by narrowing defined terms, creating new categories of advice and adopting different rules for those different categories.* This is a much-wanted approach which requires heroic assumptions. Nevertheless, there are always opportunities for simplification and statements of principles to guide interpretation. Arguably, the best interests obligation is principle-based as ASIC has confirmed.
- The review does not mention the obligation in section 912A for a Dispute Resolution System. The setting up and maintenance of a formal complying system which satisfies ASIC Regulatory Guide 271 imposes material fixed costs. Consideration might be given to removing this requirement unless retained by choice. Cost savings may be available if disputes/complaints are handled on an *ad hoc* basis with reference to ASIC and/or AFCA should that become necessary.
- It is optimistic to believe that a reduction of the cost base of providers will cause a corresponding reduction in fees charged to consumer/investors. The outcome would be an improvement in the profit margin of providers and increase in the discretionary bonuses distributed to licensed advisers with the balance available for fee reduction. The provider's business model should include affordable advice using marginal cost principles.