

ASIC Consultation Paper 183

Giving information, general advice and scaled advice

SUBMISSION

CP183 sets out ASIC's proposed guidance on their view of the difference between giving **information, general advice** and **personal advice**. It also describes its view on how to meet the best interests obligation and other obligations in Div 2 of Pt 7.7A of the *Corporations Act* in the context of giving a form of personal advice called '**scaled advice**'.

The Stockbrokers Association of Australia would like to provide comments on the following aspects of CP183:

1. Implications of giving Scaled Advice, and
2. Comments on *Industry Example 14* (Stockbroking)

Scaled Advice

While the term has only recently been used by ASIC and in the *Act*, *Scaled Advice* is a concept that is very familiar to our Members and well understood in stockbroking. It is very common for clients of stockbrokers to contact their adviser for advice on particular stocks to buy or sell. This does not require 'holistic' or 'comprehensive' advice on their full financial situation, but discreet advice on a small portion of the client's portfolio of investments, perhaps one or two stocks. More often than not, the advice is *further advice* under the *Act*¹, and is therefore not accompanied by a Statement of Advice.

'**General advice**' and '**personal advice**' are terms which are already defined in the *Act*: s766B(4) and s766B(3) respectively. (These terms are not changing under FOFA.) The new FOFA best interests and other obligations only apply to personal advice: s961(1).

¹ s946B(1) as amended by Reg.7.7.10AE and Reg.7.7.10B

'Scaled advice' - while it is mentioned once in a note to the Act - is not a term that is defined in the Act. However, the concept has gained prominence through statements by the Government and ASIC from 2011 onwards to the effect that they want to encourage it.

For example, in CP164 *Additional guidance about how to scale advice* July 2011, ASIC stated –

1. Many Australians would like more information and advice about investment issues. An ASIC report released in December 2010 found that one third of Australians 'are now expressing a preference for **piece-by-piece advice** rather than **holistic** or comprehensive advice'.
Note: See our report *Access to financial advice in Australia* (REP 224) at paragraphs 53 and 62. A copy of this report can be downloaded at www.asic.gov.au/reports.
2. The proposals in this consultation paper are aimed at increasing access to advice for Australians by **facilitating the provision of piece-by-piece advice**, where appropriate and practical. (CP164 p.6)

In late 2011 and early 2012, the Stockbrokers Association and other bodies argued before the parliamentary inquiries into the FOFA Bills to limit or remove the obligation to take '*...any other step that would reasonably be regarded as being in the best interests of the client*' - when giving advice: s961B(2)(g). This was because it was so broad that it could limit the ability to give **scaled advice**. In the event, the Government did not change the wording of s961B(2)(g). However, in the final legislation, in order to address industry's concerns, an explanatory note to subsection 961B(2) has been added, which contemplates scaled advice, as follows:

*Note: The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek **scaled advice** and that the inquiries made by the provider will be tailored to the advice sought.*

Guiding principles

Table 1 of CP183 (p.12) sets out the ASIC guiding principles for giving information, general advice and scaled advice. Some of the main points are set out as follows:

- 1. Giving information** (Sec B) You can provide factual information to a client **even if** you have information about the client's relevant circumstances (i.e. their objectives, financial situation or needs).
- 2. Giving general advice** (Sec C) You can provide general advice to a client **even if** you have information about the client's relevant circumstances. We will not consider general advice given by you to be personal advice if you **clarify this with the client** at the time you are giving the advice, and you **do not in fact** consider the client's [relevant

circumstances] in giving the advice.

3. Giving scaled advice (Sec D)

...You can scale **all types** of advice, including advice about complex issues. The inquiries you make, as an advice provider, will need to reflect the complexity of the matters you are considering.

Some points to consider when giving scaled advice are:

- ...
- The rules that apply to 'scaled advice' and 'comprehensive advice' are **identical**. It is the level of inquiries you need to make as an advice provider (to meet your legal obligations) that will be different.
- Scaled advice can include single topic advice or multi-topic advice.
- It should be **very clear** in your Statement of Advice (SOA) (if you are required to give one) what advice you **have provided** and what advice you **have not provided** (as relevant to the subject matter of the advice), the **implications** of this, and **why** you have taken this approach.
- Scaled advice is not lesser quality advice.
- Scaled advice does not mean that the advice provider who gives the advice can have lower training standards.
- ...

4. Communicating the service you are providing (Sec E)

You must ensure that you **communicate clearly to clients the type of information or advice you are providing** and the type of advice **you are not providing** and the **implications** of this. We consider that it is unlikely that scaled advice will be in the **best interests of a client** if they do not understand any significant limitations or qualifications that apply to it.

5. Delivering the information or advice (Sec F)

The Corporations Act is neutral about technology. This means that you can give factual information and advice by telephone or email, on the internet, face-to-face or in any combination of these or other ways.
(emphasis added)

What are the implications of giving scaled advice?

In two of the guiding principles above (3&4), ASIC stresses the need to communicate the **type** of advice the client is receiving, and especially the **implications** of the type of advice.

This could present difficulties in practice. For example,

- **Scaled v. Comprehensive Advice - Implications?:** What are the **implications** of getting **scaled** (personal) v. **comprehensive** (personal) advice? What do you tell the client? Neither term is defined in the Act - only in the Consultation Paper, and as ASIC states, the same rules apply to both;
- **Personal v. General:** We would submit that the existing General Advice warning of s949A is sufficient, and that no further disclosure of **implications** should be necessary;
- **Scaled Advice warning:** If ASIC demands that the implications of scaled advice be made clear to the client, does this mean they're imposing a new obligation (not in the law) to provide a variation of the s949A general advice warning akin to a 'Scaled Advice warning'? We trust that this is not the case, as it is not necessary;
- **Telling the client what advice you have provided, and what advice you have not provided (Principle 4 above) v. 'Clear, concise and effective'?:** In the SOA, determining and explaining to the client what was 'In Scope' (provided) and 'Out of Scope' of the advice (not provided) – both in terms of the client's personal circumstances, and the range of products – would add considerably to the **length and complexity** of the document. Indeed, the list of 'Out of Scope' matters could be longer than the 'In Scope' matters. This would be contrary to the requirement that the document be '**clear, concise and effective**': s947B(6). (The same could be said for these disclosures when giving further advice for which an SOA is not needed.)

Industry Examples – Stockbroking (Example 14 p.136)

Stockbroking provides many good examples of scaled advice. Example 14 (p.136) involves a stockbroker (Steve) giving advice to an existing client (Ellora), and gives three different scenarios: factual information; general advice and personal advice.

In general, our Members thought that the 'Factual Information' and 'General Advice' parts of this Example were useful, but in relation to the 'Personal Advice' example (p.137), they had the following comments:

- a. It tends to labour the 'compliance points' i.e. checking to client's details so that there's been no change so the SOA is up to date, mentioning the portfolio review when all she wants to talk about is one stock, etc;
- b. It may not reflect reality. Conversations with clients – especially those who regularly speak to their adviser – tend to be much more truncated and briefer than this;
- c. While it may be useful for adviser training, this example should not be interpreted by FOS or ASIC as the industry standard for all occasions;

- d. Records of Advice only have to be given to the client upon request: s942B(2)(g). This is disclosed in the Financial Services Guide, and it would be unusual to automatically forward the client a copy of the Record of Advice as the adviser does in this example. In Example 14 therefore, we submit that Steve's last response be amended as follows:

Steve	<p>Great. I'll put that through straight away. I don't need to give you another Statement of Advice, but we keep what is called a record of advice. I can email you a copy when you get back from your holiday. Have a great time while you're away.</p>	<p><i>Because the requirements of s946B(1) <u>as amended by Reg. 7.7.10AE and Reg. 7.7.10B</u> have been met, Steve is not required to provide a SOA; however, he is required to record the further advice—in a 'record of advice' (s946B(3A)). Reg 7.7.09(1) outlines the information Steve should record. <u>Ellora has the right to request a copy of the record of advice and this must be disclosed to her in the FSG: s942B(8)</u></i></p>
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- e. Following on from the last point, since scaled advice is often *further advice* under the Act, we recommend that the Glossary to CP183 incorporate the definition of '*further advice*'.

Scaled Advice is very common in Stockbroking, and we would be very disappointed if more rigorous obligations were imposed, especially as standards of advice in stockbroking have not been found wanting. While caught by the FOFA reforms, stockbroking was not the reason for them.

Once again we are grateful for the opportunity to provide these comments to ASIC on CP183. Thank-you also for the opportunity for our Members to discuss the proposals with senior officials recently. Should you require further information please do not hesitate to contact me or Doug Clark, Policy Executive dclark@stockbrokers.org.au.



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