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Australian Law Reform Commission
PO Box 12953,
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By email: financial.services@alrc.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to Interim Report A of the Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation.

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Our Superannuation and Insurance and Financial Advice Disputes practice has represented and assisted thousands of claimants for over 20 years. We have the largest practice of its kind in Australia and currently have approximately 125 staff nationally working in the team. At any one time we provide legal assistance to approximately 3500 to 4000 clients.

A major part of this work involves providing comprehensive advice and representation in cases involving often egregious and negligent behaviours on the part of financial service providers. We witness first-hand the ramifications and impacts of poor corporate behaviours by financial service providers, which can create significant financial hardship in our clients' lives.

We note that the purpose of the review is to:

> *…. make recommendations for simplification, with the aim of promoting meaningful compliance with the substance and intent of the law, and laying the foundations for an adaptive, efficient, and navigable regulatory framework.*[1]

We welcome this review. We congratulate the ALRC on tackling the myriad issues related to the complexity of financial services legislation, and the thoroughness of the consultation process to date.

We seek to offer brief feedback on three sections of Report A:

- Chapter 11 – Definition of 'Financial Product Advice'
- Chapter 12 – Definitions of 'Retail Client' and 'Wholesale Client'
- Chapter 13 – Conduct Obligations

Our input to this Review is based on the lived experience of the clients we represent, and the observations of Maurice Blackburn staff who serve them.

Definition of Financial Product Advice

We agree with proposals A13, A14 and A15 which aim to:

> *… simplify, clarify, and improve the navigability of concepts relating to 'financial product advice'.*[2]

We believe that the term 'general advice', in its current use, is a misnomer which can (and often does) lead to confusion and poor financial outcomes for consumers. We note that this concern is shared by the Financial Planning Association of Australia, which is quoted as saying:

> *It has long been our contention at the FPA that the Corporations Act must be amended to uncouple the words "general" and "advice". In our view, if it's "advice" in any form, it is tailored to your specific circumstances. Otherwise, it's simply "general information". The terms "financial advice" and "financial product advice" should be exclusively married with "personal advice" in the context of financial planning and money matters.*[3]

In considering any change to the term itself (e.g. renaming it 'general information'), it is important to appreciate that this alone will be insufficient in dealing with the problems with the practical circumstances in which advice is provided, which go beyond semantics.

Accordingly (and subject to the outcomes of Treasury's ongoing Quality of Advice review which is considering the appropriateness of 'general advice' as a concept), we submit that in differentiating 'personal advice' and 'general advice', the test should expressly be based on the consumer's subjective belief as to whether the advice is tailored. i.e. that the advice takes into consideration their personal circumstances.

This is because, in assisting consumers who have suffered losses due to poor advice, we often see factual and legal disputes around the extent to which the advice was tailored to the

[1] Report A: Summary. Financial Services Legislation. ALRC Report 137, p.5
[2] Ibid: paragraph 60, p.36
[3] Ref: https://thewest.com.au/business/your-money/its-not-ok-to-be-general-about-financial-advice-ng-b881158371z

knowledge level of consumer as well as the issue of the consumer's perception of what they are receiving.

It is not unusual for financial service providers to attempt to argue that they were not providing personal advice as defined under the *Corporations Act*.

Often, in our experience, the disclosure of 'general' or 'limited scope' advice is provided as a written warning without any discussion as to the implications, or appears in the final document. This box ticking approach often results in the consumer being unable to process what it actually means.

We believe that it is important that the adviser, who is responsible for clearly setting the parameters of the retainer does so, and ensures the nature of the advice is properly documented.

Maurice Blackburn therefore advocates for the following marked changes to be made to s 766B(3) of the *Corporations Act* in order to provide clarity that it is the consumer's reasonable belief, rather than the adviser's intent, that is the key determinant for deciding whether personal advice has been provided:

(3) For the purposes of this Chapter, personal advice is financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

(a) *the person receiving the advice reasonably believes that the provider of the advice has considered one or more of the person's objectives, financial situation and needs (otherwise than for the purposes of compliance with the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 or with regulations, or AML/CTF Rules, under that Act); or*

(b) *a reasonable person might expect the provider to have considered one or more of those matters.*

It is submitted that this view accords with the general law insofar as the courts have adopted a broad interpretation of the statutory terms 'recommendation' and 'statement of opinion' (the statutory terms in s 766B(1)) in order to meet the statutory intention to be protective of consumers.[4]

In that regard, the High Court has recently found that the advice in issue was personal despite there being a general advice disclaimer that read: *"Everything discussed today is general in nature, it won't take into account your personal financial needs"*[5], noting that the communications with the consumers specifically related to their personal superannuation accounts.

We encourage this Review to explore ways to embed a due regard for the consumer's reasonable understanding of the nature of the advice into the legislation.

[4] See Allsop CJ in *Australian Securities and Investment Commission V Westpac Securities Administration Ltd* [2019] FCAFC 187; BC201909716

[5] https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-013mr-asic-successful-against-westpac-subsidiaries-appeal-to-high-court/. See summary: https://www.listgbarristers.com.au/publications/westpac-v-asic-high-court-vindicates-asics-position-on-personal-financial-advicewestpac-v-asic-high-court-vindicates-asics-position-on-personal-financial-advice#:~:text=ASIC%20brought%20a%20civil%20penalty,giving%20of%20financial%20product%20advice%3B&text=that%20Westpac%20had%20breached%20its,and%20fairly%20(s%20912A).

Definitions of 'Retail Client' and 'Wholesale Client'

We note from the Report A Summary document that:[6]

> *Chapter 12 examines the definitions of 'retail client' and 'wholesale client'. The distinction between these two categories is pivotal to the operation of Chapter 7 of the Corporations Act as it determines when particular protections are available (to 'retail clients') and when a less protective regime applies (to 'wholesale clients').*

The 'retail client' verses 'sophisticated investor' / 'wholesale client' distinction in the *Corporations Act* is directed towards protecting unsophisticated consumers when receiving financial advice from financial service providers. In those circumstances, sophisticated or wholesale investors were carved out as not requiring the same level of disclosure and other legal protections as so called 'retail' clients.

These classifications also have serious consequences for a consumer's ability to seek recourse through the Australian Financial Complaints Authority (AFCA)[7] and therefore goes to the issue of access to justice.

At least in hindsight, the wisdom of such a carve out is dubious: high net worth is not a reliable indicator of financial literacy. In our experience many high net worth consumers who have been classed as 'wholesale clients' were, in fact, inexperienced or risk averse consumers.

For example, a spouse or young person who inherits millions may not be financially sophisticated and therefore could be disadvantaged by being inappropriately pigeon-holed under the current rigid classification, which then reduces the advisor's disclosure obligations and the consumer's legal recourse for breaches.

Maurice Blackburn therefore submits that, as a start, the financial threshold test should be removed.

Furthermore, there should be regulatory requirements expressly requiring that financial service providers give (and document) deeper consideration of a consumer's financial literacy in deeming that consumer to be a sophisticated or wholesale investor, rather than the test being about the consumer's income and assets.

We have acted in many successful claims for compensation through AFCA (and its predecessor) where the financial services provider has argued that the negligent failure to provide written advice to a consumer with low financial literacy is evidence that the consumer was receiving 'wholesale investor' advice, or was receiving general/scaled advice.

We encourage the ALRC to ensure that reforms prioritise classification based on a properly assessed level of financial sophistication, rather than the consumer's net wealth or income.

Many of the findings of the Royal Commission spoke of the need to adopt a more consumer-centred approach to the provision of financial services, and that the best interests of consumers are to be prioritised over other considerations. The adoption of a test, based on the understanding of the consumer, is more in keeping with these findings.

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[6] Ibid: paragraph 65, p.37

[7] AFCA rule C.2.2(j) says *'a complaint about a financial service where the complainant is a wholesale client within the meaning of the Corporations Act'* is an example of where AFCA may consider excluding a complaint.

Conduct Obligations:

We note that Report A seeks feedback on:

> *amending the 'safe harbour' by recasting the relevant sub-sections as indicative behaviours of compliance, to which a court must have regard when assessing compliance with the duty.*[8]

With respect, the proposed recasting appears superfluous given the judgment in *ASIC v NSG* [2017][9] wherein both parties accepted that a financial services provider may be able to satisfy the best interests duty in s 961B(1) even though they do not fall within s 961B(2).

Specifically, the court stated:

> *There was, at least, a difference in emphasis between the parties as to the interaction between the primary provision, in s 961B(1), and the 'safe harbour' provision, in s 961B(2). However, ultimately, in the course of oral submissions, there did not appear to be any significant difference between the parties. It was accepted by ASIC that (as submitted by NSG) a person may be able to satisfy the best interests duty in s 961B(1) even though they do not fall within the 'safe harbour' of s 961B(2). The difference in emphasis was that ASIC contended that, in a "real world" practical sense, s 961B(2) was likely to cover all the ways of showing that a person had complied with s 961B(1) and, in this way, a failure to satisfy one or more of the limbs of s 961B(2) is highly relevant to the Court's assessment of compliance with the best interests duty.*

Moreover, Maurice Blackburn urges caution in introducing any changes that could have the effect of narrowing the application of the best interests duty, in terms of process as well as outcome.

Please do not hesitate to contact me and my colleagues on [redacted] if we can further assist with the Commission's important work.

Yours faithfully,

[redacted]

Josh Mennen
Principal Lawyer
Maurice Blackburn

[8] Ibid: paragraph 78, p.41
[9] *Australian Securities and Investments Commission v NSG Services Pty Ltd* [2017] FCA 345 at [18]