

Ms Sophie Waller
Senior Lawyer, Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

email: policy.submissions@asic.gov.au

25 September 2012

Dear Ms Waller

CONSULTATION PAPER 183: GIVING INFORMATION, GENERAL ADVICE AND SCALED ADVICE

The Insurance Council of Australia (*Insurance Council*) appreciated the opportunity to meet with ASIC on 14 September 2012 and then to follow up with this submission in relation to the proposed guidance on how to scale advice in Consultation Paper 183. The Insurance Council acknowledges that guidance provided by ASIC plays an important role in enabling the general insurance industry to ensure compliance with legislative requirements and welcomes ASIC's commitment to finalising guidance before the end of 2012.

As we have stated in previous submissions, the general insurance industry is mostly unwilling to provide personal advice on its products as there is uncertainty in relation to the boundary between personal advice and general advice and the means by which personal advice can be scaled. This uncertainty means that many insurers adopt a no advice model to avoid the risk that general advice may move into personal advice and trigger the additional compliance obligations.

The explicit acknowledgement that both factual information and general advice can be tailored without triggering personal advice obligations is therefore welcomed. Many broad risks are covered by retail general insurance policies and it is not feasible in the cost effective distribution of general insurance to have extensive discussion on each of these risk exposures. In particular, it would be prohibitively expensive to script call centres for such discussions.

The purpose of examples in guidance material

We note that in discussions held with ASIC on 14 September, ASIC advised that the examples in CP183 are entirely fact dependent and should not be extrapolated out to apply in other circumstances. We respectfully submit that this approach severely limits the usefulness of the examples provided as they would only be relevant where the circumstances of the advice provider perfectly mirror the example.

We suggest ASIC's guidance should include simple examples which highlight the guiding principles found in CP183, thereby providing clarity to providers of financial advice. As ASIC

found with RG 200 on intra-fund advice, clear examples can give industry confidence that they will not be found in breach of the regulatory regime.

Giving information and advice in general insurance

We are aware of the difficulties in crafting advice to apply to all financial service providers. However, we encourage ASIC to ensure guidance material is sufficiently flexible to apply in simple advice scenarios. Most retail insurance products are typically sold in the call centre environment. Regulator guidance should not be so prescriptive that the focus of training for general insurance telephone consultants is on phrasing information so as to allow them to remain within the definition of the advice model they are operating under. This is at the cost of delivering information that would be of the most assistance in addressing the customer's inquiry.

Our response to the feedback questions is attached. Please note that we have only responded to those questions directly relevant to Insurance Council members.

Should you have any queries in relation to the issues raised in this letter, please contact the Insurance Council's General Manager Regulatory Policy, Mr John Anning, on tel: 02 9253 5121 or email: janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director & CEO

GIVING FACTUAL INFORMATION

B1Q1 Will this guidance help financial services providers to provide good quality information to their clients and potential clients, including when a provider has personal information about a client?

We support the clear acknowledgement that it is possible to tailor factual information using personal information held about the client. This will assist insurers to provide more relevant information to clients.

We acknowledge that the proposed guidance is aimed at all financial service providers and will therefore be high level only. However, we do not believe the guidance at paragraphs 31 and 32 are necessary in the general insurance context.

31 Factual information given by you will not be general or personal advice if you clarify at the outset the type of service you are offering, and that the information is not intended to imply any recommendation or opinion about a financial product.

32 It is good practice to ensure that a client understands upfront that you are only providing factual information, and not general or personal advice. This will avoid confusion and help the client to understand what service they are getting.

We note the proposed guidance refers to good practice and whilst it does not make it mandatory to inform the client that only factual information is being provided, it would be beneficial to add a sentence allowing for recognition of the relevant circumstances, such as when tailored factual information is being provided.

When a client contacts a general insurer or their representative to inquire about a product, they typically do not expect to receive comprehensive personalised advice or to be advised at the outset that the consultant can provide factual information. Accordingly, the proposed guidance in paragraph 32 should be qualified to take account of situations where generic verbal or written factual information is being provided. We further recommend that ASIC amend its guidance to note that the context within which information is being provided should be considered when determining whether upfront clarification of the type of information/advice should be given to the client.

B1Q2 Is there any further guidance we should give? Please provide as much specific information as possible, as this will assist us to provide further guidance.

Initiating product discussions

At paragraph 28, the proposed guidance states that:

“If a communication is a recommendation or a statement opinion, or a report of either of these things, that is intended to, or can reasonable be regarded as being intended to, influence a client in making a decision about a particular financial product or class of financial product.... it is financial product advice.”

Example C then notes that “because the home loan specialist has initiated the discussion about CCI with the client, and in doing so, appears to have made a recommendation

intended to influence the client's decision about the CCI product, this could constitute financial product advice"¹

ASIC should clarify in what circumstances initiating a discussion about a financial product constitutes a recommendation and therefore financial product advice. A one size fits all approach should not be adopted, particularly where the insurer (or their representative) is already engaged in a discussion with the client, which is the case in Example C. When a client contacts an insurer, the client expects to receive information (and, depending on individual circumstances, advice) in relation to that insurer's products. Initiating a discussion in relation to other suitable products available should not be considered a determinative or persuasive factor in considering whether a recommendation is being made in these circumstances. The following example could be used to highlight this principle:

General Insurance Scenario 1

A client contacts an insurer's call centre and requests a quote for comprehensive car insurance. Noting the client's car is old and of low value, the call centre operator mentions the possibility of third party property damage and explains the difference between it and comprehensive cover. At the client's request, the call centre operator provides a quote for the annual premiums for each product.

Although the insurer has been provided with some information in relation to the client's personal circumstances and using this information, has initiated a discussion about a different product with the client, the insurer has not made a recommendation.

Tailoring factual information:

We support the principle that a financial advice provider can tailor the factual information provided to the client, using personal information held. However, we submit that paragraphs 35 and 36 require clarification.

35 It is possible to tailor the factual information you give, using the personal information you have about the client

36 The test for whether you are giving personal advice includes whether you have considered the client's relevant circumstances in giving the information, or whether a reasonable person might have expected you to do so (s766B(3))—not whether you merely possess information about the client's relevant circumstances. You will have considered the client's relevant circumstances if you have taken them into account.

We submit that the guidance in paragraph 36 is incomplete and suggest that the final sentence could be improved as follows:

You will have considered the client's relevant circumstances if you have taken them into account in forming a qualitative judgment and communicating a recommendation or opinion that is intended to (or can reasonably be regarded as being intended to) influence the client's decision."

This would bring the guidance into alignment with paragraphs 25 and 28.

In Example B² the adviser tailors the information provided by limiting it to information associated with severe financial hardship, as the client has indicated they are unemployed.

¹ Example C CP183 page 17

² CP183 page 16.

If, by tailoring factual information, ASIC is referring to the scope of the information (whether narrowing or broadening it), rather than the information itself, this should be made clear in guidance material. Further guidance is also required from ASIC to clarify the timing issue, that is, that factual information can be tailored both when the adviser is already aware of the client's relevant circumstances and when the adviser requests the client to provide further background information and subsequently uses this information to tailor the factual information provided.

Balanced and complete factual information:

We are also concerned by the reference to providing 'balanced and complete' factual information in Example C³. This concept is not found in the relevant legislation and it appears to imply a new obligation on advisers. From discussions with ASIC, we understand the reference to 'balanced' aims to ensure those providing advice do not solely focus on the positive aspects of a financial product and neglect to inform the client of the negative aspects, or risks.

However, the reference in Example C is to information that is 'balanced and complete'. It is unclear how an insurer could simultaneously 'tailor' the provision of "balanced and complete" factual information using personal information about the client, without inadvertently overstepping into providing advice.

There are potentially significant compliance costs associated with this reference to 'balanced and complete' information. It would not be cost effective for insurers to provide 'balanced and complete' information in relation a particular insurance product, including all exclusions, limits, excesses etc, especially in the call centre sales environment.

Example C states that a failure to provide balanced and complete information indicates that a recommendation may have been made. This seems to constrain the practical ability of an adviser to tailor general information in a "safe" manner (i.e. so that ASIC would not consider that the adviser has intended to influence the client). Paragraph 28 reflects the existing law that a recommendation or statement of opinion will be financial product advice, and we do not consider that the policy objective of providing greater access to good quality information is promoted by the apparent extension of the definition of financial product advice that is reflected in Example C.

GIVING GENERAL ADVICE

C1Q1 Will this guidance help financial services providers to provide good quality general advice to their clients, including when a provider has personal information about the client?

Similar to our comments above, we submit it remains unclear how personal information about the client can be used to provide tailored general advice without triggering personal advice obligations. We support the clarification stated in paragraph 50 that personal information can be used to provide tailored general advice. However it is unclear how this can be achieved as the guidance also requires that an insurer must not consider the client's relevant circumstances when preparing or giving general advice.

³ CP183 Page 17.

The guidance in paragraphs 45 to 53 (inclusive) is open to broad interpretation and will not provide sufficient certainty to encourage insurers or their representatives to alter their existing practices. If insurers cannot design compliance programmes that provide clear delineation between these phrases then this would seem to increase the risk of different industry practices and consumer confusion.

We recommend ASIC provide greater guidance, if possible, on the distinction between an adviser “using” personal information, taking personal information “into account”, and “considering the client’s circumstances”. Furthermore, whilst Example D⁴ is suitably simple and on point, additional examples would be useful. In particular, examples should be used clarify that using personal information to provide general advice which is more targeted means:

- (a) an insurer can use personal information about the client to decide not to provide information that will not be relevant to the client. For example:

Insurance Council Example 1: Individual C phones an insurer to seek a quote for comprehensive car insurance on a new vehicle and indicates that he, his wife and adult children will all use the vehicle. The insurer provides a quote. C indicates the premium is more than he would like to pay and asks for advice on how to reduce the premium. The insurer outlines that some people elect to reduce their premium by increasing the basic excess payable and C opts to take up this option.

In this example, the insurer does not inform C of the option to reduce the premium by restricting the age of drivers for the vehicle as C has stated that adult children under 25 years of age will be driving the vehicle. The insurer has used personal information about the client to give advice that is targeted to the clients’ circumstances.

- (b) an insurer can use personal information about the client to identify and provide general advice about other products which may be relevant to the client.

Insurance Council Example 2: Individual M contacts an insurer’s call centre and requests a quote for the best value comprehensive car insurance. Noting that M’s car is old and of low value, the call centre operator mentions the availability of third party property damage and explains the difference between it and comprehensive cover. M asks the call centre operator which policy would be best for him. The call centre operator advises M that generally third party property damage policies are a popular choice amongst people with older cars. At M’s request, the call centre operator provides a quote for the annual premiums for each product. M purchases for the third party property policy.

In this example, the insurer has been provided with some information in relation to M’s personal circumstances and has used this information to identify a relevant alternative product and provide targeted general advice to M. However the insurer has not considered M’s circumstances when providing general advice about the suitability of the respective products.

C1Q5 Do you currently rely on Class Order [CO 05/1195] *Simplified warning for oral general advice*? Should ASIC allow it to expire on its ‘sunset date’ (in April 2016)?

⁴ CP813, Page 22.

The Insurance Council submits that Class Order [CO 05/1195] should be retained as it provides useful relief for the general insurance industry.

GIVING SCALED ADVICE

D1Q1 Do you agree with our proposed guidance?

The Insurance Council welcomes guidance aimed at facilitating the provision of scaled advice. However, we believe the guidance in relation to training requirements should be clarified.

66 When you are considering how the best interests duty and related obligations apply in the context of giving scaled advice, remember that:

- (a) all advice is scaled to some extent - advice is either less or more comprehensive in scope along a continuous spectrum (i.e. there are not two categories of advice: 'scaled' and 'comprehensive');*
- (b) the same rules apply to all personal advice on the same topic, regardless of the scope of the advice. Scaled advice does not equate to lesser quality advice for clients or lower training standards for advice providers; and*
- (c) it is possible to provide scaled advice that is limited in scope that meets your legal obligations, including the best interests duty and related obligations.⁵*

ASIC should make it clear that the appropriate level of training depends on the service being offered to the client. For staff giving simple scaled advice, general insurers should not be obliged to provide the training necessary for comprehensive financial planning.

COMMUNICATING THE SERVICE BEING PROVIDED

E1Q1 In your view, is our guidance consistent with current good business practice, and the new obligations under the FOFA reforms?

As explained above, we do not support the proposed requirement that would require an insurer to communicate clearly to the client the type of service being provided⁶. Whilst this requirement may be appropriate in some advice scenarios, we do not believe it is necessary or beneficial in the insurance context.

We query whether clients would understand the Corporations Act concepts behind a statement that they were about to be given factual information and whether it was necessary where an insurer or their representative is selling only their own products. Consumers would likely find such statements confusing, leading to possible negative consumer interactions. This concern could be alleviated by changing the requirement in paragraphs 92 and 95 from an absolute obligation ('you must') to a more flexible requirement, such as encouraging such statements as good practice (consistently with paragraphs 32 and 46 of CP183).

⁵ CP183 Paragraph 92.