



HENRY DAVIS YORK  
LAWYERS

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Our Ref EAG/LCG000

**BY EMAIL [futureofadvice@treasury.gov.au](mailto:futureofadvice@treasury.gov.au)**  
The General Manager  
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The Treasury  
Langton Crescent  
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Dear Treasury

**Exposure Draft - Corporations Amendment (Future of Financial Advice) Bill 2011**

Henry Davis York is grateful for the opportunity to comment on the Exposure Draft of the Corporations Amendment (Future of Financial Advice) Bill 2011. Our submission is set out in the attachment to this letter.

We would be happy to elaborate on our comments if that would be of further assistance.

Yours faithfully  
Henry Davis York

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# Corporations Amendment (Future of Financial Advice) Bill 2011

## Submission on Exposure Draft

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### 1 Background

Under the Exposure Draft Corporations Amendment (Future of Financial Advice) Bill 2011 (**Draft Bill**), one of the key proposals is the enhancement of the ability of the Australian Securities and Investments Commission (**ASIC**) to supervise the financial services industry through changes to its licensing and banning powers.

The Draft Bill amends ASIC's licensing and banning powers to clarify the operation of its powers, as well as prescribe additional tests under which ASIC can remove persons from the industry.

We note the background to the amendments outlined in the Explanatory Memorandum to the Draft Bill and the concerns raised by ASIC. We further note the recommendations proposed by the Parliamentary Joint Committee, which suggested the amendments under section 913B, 915C and 920A of the Corporations Act 2001 (Cth) (**Act**).

As currently drafted, the new legislation will significantly increase ASIC's powers, considerably widening the scope of potential circumstances under which ASIC may refuse, suspend or cancel an Australian Financial Services Licence (**AFSL**) and issue a banning order.

Whilst we are generally supportive of ASIC being granted enhanced powers to supervise the financial services industry, we are concerned that the Draft Bill fails to provide ASIC and the industry with any guidance as to the matters ASIC is required to take into consideration in determining whether to refuse, suspend or cancel an AFSL or issue a banning order under its enhanced powers. Furthermore there is currently no materiality threshold limiting the circumstances in which ASIC may use these enhanced powers. This is inconsistent with the policy behind the existing significant breach reporting provision of the Corporations Act. This lack of guidance and materiality threshold may give rise to significant business risk and uncertainty for financial services licensees.

Our submission suggests the Government consider giving ASIC some objective criteria which it is required to take into consideration in determining whether to refuse, suspend or cancel an AFSL or issue a banning order under its enhanced

powers. Secondly, we propose the enhanced powers should only apply where ASIC has formed the view that the likely contravention is significant and likely to cause loss to clients.

Our submission also briefly touches on 3 particular observations regarding the best interests duty and opt-in aspects of the Draft Bill.

## 2 Objective criteria

Under the Draft Bill, ASIC may:

- (a) refuse to grant an AFSL under section 913B(1)(b);
- (b) suspend or cancel an AFSL under section 915C(1)(aa); or
- (c) make a banning order against a person under section 920A(1)(ba),

if ASIC has reason to believe that the applicant or licensee is likely to contravene their obligations under section 912A of the Act.

The Draft Bill does not set out the matters ASIC is required to take into consideration in determining whether to use these enhanced powers. In contrast, the Draft Bill proposes criteria for determining good fame and character under proposed new section 920A(1A). We believe a similar approach should be taken to the enhanced powers to be granted to ASIC under proposed new sections 913B(1)(b), 915C(1)(aa) and 920A(1)(ba).

We note the Explanatory Memorandum suggests some criteria under paragraph 3.11 and in our view, there are a number of additional considerations that ASIC could be required to take into consideration. It is our view that these considerations should be set out in the Act rather than in any additional guidance.

For example, ASIC could be required to have regard to:

- (a) the quality of the person's compliance procedures;
- (b) whether the person has a representative or representatives dedicated to ensuring the person's compliance with section 912A;
- (c) how often the person, or the person's officers, have been involved in significant breaches of section 912A in the past;
- (d) whether the person has previously been required to compensate clients for losses suffered as a result of a breach of section 912A; and
- (e) whether refusing to grant or cancelling or suspending an AFSL is proportionate to the likely contravention.

We recognise that ASIC will specifically use some of the criteria above to assess AFSL applicants and this is already set out in the AFS Licensing Kit. However we believe that in light of the Draft Bill, the Government should consider including high level criteria within the Act to specifically consider whether an applicant is likely to contravene. This will clarify the position for industry and ensure transparency.

### 3 Significant breach

The Act and ASIC policy recognises that, from time to time, financial services licensees may breach section 912A. A breach may be technical and non-material or it may be significant. The Act and ASIC policy distinguish between technical and non-material breaches and significant breaches (see section 912D of the Act and ASIC Regulatory Guide 78). Under the Draft Bill, as currently drafted, ASIC's powers will indeed be significant as the Draft Bill will provide ASIC power to refuse, suspend or cancel a licence or make a banning order against a person for a likely minor or technical breach.

Under the current law, where a minor breach occurs, a financial services licensee does not need to report this to ASIC. Where a significant breach occurs the financial services licensee needs to report this to ASIC under section 912D of the Act. However, even where a significant breach is reported, this does not automatically mean that the licensee's AFSL will be revoked or indeed that any regulatory enforcement action will be taken.

In our view, ASIC's powers under the Draft Bill to:

- (a) refuse to grant an AFSL;
- (b) suspend or cancel an AFSL; and
- (c) make a banning order,

should only apply where ASIC has formed the view that the likely contravention is significant (as described in section 912D of the Act) and is likely to cause loss to clients.

### 4 Proposed drafting

We have set out in Annexure A proposed drafting which would address the concerns we have outlined at paragraphs 1-3 above.

### 5 Other matters

We would also like to draw your attention to the following issues regarding the best interests duty and arrangements for charging of ongoing fees (**Opt-in**), as currently drafted in the Draft Bill:

- (a) On the basis of the current drafting, the scope of the definition in new section 962A of "ongoing fee arrangement" is potentially broader than what we understand to be the policy intent. As currently drafted, the definition covers general advice situations as well as personal advice situations. We submit that in the interests of consistency with both the policy intent and the best interests test, the definition of "ongoing fee arrangement" in proposed section 962A should be expressly limited to personal advice situations. We believe that unless this amendment is made, the unintended consequences for product issuers who also give general financial product advice could be significant.
- (b) Draft section 961C(2)(f) is potentially very broad and is uncertain, for example, does this section impose an obligation on an advisor to advise a

client who wants to live comfortably in retirement to marry someone rich? Presumably this is not the policy intent. Arguably this proposed subsection does not add significantly to the already extensive list provided in draft section 961C(2) and could be deleted.

- (c) It appears to us that the word "would" in draft section 961G(1)(c) and 961G(2)(c) should be replaced with the word "might" for consistency with proposed section 961C and to avoid any argument that a financial advisor needs to form a view that a financial product "will" meet a client's objectives and needs.

**Henry Davis York**

16 September 2011

Please contact either Liz Gray or Jon Ireland if you wish to discuss any aspect of this submission.



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## Annexure A

Insert:

- (#A) In considering whether, at a particular time, there is reason to believe that a person is likely to contravene their obligations under section 912A, ASIC must have regard to:
- (#A(1)) (a) the quality of the person's compliance procedures;
- (b) whether the person has a representative or representatives dedicated to ensuring the person's compliance with section 912A;
- (c) how often the person, or the person's officers, have been involved in significant breaches of section 912A in the past;
- (d) whether the person has previously been required to compensate clients for losses suffered as a result of a breach of section 912A; and
- (e) whether refusing to grant or cancelling or suspending an AFSL is proportionate to the likely contravention.
- (#B) ASIC may only exercise its powers under sections 913B(1)(b), 915C(1)(aa) and 920A(1)(ba) if the likely contravention is significant having regard to the matters listed in section 912D(1)(b).