Quality of Advice Review

Executive Summary

Industry Super Australia (ISA) welcomes the opportunity to respond to the Quality of Advice Review Issues Paper.

Our submission focuses on access to quality affordable advice for super fund members.

Affordable quality advice can help members make good decisions that advance their financial position in retirement. It can also help members avoid poor decisions that compromise their financial position. Super funds have an important role to play in meeting the financial advice needs of members and are well placed to do so because of the long-term relationship and trust members build with their fund. Further, given retirement income is a core purpose of superannuation, funds ultimately have a responsibility to provide guidance to members. This is supported by the introduction of the Retirement Income Covenant, which requires funds to formulate and give effect to a retirement income strategy outlining how they plan to assist their members to balance key retirement income objectives.

However, in the context of super, access to quality affordable advice should not always mean comprehensive personal advice. Many members – particularly those with relatively straightforward financial circumstances – may be able to rely on advice and guidance other than comprehensive personal advice to achieve good retirement outcomes. It is also unrealistic to expect every super fund member to pay for comprehensive personal advice and equally, it is not possible for super funds or the retail financial advice industry to give comprehensive personal advice to each member or even to those who are close to retirement.

Our submission will therefore explore how the regulatory settings can enable super funds to provide cost effective advice and guidance to members at scale. Our recommendations are:

- **Recommendation 1**: The Review should consider whether a separate framework for digital advice that focuses on the design and ongoing monitoring of the algorithm underpinning the digital tool will encourage the development and use of digital advice solutions.
- **Recommendation 2:** ASIC's remit should be extended to provide clear advice to licensees on proposed services – including in relation to digital advice.
- **Recommendation 3:** The Review should include recommendations to clarify the boundaries between personal advice, general advice, guidance and factual information.

- **Recommendation 4:** Intra-fund advice (which can be collectively charged) should be expanded to include advice about retirement adequacy and Age Pension eligibility, and advice about the member's household that is pertinent to the member's retirement.

- **Recommendation 5:** The updated relief from the licensing and personal advice obligations for providers of super calculators and retirement estimates should ensure:
    - there is less emphasis on the role of personal advice,
    - that funds can provide retirement estimates to more members if they choose, and
    - that funds can provide Age Pension amounts in static retirement estimates.

- **Recommendation 6:** The Review should consider:
    - facilitating tailored generic advice by recommending that the government make available to funds data it holds about members on a de-identified basis to assist funds to determine characteristics of cohorts, and
    - lower regulatory settings for personal advice about retirement where the member has already received tailored generic advice.

- **Recommendation 7:** In light of the broader regulatory settings that apply specifically to super funds, the Review should consider whether it is appropriate that a less stringent regulatory regime apply to advice provided by funds.

- **Recommendation 8:** ASIC should provide a public view and supporting evidence on whether the FOFA reforms have improved the quality of financial advice before the Review begins preparing the Final Report.

- **Recommendation 9**: The Review should consider regulatory changes to the training, education and ethical standards of financial advisers. In any event, any changes to the professional standards for financial advisers should be delayed pending the outcome of the Review.

- **Recommendation 10:** The Review should assess any proposed changes to the current regulatory settings against the impact of any changes on consumer protections.

- **Recommendation 11:** The Review should consider the role of government in the provision of guidance and advice.

- **Recommendation 12:** The Review should consider the merits of introducing a legal requirement that funds engage with their members in the lead up to their retirement – similar to the United Kingdom's wake-up packs.

- **Recommendation 13:** The outright ban on the deduction of ongoing advice fees from MySuper accounts should be extended to choice products.

- **Recommendation 14:** Commissions for the sale of life insurance should be banned.

- **Recommendation 15:** Advice about aged care costs should be expressly permitted to be paid out of a member's super.

- **Recommendation 16**: The design and distribution obligations should be extended to SMSFs.
- **Recommendation 17:** The Review should include recommendations that reduce unnecessary overlap of the conduct obligations for financial advisers.

Many of these recommendations will require significant adjustments to the current regulatory settings. However, without these adjustments, the issues with the current framework will persist and members will be left worse off. The Quality of Advice Review is therefore a critical opportunity to improve retirement outcomes for members.

Contents

About Industry Super Australia

Industry Super Australia (ISA) is a research and advocacy body for funds that carry the Industry SuperFund symbol. ISA manages collective projects on behalf of those funds and their five million members. Our aim is to maximise the retirement savings of all our members.

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Section 1: Introduction

Since the introduction of the *Financial Services Reform Act 2001*, reviews of financial advice have focused on the delivery of comprehensive personal advice to consumers – on whether that advice has met regulatory requirements and when it is found to be lacking, the impact on consumers.

However, there is a significant advice gap that will not be met by the delivery of comprehensive personal advice to consumers alone. This is clear in the context of superannuation. Many members – particularly those with relatively straightforward financial circumstances – may be able to rely on advice and guidance other than comprehensive personal advice to achieve good retirement outcomes. It is also unrealistic to expect every super fund member to pay for comprehensive personal advice and equally, it is not possible for super funds or the retail financial advice industry to give comprehensive personal advice to each member or even to those who are close to retirement.

This submission will explore how the regulatory settings can enable super funds to close this advice gap by providing cost effective guidance and advice to super fund members at scale. While a step change is clearly needed, this outcome can be achieved by targeted changes that aim to reduce uncertainty in the legislation, facilitate innovative advice services and ensure regulatory settings are proportionate to the impact on consumers.

To inform this submission, ISA consulted with our member funds, conducted a quantitative survey to understand the advice services they deliver and, through Right Lane Consulting, interviewed a smaller number of funds to gain further insights.

The remainder of this submission is set out in the following sections:

- Section 2: The role of financial advice in super
- Section 3: Providing financial advice to members at scale
- Section 4: Review focus
- Section 5: Other reforms.

Section 2: The role of financial advice in super

Section 2.1: Better defaults

In the Australian superannuation context, the issues around low levels of member engagement and poor financial literacy are well documented.[1] The responses from the interviews and the survey, discussed further in Section 2.4: State of advice provided by funds, support this view and indicate that many members are anxious or uncertain about engaging with their super because they do not understand the superannuation system or have a general disinterest in the topic.

In combination with the compulsory nature of our superannuation system, this underlines the importance of good default settings that protect members' interests without recourse to personal financial advice. Of course, where individuals decide otherwise, there should be ways for them to receive affordable, quality personal financial advice.

A benefit of a better default system is therefore a reduced need for personal financial advice. The Retirement Income Review arrived at a similar conclusion stating:

> Carefully designed defaults, guidance from superannuation funds, as well as accessible and affordable advice at retirement, would help people get better outcomes in retirement.[2]

The case for better defaults reducing the need for personal financial product advice has also been made by ASIC.[3]

The objective of the Your Future, Your Super reforms is to eliminate underperformance in super funds and therefore improve the default system. The reforms have the potential to offer a reliable means of connecting members to good products by setting a quality filter for funds in the form of a performance test and consequences if funds do not meet the test. However, to realise this objective, the following important improvements are needed. The performance test should:

- apply to all super products, and
- measure the net benefit to members after all fees and charges have been accounted for over a 10-year period.

Further, the regime should not staple members to an underperforming product.

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[1] Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness Inquiry Report* (2018), 245.
[2] Michael Callaghan, Deborah Ralston and Carolyn Kay, *Retirement Income Review Final Report* (2020), 58.
[3] ASIC, *Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Round 5: Superannuation* (2018), para 118.

Section 2.2: Advice by super funds

The retirement income system is complex. This was recognised by the Retirement Income Review, which noted that:

> There is a need to improve understanding of the system. Complexity, misconceptions and low financial literacy have resulted in people not adequately planning for their retirement or making the most of their assets when in retirement. Adding to complexity is the interaction with other systems, such as the aged care and the tax systems. People need better information, guidance and good, affordable advice tailored to their needs.[4]

Guidance and advice by super funds can help members to understand the system and improve their retirement outcomes. This is demonstrated through research conducted by one of our member funds, which showed that over a six-month period in 2020, members who speak with the fund's advice team are:

- 5 times more likely to make a voluntary contribution,
- 2.5 times more likely to make salary sacrifice contributions, and
- 35 times more likely to commence an account-based pension.

Super funds are well placed to provide guidance and advice to their members because of the long-term relationship and trust members build with their fund. Funds are also uniquely placed to provide this guidance and advice because members currently need to contact their fund to start a retirement income product.

It was also noted by the Retirement Income Review that more advice and guidance from super funds at retirement would likely help people get better outcomes in retirement.[5] Additionally, given retirement income is the core purpose of superannuation, funds arguably have a responsibility to their members to provide this advice and guidance.

It has been suggested that funds may have a conflict of interest because acting in the best interests of their members as a whole (which would involve keeping costs for the entire membership down and trying to maximise funds under management) may not be in the best interests of an individual member. However, the Retirement Income Review concluded that the benefits associated with drawing down more retirement savings and higher standards of living in retirement, coupled with effective regulation, would likely outweigh any potential impact from these conflicts of interest.[6]

In addition to being well placed to provide guidance and advice to members, super funds are trusted by their members to provide such guidance and advice. ISA's research indicates that members place a considerable degree of trust in the guidance and advice provided by their super fund, particularly if their fund is an industry super fund.

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[4] Michael Callaghan, Deborah Ralston and Carolyn Kay, *Retirement Income Review Final Report* (2020), 17.
[5] Ibid, 58.
[6] Ibid, 455–56.

In March 2022, ISA commissioned UMR Strategic Research to conduct a survey of public attitudes towards super. They key findings from that survey are that:

- Most people surveyed (53 per cent) reported that they had sought guidance from their super fund about their super. This increases to 71 per cent of those who believed they were with an industry super fund.
- 51 per cent of people said they regarded their super fund as a reliable and trusted source of guidance on super, increasing to 66 per cent for those with an industry super fund.
- A significant majority (63 per cent) of people see super funds as a credible source of guidance when it comes to how much money they need to save for retirement. They also thought accountants (64 per cent) and financial advisers (62 per cent) were credible sources. Amongst industry super fund members, this increased to 75 per cent, 69 per cent and 70 per cent respectively.

Research provided by one of our member funds also demonstrates the trust members place in their funds for advice.

- Internal research conducted by the fund shows that the main reason for choosing their fund as the primary source of advice was trust. The principal source of advice for members of the fund over the age of 60 was the fund's advice team. Additionally, more than 4 in 5 members aged 60 years plus were satisfied with the advice received.
- Research commissioned by the fund in October 2020 showed that members are very trusting of their main super fund, with 61 per cent rating trust of their main fund at an 8 or higher out of 10.
- A recent member satisfaction survey also showed that members have positive engagements with their super fund and seek information from their super fund. Members who interacted with the contact centre advice team during the 2020-21 financial year had a satisfaction score of 8.5 out of 10.

Section 2.2.1: The use of general advice by industry super funds

Industry super funds use general advice to help members navigate the retirement income system and to better understand their options. This is very different to the general advice models that were examined by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which were primarily used to sell superannuation products and circumvent personal advice obligations.[7]

General advice can be an efficient way of providing valuable advice to large numbers of members at low cost. Industry super funds provide a wide range of general advice services to members. Generally, the services take the form of phone channels, seminars, webinars. This is in addition to factual information provided through the same channels and also through electronic direct mail, short online videos, fact sheets and newsletters. General advice provided by funds can also be a stepping-stone to more

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[7] Kenneth Hayne, *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2019), 248.

comprehensive personal advice, however the results of our survey indicate that this occurs infrequently – see Section 2.4: State of advice provided by funds.

However, uncertainty about the dividing line between personal and general advice - as highlighted by the litigation taken by ASIC against Westpac Securities Administration Limited and BT Funds Management limited and enforceable undertakings from the Commonwealth Bank of Australia and Australia and New Zealand Banking Group – means some funds are less confident providing general advice to members, particularly as they begin collecting more data about their members to implement their retirement income strategies. We discuss this further in our submission in Section 3.2: Uncertainty about the boundaries between types of advice.

Various inquiries and ASIC's own work have shown that consumers generally do not understand the meaning of general advice, and recommendations have been made that it should be re-labelled, to divert consumers away from relying on it to make financial decisions.[8] However, this ignores the value of general advice if its limits are understood and the motivation for providing it is in the members interest, and not to switch or sell super products; that is, if the reason for giving general advice is to assist members to better understand their super and how to obtain good retirement outcomes. This kind of general advice should be facilitated and focusing regulatory efforts on the label rather than the content is unlikely to assist the overall objective of making advice more affordable for consumers.

Section 2.2.2: The use of intra-fund advice by industry super funds

Industry super funds also use intra-fund advice to deliver affordable advice to members on limited topics – often meeting the needs of members with modest balances and straightforward circumstances. Responses from our member funds to the House of Representatives Standing Committee on Economics as part of the Review of the Four Major Banks and Other Financial Institutions indicates that the cost of intra-fund advice for the 2018-19 financial year ranged from just 50 cents to $1.34 per member.[9]

It can also be a stepping-stone to comprehensive personal advice, however as with general advice, the results of our survey indicate that this occurs infrequently – see Section 2.4: State of advice provided by funds.

Intra-fund advice began as 'within product advice' in 2008. It was designed to provide information and advice on simple questions fund members had with their existing super – for example, 'which investment option should I be in?' It was confined to an existing holding in a super fund so that it could not be used for advice on switching funds. It also had to be one-off advice.

Long before the inception and legislative introduction of a Retirement Income Covenant, the Super System Review in 2010 considered advice by funds to members to be sufficiently important to recommend that trustees be required to proactively offer intra-fund advice to MySuper members as

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[8] David Murray et al., *Financial System Inquiry Final Report* (2014), 271; Productivity Commission, *Competition in the Australian Financial System Inquiry Report* (2018), 292; ASIC, "Findings from consumer research on 'general advice' label," 4 May 2021.
[9] Parliament of Australia, "Review of the Four Major Banks and other Financial Institutions – Superannuation Sector Documents", accessed 1 June 2022.

they approach retirement and also during retirement (recommendations 7.2 and 7.3).[10] The Super System Review said:

- Intra-fund advice is of great value to members as it comes from the trustee, the entity that is more familiar with the fund's operation (provided the trustee is complying with its obligation to act in the best interests of members).[11]
- Trustees should be required to proactively offer intra-fund advice to MySuper members as they approach retirement age. This advice should cover a broad range of financial issues members will face in retirement (including investment allocation and alternative retirement products offered by the fund).[12]
- Trustees should also proactively offer intra-fund advice to MySuper members in the retirement phase at periodic intervals.[13]

Under the 2013 Stronger Super reforms, intra-fund advice became a type of advice that a trustee could provide to its MySuper members, where the cost of the advice is borne by all members of the fund (i.e., collectively charged out of the administration fee). Intra-fund advice was confined to advice on contributions, investment options and insurance (within product) and could not be on-going advice. The best interest duty and related obligations introduced by the Future of Financial Advice (FOFA) reforms apply to intra-fund advice. Our survey results, which are set out in Section 2.4: State of advice provided by funds, show the use of intra-fund advice by funds surveyed.[14]

However, the limited scope of the advice funds can provide under an intra-fund model restricts its usefulness for members – particularly those close to retirement. These limits are discussed in Section 3.3.1: Expanding the scope of intra-fund advice.

Section 2.3: Typical financial circumstances of retirees and pre-retirees

For most super fund members approaching retirement, their financial circumstances are relatively straightforward and do not require costly comprehensive personal advice. For the majority of retirees, their primary asset other than their home is their superannuation, followed by only modest non-super savings and investments.

ISA analysis of the 2017-18 ABS Survey of Income and Housing (SIH) shows that of those aged 55-65 years old with super:

- 73.5 per cent hold more than three quarters of their total financial assets in super,
- the median super savings of this cohort is $180,000 and other savings just $6,000, and

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[10] Jeremy Cooper et al., *Review of the Governance, Efficiency, Structure and Operation of Australia's Superannuation System Final Report* (2010), 47.
[11] Ibid, 21.
[12] Ibid, 208.
[13] Ibid, 208.
[14] We understand that the Investment Trends 2020 Financial Advice Report examined the use of intra-fund advice and found that 1 in 6 Australians use intra-fund advice from their main super fund.

- just 5 per cent of households among this cohort have residential housing investments.

The presence of debt at retirement is also becoming typical. The SIH shows an increasing proportion of pre-retirees have housing and other debt. In 2017-18, 47 per cent of couples had a mortgage and other debt in the lead up to retirement. For half of this group, repayment of this debt would halve their available super savings.

In 2020, ISA commissioned research[15] about Australians' experiences and expectations of retirement to support our submission to the Retirement Income Review. The research indicates that among those who recently retired, a significant proportion used part of their super to pay off debt (35 per cent), and only 41 per cent used their super to invest in a retirement income stream. Lifting the proportion of retirees who utilise an income stream would seem to be an important priority.

Accordingly, it appears that many retirees and pre-retirees would benefit from simple advice around paying off debt using a portion of their super savings and the benefits of investing in a retirement income stream rather than withdrawing their super savings and putting it in their bank account.

This is one of the primary reasons our submission focuses on the provision of cost effective guidance and advice to members at scale, rather than the comprehensive personal advice regime.

The data from our surveyed funds about whether general advice and intra-fund advice was used by members as a stepping stone for comprehensive personal advice also supports our position. The data, set out in further detail in the next section, indicates that for most members, general advice and intra-fund advice are sufficient to meet their advice needs.

Section 2.4: State of advice provided by funds

In May 2022, ISA conducted a survey of some of our member funds to understand their advice offerings. Our key findings – which are based on the 2020-21 financial year – are set out below.

- **General advice and intra-fund advice were by far the dominant advice offerings accessed by members**. Together, these offerings comprise 95 per cent of all advice provided by surveyed funds. A further breakdown of the type of financial advice accessed by members is below.

Advice type	Proportion of members accessing the advice
General advice	66.3%
Intra-fund advice	28.8%
Other forms of limited personal advice	4.1%
Comprehensive personal advice	0.8%

[15] Susan Bell Research, *Australians' experiences and expectations of retirement* (2020).

- Only a small proportion of members used general advice and intra-fund advice as a **stepping stone for comprehensive personal advice**. This indicates that for most members, general advice and intra-fund advice were sufficient to meet their advice needs.
    - Advisers from one of our funds held almost 26,000 conversations over the phone with members and this only resulted in 235 referrals for comprehensive personal advice (0.91 per cent).
    - Another fund found that around 13 per cent of members who engaged with their phone-based general and intra-fund advice services were referred to a comprehensive planner.
    - Another fund observed that around 80 per cent of those receiving intra-fund advice had engaged with general advice previously, and an additional 5-10 per cent of those who received general advice were referred to a comprehensive advice partner.
- Notably, **one of our funds recently cancelled its comprehensive personal advice service** and now offers general and limited/scaled advice only.
- Members who used intra-fund channels mainly sought advice on **investment options** (81.5 per cent).
- Members who used general advice channels sought advice on **retirement planning** (49.0 per cent) and **investment options** (26.5 per cent).
- The main retirement questions members ask funds relate to **retirement standards of living, contributions and longevity risk**. For example, members often asked their funds questions like:
    - Am I on track for a comfortable retirement?
    - How much do I need to retire?
    - How much should I contribute to put myself in the best position for retirement?
    - How long will my super last?
- Most of our surveyed funds indicated that that they planned to **expand their advice offerings in the next 5 years**.
- Some funds indicated that they would continue to invest and expand their **digital advice offering**, particularly in the retirement space in an effort to provide general and intra-fund advice in a digital and readily accessible format.

Section 3: Providing financial advice to members at scale

In this section we discuss how the regulatory settings can further facilitate the provision of advice and guidance that can reach many members. This includes advice that is provided to more than one member at once (one to many) and advice that members either do not need to pay for or only pay a small amount for.

In the superannuation context, there are already many established advice models of this kind. This includes the provision of intra-fund advice, general advice offerings in the form of seminars and webinars, and the availability of forecasts through online super calculators and retirement estimates.

Additionally, some funds have begun incorporating digital elements into their general and intra-fund advice offerings and exploring how they can provide tailored generic advice to their members. We discuss this concept further in Section 3.3.3: Tailored generic advice for cohorts of members.

Our focus on the provision of advice to members at scale reflects the reality that comprehensive personal financial advice – regardless of how it is delivered – is not enough to close the significant advice gap for members. It also ensures that low-and middle-income earners with modest super balances are not left out of the discussion, as advice that is provided at scale is far more accessible and affordable compared to comprehensive personal advice.

In our view, more can be done within the regulatory settings to facilitate the provision of financial advice to members at scale. Our key concerns are:

- the regulatory framework can go further to encourage the development and use of digital advice,
- the boundaries between personal advice, general advice, guidance and factual information remains unclear, and
- some of the regulatory settings are disproportionate to the potential consumer harm or consumer benefits.

The funds interviewed by Right Lane Consulting also cited that fixing these issues would go a long way to helping funds deliver advice at scale.

These issues must be addressed by the Review and are discussed in turn.

Section 3.1: Encouraging the development and use of digital advice

The regulatory framework should encourage the development and use of digital advice, including in hybrid advice models. In this context, the term digital advice is used to mean advice that is generated by a digital tool underpinned by an algorithm.

Digital advice is critical to the discussion about improving the provision of advice at scale. It is a practical way of ensuring low-cost, consistent and useful advice is provided to members.

At present, we consider that digital advice is most helpful for members when it is capable of being used in combination with some level of human engagement, including advice provided by phone, videoconference or in person. This reflects research that indicates that consumers may still prefer a level of human engagement when seeking financial advice and guidance.[16]

Some of the funds interviewed by Right Lane Consulting indicated that they are considering leveraging digital advice solutions to provide simple scaled advice to their members. At this stage, this primarily involves incorporating (or further incorporating) digital elements into their intra-fund and general advice offerings.

However, there is considerable uncertainty in the industry about whether digital advice and hybrid advice models can be delivered in a compliant manner, which has hampered its use and potential innovation in this space.

This is primarily due to the technology neutral nature of the corporations law. Applying the obligations that relate to the provision of traditional (i.e., non-digital) financial advice to the provision of digital advice – when many of those obligations were introduced at a time when policymakers were not actively considering the role of digital advice – raises legitimate concerns.

There is a particular lack of clarity about the involvement and responsibility of a human in a digital advice process. For example, in a hybrid advice model it is not clear who is legally responsible for the advice, when the involvement of a human could alter the nature of the advice (for example from general advice to personal advice) and specifically for personal advice, how the best interests duty applies. This is compounded if there are multiple licensees involved, such as a financial service provider and a digital advice provider.

Another issue arises where the digital advice provider does not hold an Australian financial services licence. In that case, legal responsibility for the advice rests solely with the Australian financial services licensee (usually the fund, a subsidiary of the fund or a related party of the fund). However, it is often the digital advice provider who designs and ultimately controls the algorithms that define the advice outcomes. Placing sole responsibility for advice on the Australian financial services licensee in this case has impeded the willingness of funds to invest in digital advice solutions.

We acknowledge that there are aspects of the technology neutral application of financial advice laws that are advantageous – particularly those aspects that ensure strong consumer protections also apply to the digital advice context. However, the Review should consider whether a separate framework for digital advice that focuses on the design and ongoing monitoring of the algorithm underpinning the digital tool – where digital advice providers are legally responsible for their algorithms where appropriate – would improve the development and use of digital advice.

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[16] ASIC, "Response to ASIC Consultation Paper 332 Promoting access to affordable advice for consumers", 1 July 2021.

Recommendation 1: The Review should consider whether a separate framework for digital advice that focuses on the design and ongoing monitoring of the algorithm underpinning the digital tool will encourage the development and use of digital advice solutions.

Section 3.1.1: Regulatory assistance with innovation

Regulatory assistance in the form of clear advice is not available for entities that hold an Australian financial services licence, should they wish to develop innovative advice offerings for members. ASIC currently:

- operates an Innovation Hub with the stated objective of providing 'practical support to start-ups and scaleups as they navigate Australia's financial regulatory system',[17] and
- administers the Enhanced Regulatory Sandbox which allows unlicensed persons and businesses to test certain innovative financial services.

However, neither is available to an entity that holds a licence unless that entity is seeking to expand its licence authorisations.

While funds can and do seek their own legal advice on new services, often the advice will be hedged because it is unclear what the regulator's position will be. Ultimately this regulatory uncertainty can stifle innovation in the delivery of services to members, particularly as funds consider using digital advice solutions to deliver advice at scale to members.

By contrast the Australian Taxation Office will, on application, give a private ruling to an entity which is binding advice that sets out how a tax law applies to the entity in relation to a specific scheme or circumstance. An equivalent process offered by ASIC would be extremely valuable in facilitating advice service innovation in superannuation.

Recommendation 2: ASIC's remit should be extended to provide clear advice to licensees on proposed services – including in relation to digital advice.

Section 3.2: Uncertainty about the boundaries between types of advice

The regulatory framework broadly distinguishes between personal advice, general advice, guidance and factual information.

However, even with ASIC guidance, the boundaries between these matters remains unclear. This means that funds are less confident providing general advice and guidance and factual information to members on the off chance it constitutes personal advice (or general advice if the fund is providing guidance or factual information). As a consequence, members may not be receiving the assistance they need from their funds.

[17] ASIC, "Innovation Hub", accessed 17 May 2022.

Ultimately, this uncertainty inhibits funds from providing advice at scale, as general advice, guidance and factual information – rather than personal advice – can be more easily adapted for a larger audience. In particular, it inhibits the ability for funds to develop and use innovative advice models, such as a model based on tailoring generic advice for cohorts of members discussed in Section 3.3.3: Tailored generic advice for cohorts of members.

This uncertainty was recognised by the Retirement Income Review. The Review noted that guidance at retirement, which is unlikely to fall within the definition of regulated financial advice, can be helpful for members, however funds may be reluctant to offer guidance as there is ambiguity about what constitutes financial advice.[18]

Additionally, uncertainty around the boundaries of personal advice and general advice was highlighted in the recent litigation by ASIC against Westpac Securities Administration Limited and BT Funds Management Limited. While that litigation has concluded, the expansive interpretation given by the High Court to personal advice means that funds are less confident providing general advice to members.

A practical example that our member funds have raised relates to the provision of super calculators. Funds generally rely on ASIC class order relief from the licensing and personal advice requirements when providing super calculators to their members. However, when members require assistance to use these tools, it is unclear the extent to which funds can provide this assistance – even where it is entirely straightforward – without stepping into the realm of regulated personal advice. This is not adequately addressed in the ASIC relief or guidance, and ultimately means that funds cannot help their members as needed.

The Review should therefore include recommendations that aim to clarify the boundaries between personal advice, general advice, guidance and factual information. Given the value of general advice to members of industry super funds, any clarification of the boundaries should ensure it does not restrict the current scope of general advice.

Recommendation 3: The Review should include recommendations to clarify the boundaries between personal advice, general advice, guidance and factual information. As discussed in Section 3.1.1: Regulatory assistance with innovation, it may also be helpful for ASIC's remit to be extended to allow ASIC to provide clear advice to licensees about the relevant boundaries in relation to proposed services.

Section 3.3: Regulatory settings that are disproportionate to potential consumer harm or consumer benefits

The primary lens through which we assess regulatory settings in this context is the impact on consumers. In particular, financial advice settings should minimise potential consumer harm and/or improve outcomes for members.

[18] Michael Callaghan, Deborah Ralston and Carolyn Kay, *Retirement Income Review Final Report* (2020), 451.

The key areas in which there is some misalignment include:

- the limited scope of intra-fund advice, which should be expanded to ensure it is more helpful for members when it comes to retirement planning,
- the over-emphasis on the role of personal financial advice in the relief provided to entities that offer super calculators and retirement estimates, which is disproportionate to potential consumer harm and consumer benefits,
- the binary nature of current advice definitions which results in inflexible regulatory obligations, and
- the lack of recognition of overlapping regulatory frameworks that apply to funds in the context of financial advice.

In the next sections we discuss these matters further.

Section 3.3.1: Expanding the scope of intra-fund advice

Intra-fund advice is personal financial advice that is collectively charged to the fund members and is limited to advice about the member's contributions, investment options and insurance within the fund.

Members will often seek guidance from their fund about when to retire, if they will have enough money on which to retire, how they can maximise Centrelink payments (e.g., Age Pension) and how to draw down on their superannuation savings. Members will also generally think in terms of household assets when making these decisions.

However, the current scope of intra-fund advice means that funds cannot provide this guidance to their members – even where it is very simple – as part of their intra-fund advice offering. This issue has been recognised by the Retirement Income Review, which noted that the current scope of intra-fund advice means that it is of limited assistance at retirement.[19]

To address this need, ISA has long advocated for the scope of intra-fund advice to be expanded to include:

- advice about retirement adequacy and Age Pension eligibility, and
- advice about the member's household, i.e., spouse/partner of the member and if applicable, dependants of the member that is pertinent to the members' needs.

The Table below shows how an expanded intra-fund advice model would differ from the current model.

[19] Michael Callaghan, Deborah Ralston and Carolyn Kay, *Retirement Income Review Final Report* (2020), 450.

Current regime	Proposed regime
Relatively simple topics - allowable advice limited to: ▶ Contributions ▶ Investment options ▶ Insurance	Same as left and add: ▶ Superannuation and Centrelink payments, including estimating Age Pension entitlements and any other concessions/entitlements ▶ Advice permitted to consider financial circumstances of member's household, which may include financial circumstances of a non-member spouse/partner that are pertinent to the member ▶ Issues relating to pension phase such as taking a lump sum versus an allocated pension, using super to reduce debt versus providing an income stream, longevity risk ▶ Transition to Retirement advice including advice on how to replicate existing income and how to target a specified income, not limited to a related fund ▶ Retirement planning adequacy projections such as, how much do I need to retire, am I on track, if not what can I do? How long will the money last?
'within product advice' / existing holding	'within product advice' / existing holding
No switching advice (including consolidation)	No switching advice (including consolidation)
Best interests duty applies	Best interests duty applies
Collectively charged from the admin fee	Collectively charged from the admin fee
Cannot be ongoing advice	Cannot be ongoing advice

In 2020, ASIC issued a COVID 19 no action position to facilitate an expanded form of intra-fund advice by allowing reference to 'household circumstances' – recognising the utility of permitting discussion of broader personal circumstances.[20]

[20] ASIC, "Temporary no-action position for expanded intra-fund advice on early release of superannuation relating to COVID-19", 14 April 2020.

Recommendation 4: Intra-fund advice (which can be collectively charged) should be expanded to include advice about retirement adequacy and Age Pension eligibility, and advice about the members household that are pertinent to the member.

Section 3.3.2: Super calculators and retirement estimates

The role of calculators and retirement estimates

Super calculators and retirement estimates are low-cost forecasting tools that provide members with projections of their retirement income, which can help them to plan for their retirement. Super calculators can also provide members with projections about insurance needs and how to optimise super contributions.

Many funds provide super calculators on their websites for the public to use at no cost, and provide retirement estimates to their members in their annual member statements.

As funds begin to implement their retirement income strategies under the Retirement Income Covenant, the usefulness and low-cost nature of these tools means that they will become more important, as funds are expected to increase the assistance provided to their members through these tools.

The role of these tools in helping people who are seeking retirement guidance has been recognised by the Retirement Income Review and consumer groups like Super Consumers Australia.[21]

It is also recognised by ASIC, who currently provides relief to entities that provide super calculators and retirement estimates from certain licensing, conduct and disclosure requirements associated with providing personal financial advice. This is because the provision of super calculators and retirement estimates may involve personal financial advice.

This relief enables funds to offer guidance to members at a low cost. Without it, providers would be unlikely to offer these tools given the increased costs associated with uncertainty about when it may constitute personal financial advice and the incommensurate regulatory burden linked with providing personal financial advice.

ASIC consultation on updated relief

In November 2021, ASIC consulted on updates to their relief and guidance on super calculators and retirement estimates. To date, ASIC has not issued updated relief and guidance following the consultation.

In our submission[22] to that consultation, we broadly supported the proposals that promote greater consistency in the assumptions used across the tools and that ensured the MoneySmart calculators use

[21] Super Consumers Australia, *Submission to ASIC on Consultation Paper 351 – Superannuation forecasts: Update to relief and guidance* (2022).
[22] ISA, *Submission to ASIC on Consultation Paper 351 – Superannuation forecasts: Update to relief and guidance* (2022).

the same assumptions in the updated relief. This standardisation will improve the accuracy of the forecasts and reduce the risk of confusion for members using multiple tools.

However, in that submission we outlined how the relief and associated guidance can be improved to ensure the tools are more useful for more members. Those improvements are set out in turn.

Less emphasis on the role of personal advice

The proposed relief continues to overemphasise the role of personal advice. It requires providers of super calculators and retirement estimates to include disclaimers that members should not rely on the tools to make financial decisions and instead, seek personal advice from a licensed provider.

This requirement undermines the utility of the tools (which will likely be more accurate and helpful following the implementation of the proposals that promote greater consistency and accuracy) and does not reflect the reality that most members will not seek personal financial advice.

At the very least, a member who engages with their super and retirement by relying on these tools is likely to be better off in retirement than if they did not rely on the tools and also did not seek personal advice. In other words, there would be minimal consumer harm involved if a member relied on the forecast provided by one of these tools to make financial decisions.

Funds should be able to give retirement estimates to more members

Under the proposed relief, funds are unable to provide retirement estimates to members who are over 67 years of age (even if they are still in the accumulation phase) and members who are in the retirement phase.

However, members in these cohorts are still likely to benefit from receiving retirement estimates from their funds. For example, members in the retirement phase may benefit from seeing their retirement estimate presented as an annual income stream to illustrate the level of spending that can be supported throughout the rest of their retirement as well as the effect of different drawdown rates, investment options and lump-sum withdrawals on their regular income.

Inclusion of Age Pension amounts in static retirement estimates

Funds should be able to include Age Pension amounts in static retirement estimates. For some members, the Age Pension can make up a significant proportion of their income in retirement. Receiving a static retirement estimate without their possible Age Pension entitlements could be extremely confusing and cause panic, and it is unclear why the proposed position is different for static retirement estimates compared to forecasts from super calculators and interactive retirement estimates.

Recommendation 5: The updated relief from the licensing and personal advice obligations for providers of super calculators and retirement estimates should ensure: there is less emphasis on the role of personal advice; that funds can provide retirement estimates to members over 67 years of age and members in retirement; and that funds can provide age pension amounts in static retirement estimates. Given this relief is longstanding, we would also support the Government providing this relief in regulations.

Section 3.3.3: Tailored generic advice for cohorts of members

An option to facilitate the provision of advice to members at scale is through creating generic sets of advice designed for different cohorts of members, based on a set of parameters (e.g., age, super balance, home ownership, partnered status). The higher the quality of data available to the funds, the smaller (more granular) they can make each of these cohorts. If the cohorts became granular enough, funds would be able to provide highly tailored advice to small cohorts of members at low cost.

However, should members feel a need, they could seek assistance from an adviser to further personalise that advice. This further personalised advice could be provided at low cost because it would be a modification of the tailored generic advice. Such a model would assist funds to help more members without referring them to comprehensive personal advice.

Identifying characteristics of cohorts of members is not a new concept for funds, for example:

- APRA *Prudential Standard SPS 515 Strategic Planning and Member Outcomes* requires trustees to assess outcomes provided to different cohorts of members.
- The design and distribution obligations require trustees to consider the design of its product and to determine an appropriate target market for the product, being a class of consumers for whom the product would likely be consistent with their likely objectives, financial situation and needs.[23]
- The Retirement Income Covenant requires trustees to have a strategy that reflects a trustee's broad understanding of its membership, either for the members of the fund as a whole or for cohorts of members. The characteristics of these cohorts are at the discretion of trustees but could be determined by factors such as super balance, home ownership status, partnered status, or age of retirement.

Understanding the characteristics of different cohorts of members and then creating generic guidance for each cohort is a way to deliver guidance to members at scale, and for many members this will be sufficient to meet their needs. All funds interviewed by Right Lane Consulting said that they believed it would be in members' best financial interests if they could tailor mass customised (generic) advice to individual circumstances. Some funds are already offering a service along these lines.[24]

In the context of existing regulatory settings, tailored or customised advice designed for member cohorts would sit halfway between general advice and personal advice, and be regulated proportionately. For example, there may be no need for a full fact find and resulting Statement of Advice because generalised assumptions based on reliable and, with time, more granular data could be made about the member's financial circumstances.

[23] The design and distribution obligations do not apply to MySuper products.
[24] HESTA, "Super questions answered", accessed 17 May 2022.

In submissions to Treasury on the Retirement Income Covenant, ISA argued that understanding the personal and financial situation and retirement objectives of cohorts of members is central to a fund's retirement income strategy. Government held data such as employment income, relationship status and home ownership, in addition to publicly held data and data collected from member surveys would assist funds to appropriately determine classes or sub-classes of members and formulate a suitable strategy for the class or sub-class.[25]

Access to similar government held data would also assist funds to cohort members with similar financial circumstances and needs for the purpose of offering generic advice tailored to cohorts of members.

> Recommendation 6: The Review should consider: facilitating tailored generic advice by recommending that the government make available to funds data it holds about members on a de-identified basis to assist funds to determine characteristics of cohorts; and lower regulatory settings for personal advice about retirement where the member has already received tailored generic advice.

Section 3.3.4: Overlapping regulatory settings that apply to funds

There has been much public debate about overlapping or duplicate obligations that apply to financial advisers. This is an important consideration for the Review and we discuss one of the key areas where there is overlap later in this submission in Section 5.6: Code of Ethics and the FOFA reforms.

However, in this section, we examine a less discussed topic: the broader regulatory settings that apply specifically to funds and how these are relevant when assessing the regulation of advice provided by funds. This warrants further consideration given funds are a growing source of advice for the average Australian. The broader regulatory settings in question include:

- APRA's member outcome obligations, which requires funds to undertake product-level outcomes assessment on an annual basis,
- the design and distribution obligations, which requires funds to consider the design of its products (other than MySuper products) and to determine an appropriate target market for the product,
- the Retirement Income Covenant, which requires funds to formulate, review regularly and implement a retirement income strategy for retired members and those close to retirement,
- fiduciary obligations imposed on trustees under the *Superannuation Industry (Supervision) Act 1993* and trust law, and

[25] ISA, *Submission to Treasury on the Retirement Income Covenant Position Paper* (2021); ISA, *Submission to Treasury on the Retirement Income Covenant: exposure draft legislation* (2021).

- the annual performance test introduced by the Your Future, Your Super reforms, which will assess both MySuper products and trustee-directed products this year. We also note that the government is considering extending the performance test to retirement income products.

The combined effect of these settings (when fully implemented) is that funds should have high quality and targeted strategies and products for members in both the accumulation and the retirement phase, with overriding fiduciary obligations that financial advisers do not have. In other words, there are many regulatory mechanisms working together to ensure funds, as far as possible, help improve retirement outcomes for their members.

In our view, the Review should consider whether this means that the regulation of advice provided by funds should be less stringent, given the lower risk of consumer harm. For example, this could involve paring back disclosure obligations relating to the provision of advice by funds.

A less stringent regulatory regime for funds providing advice may also allow the full benefits of the broader regulatory settings to be realised, while ensuring there are sufficient safeguards for consumers. For example, it would allow funds to give advice to members at a lower cost about suitable retirement income products developed by the fund under the Retirement Income Covenant, which may otherwise sit on the shelf largely unused.

This approach appears to have been supported to an extent by the Retirement Income Review, which said that "overall, giving funds the confidence to provide limited and targeted guidance to members without needing to comply with the legal obligations associated with financial advice would likely improve people's retirement outcomes."[26]

Recommendation 7: In light of the broader regulatory settings that apply specifically to super funds, the Review should consider whether it is appropriate that a less stringent regulatory regime apply to advice provided by funds.

[26] Michael Callaghan, Deborah Ralston and Carolyn Kay, *Retirement Income Review Final Report* (2020), 456.

Section 4: Review focus

This section identifies areas where the effectiveness of the Review could be improved.

Section 4.1: The Future of Financial Advice reforms

The Future of Financial Advice (FOFA) reforms were aimed at improving the quality of financial advice and in doing so protecting consumers from the harm associated with poor quality and conflicted advice. They included several conduct obligations for financial advisers providing personal advice to retail clients, including:

- an obligation to act in the best interests of the client,
- an obligation to prefer the interests of clients over the interests of the financial adviser and other related entities, and
- a ban on many forms of conflicted remuneration.

The FOFA reforms are arguably the most significant reforms to the provision of advice in recent years and yet there has been no independent evaluation of their effectiveness or compelling evidence to the contrary.[27] Whether previous regulatory changes have improved the quality of advice is an important threshold question on which ASIC, as an independent government agency and the primary regulator of financial advice, must provide a view and supporting evidence in order to properly inform the public debate. Without this missing piece of the puzzle, the Review has no credible basis for making any recommendations in relation to the FOFA reforms.

> Recommendation 8: ASIC should provide a public view and supporting evidence on whether the FOFA reforms have improved the quality of financial advice before the Review begins preparing the Final Report.

Section 4.2: The Professional Standards reforms

Reforms to the professional standards of financial advisers contained in the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (professional standards reforms) built on the FOFA reforms by lifting the training, education and ethical standards of advisers. In doing so they formed part of a package of reforms aimed at improving the quality of financial advice. They included requirements for financial advisers to:

- have an approved qualification,
- pass the financial adviser exam,
- participate in 40 hours of continuing professional development (CPD) each year,

[27] One post-implementation review was undertaken by Treasury in 2017, however it only related to five FOFA measures for which there was no approved Regulatory Impact Statement.

- comply with the *Financial Planners and Advisers Code of Ethics 2019* (Code of Ethics), and
- complete a professional year if they are in training to become a financial adviser.

Yet consideration of the impact of these reforms is excluded from the Review.

The government recently consulted on proposals to lower the education requirements for financial advisers.[28] It is unclear how the government can undertake a review of the quality of financial advice while at the same time lowering standards that go directly to the quality of that advice - which have yet to be fully implemented.

Recommendation 9: The Review should consider regulatory changes to the training, education and ethical standards of financial advisers. In any event, any changes to the professional standards for financial advisers should be delayed pending the outcome of the Review.

Section 4.3: Impact of changes on consumer protections

As noted above, the FOFA reforms and reforms to professional standards of financial advisers were aimed at lifting the quality of financial advice and reducing consumer harm. Other recent measures that aim to protect consumers (among other things) include the design and distribution obligations and the breach reporting reforms.

In considering the need to reduce the regulatory burden and associated cost of giving advice, it is important for the Review to also measure the impact of any proposed reforms on consumer protections. It is insufficient to only consider the impact of any changes against the cost and regulatory burden of providing advice.

Recommendation 10: The Review should assess any proposed changes to the current regulatory settings against the impact of any changes on consumer protections.

Section 4.4: Government's role in providing guidance

Expressly excluded from the Review is consideration of the provision of information by governments aimed at assisting people when making financial decisions. ISA considers this a flawed exclusion as governments have a valuable role in this space.

For example, MoneySmart provides helpful information and guidance, and the Financial Information Service assists eligible Australians with financial advice. [29] Financial counsellors also provide assistance to people experiencing money problems. These are free, trusted and independent services.

Some ways in which the government can increase assistance it provides are through:

- expanding the Financial Information Service to benefit more people,

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[28] Department of the Treasury, *Education Standards for Financial Advisers Policy Paper* (2021).
[29] Services Australia, "Financial Information Service", accessed 17 May 2022.

- enhancing the role of MoneySmart beyond giving factual information, and
- adding an advice service to the Government's new financial capability website.[30]

The United Kingdom's MoneyHelper service may provide a useful model for Government to consider.[31]

Recommendation 11: The Review should consider the role of government in the provision of guidance and advice.

[30] Department of the Treasury, "Financial Capability", accessed 17 May 2022.
[31] Money and Pensions Service, "MoneyHelper", accessed 17 May 2022.

Section 5: Other reforms

This section identifies other reforms for the Review to consider.

Section 5.1: Wake-up packs

In the United Kingdom, workplace pension providers are required to send a wake-up pack to their members within two months of the member reaching the age of 50. Following the original pack, providers are required to send additional wake-up packs at 5-year intervals.

These packs contain information about the members' options at retirement and are intended to help members make better informed decisions about their retirement – including in relation to their pension at the point of retirement and saving in the years leading up to retirement.

These packs are intended to be simple and easy to understand, with the Financial Conduct Authority recommending that the packs contain at least a single page summary document and a fact sheet.

In the Australian superannuation context, the issue around low levels of member engagement and poor financial literacy is well documented.[32] Some members do not know when or how to engage with their super and some are unaware of the assistance their funds can provide.

Currently, some of our member funds have processes in place to prompt their members to think about their retirement. For example, these funds:

- encourage pre-retirees to attend seminars to better understand the retirement process,
- send correspondence to pre-retirees encouraging them to consider seeking advice, and
- provide workplace presentations on retirement related topics to members.

We also expect that other funds will consider incorporating similar processes into their retirement income strategies.

Despite this, ISA considers there is some merit in introducing a legal requirement that funds engage with their members in a similar way to the United Kingdom's wake-up packs. This would ensure that no members miss out on possible opportunities to engage with their super and retirement and that the packs are broadly consistent.

Recommendation 12: The Review should consider the merits of introducing a legal requirement that funds engage with their members in the lead up to their retirement – similar to the United Kingdom's wake-up packs.

[32] Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness Inquiry Report* (2018), 245.

Section 5.2: Charging arrangements

The law currently permits different charging arrangements for MySuper and choice products. This results in an uneven playing field that entrenches a lack of product neutrality and is not in members' interests.

Following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the Government made several changes to the charging arrangements in super. This included:

- prohibiting the charging of ongoing advice fees from MySuper products,
- requiring a member's consent before charging the member for non-ongoing advice fees from a MySuper product, and
- requiring a member's consent before charging the member for any advice fees (including ongoing advice fees) from a choice product.

Our key concern with these changes is that there are now different charging arrangements for MySuper and choice products – namely, it is still possible to charge ongoing advice fees to a choice account, provided the member's consent has been given.

ISA's longstanding view is that all ongoing fee arrangements should be banned, and advisers should be required to charge for specific services when those services are provided. Otherwise – even with the consent requirements – there is less transparency around what the adviser is charging for, and a higher risk of consumers being charged a fee for no service.

Further, the fact that there are different charging arrangements for MySuper and choice products means there is a risk of members being mis-sold or nudged into inappropriate choice products solely for the purpose of being able to pay for ongoing advice from their fund. This is particularly concerning because on average, the choice segment significantly underperforms in comparison to the MySuper segment of the super system.

To ensure competitive neutrality between MySuper and choice products and to reduce the risk of members being mis-sold or nudged into inappropriate choice products, ongoing advice fees should be banned for choice products.

> Recommendation 13: The outright ban on the deduction of ongoing advice fees from MySuper accounts should be extended to choice products.

Section 5.3: Commissions on sale of life insurance outside super

The strong correlation between commissions and poor consumer outcomes resulted in the FOFA ban on conflicted remuneration. It was also found by ASIC to be a key driver of poor advice in the retail life insurance sector.[33] This is not surprising.

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[33] ASIC, *Report 413 Review of retail life insurance advice* (2014).

As noted in the Issues Paper, the objective of the life insurance framework (LIF) reforms was to better align adviser and consumer interests by introducing measures to reduce the risks of conflicted remuneration to the quality of advice about life insurance. The reforms sought to address unnecessary policy replacement ('churn') by introducing capped upfront commissions and claw-back arrangements where a policy is terminated within two years. Claw-back does not apply to the trail commission received by the adviser.

At current levels – 60 per cent of the first-year policy premium and 20 per cent ongoing trail commission – the commissions remain objectively high and incentives, although much smaller, to churn clients remain as trail commissions do not need to be re-paid if a policy is terminated within two years.

While commissions remain permissible for life insurance sold outside of super, there will always be a clear incentive for financial advisers to recommend retail life insurance products instead of life insurance within super. This is unacceptable and commissions should be banned to remove this conflict of interest.

Understanding whether banning commissions on the sale of life insurance will exacerbate under-insurance was a key evidentiary threshold for Commissioner Hayne. It is unclear but probably highly unlikely that the ASIC post-implementation review of the LIF reforms will provide any data on the risk of underinsurance if commissions are banned completely as it seems to primarily involve the collection of data from insurers.

However recent insights by Rice Warner indicate that:

> Over recent years, the level of underinsurance has reduced primarily because of the increase in default insurance benefits provided by superannuation funds. Today, some 70% of life insurance benefits are provided via superannuation funds rather than via individual, retail risk insurance.[34]

Recommendation 14: Commissions for the sale of life insurance should be banned.

Section 5.4: Advice about aged care costs

Advice to members about adequacy of retirement savings and consequently expenditure in retirement should include an assessment of the need for precautionary saving and importantly expenditure on items such as health, aged care, emergencies or a funeral.

While a discussion about aged care costs may be factual, i.e., explaining the different elements that comprise the cost and the availability of government support, it can also be complex covering how aged care costs are funded by the member or strategies for the member to maximise government benefits.

Given the relevance of aged care costs to an assessment of retirement income adequacy, funds should be able to provide this advice, if they choose to, and members should be able to pay for it from their super. However, under the current regulatory setting only fees associated with advice that relates to the member's super, or insurance obtained through super, may be deducted from a member's super

[34] Rice Warner, "The Age-Old Debate about the Validity of Commission Payments", 21 February 2019.

account. This is a significant restraint on the utility of advice funds can give members about adequacy of their retirement savings.

Recommendation 15: Advice about aged care costs should be expressly permitted to be paid out of a member's super.

Section 5.5: Stronger consumer protections for advice on self-managed super funds (SMSFs)

Members in SMSFs bear far greater responsibilities and risks compared to members in other super funds. For this reason, the Productivity Commission noted that:

> Good financial advice is therefore imperative, but the evidence points to widespread problems of poor quality or conflicted advice. Many SMSF owners lack even a basic understanding of their legal obligations and over 40 per cent of SMSFs persist with low balances, high average costs and low average returns.[35]

The decision to switch from an APRA regulated fund to an SMSF is also often made by a consumer after attending a seminar or using an online establishment tool – that is, without personal advice or after only receiving general advice. This is particularly concerning given this is one of the most significant steps a consumer can take in relation to their retirement savings.

ASIC has also long been concerned about inappropriate advice being given to consumers on establishing and/or switching to an SMSF.[36] This inappropriate advice has resulted in SMSFs being sold to consumers for whom they are not appropriate, leaving these consumers worse off in retirement.

Despite these risks, the design and distribution obligations – which provide an important safeguard for consumers where general advice or poor personal advice is given – do not currently extend to SMSFs.

These obligations should be extended to SMSFs to mitigate the risk of SMSFs being inappropriately distributed and sold to consumers. ISA appreciates that applying the design and distribution obligations to SMSFs is not straightforward and may require some adjustment in the regulatory settings (given the issuer of the SMSF is also the trustee). However, this should not prevent its application. This approach would also strengthen ASIC's regulatory toolkit when it comes to overseeing the provision of advice relating to SMSFs.

Recommendation 16: The design and distribution obligations should be extended to SMSFs.

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[35] Productivity Commission, *Superannuation: Assessing Efficiency and Competitiveness Inquiry Report* (2018), 599.
[36] ASIC, *Report 337 SMSFs: Improving the quality of advice given to investors* (2013); ASIC, *Report 575 SMSFs: Improving the quality of advice and member experiences* (2018); ASIC, *Report 576 Member experiences with self-managed superannuation funds* (2018).

Section 5.6: Code of Ethics and the FOFA reforms

While the focus of ISA's submission is on closing the advice gap by exploring ways to deliver advice to members at scale, we make the following observations about the intersection between the *Financial Planners and Advisers Code of Ethics 2019* (code) and the FOFA reforms.

The code was introduced by the professional standards reforms with the objective of increasing the ethical standards of financial advisers. The code contains a set of moral principles – or standards and core values – designed to guide behaviour and are a key element of what it means to be a profession.

Central to the code, and to meet key indicia of a profession, financial advisers must avoid conflicts of interests and put the interests of the clients above their own in all circumstances.

As set out in Section 4.1: The Future of Financial Advice reforms, the FOFA reforms included a number of conduct obligations for financial advisers providing personal advice to retail clients, including:

- an obligation to act in the best interests of the client,
- an obligation to prefer the interests of clients over the interests of the financial adviser and other related entities, and
- a ban on many forms of conflicted remuneration.

These same obligations form the most important elements of the code however they are not completely aligned causing unnecessary overlap, confusion and expense for financial advisers. If it is acknowledged that the fundamental obligations in the code are already in the law and that the duplication is unnecessary, confusing and expensive, the question is where should these ethical obligations sit?

Commissioner Hayne said:

> Codes of ethics are not laws. Codes of ethics are important to fostering public confidence and practitioner integrity in a profession. They are composed by industry practitioners according to agreed industry processes. Laws, by contrast, are the product of a public process conducted under the authority of democratic institutions. It is laws, and not codes of ethics, that are the proper repositories for basic norms of conduct.[37]

ISA supports the view of Commissioner Hayne that the law is the appropriate place for norms of conduct to reside.

Recommendation 17: The Review should include recommendations that reduce unnecessary overlap of the conduct obligations for financial advisers.

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[37] Kenneth Hayne, *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (2019), 211.