

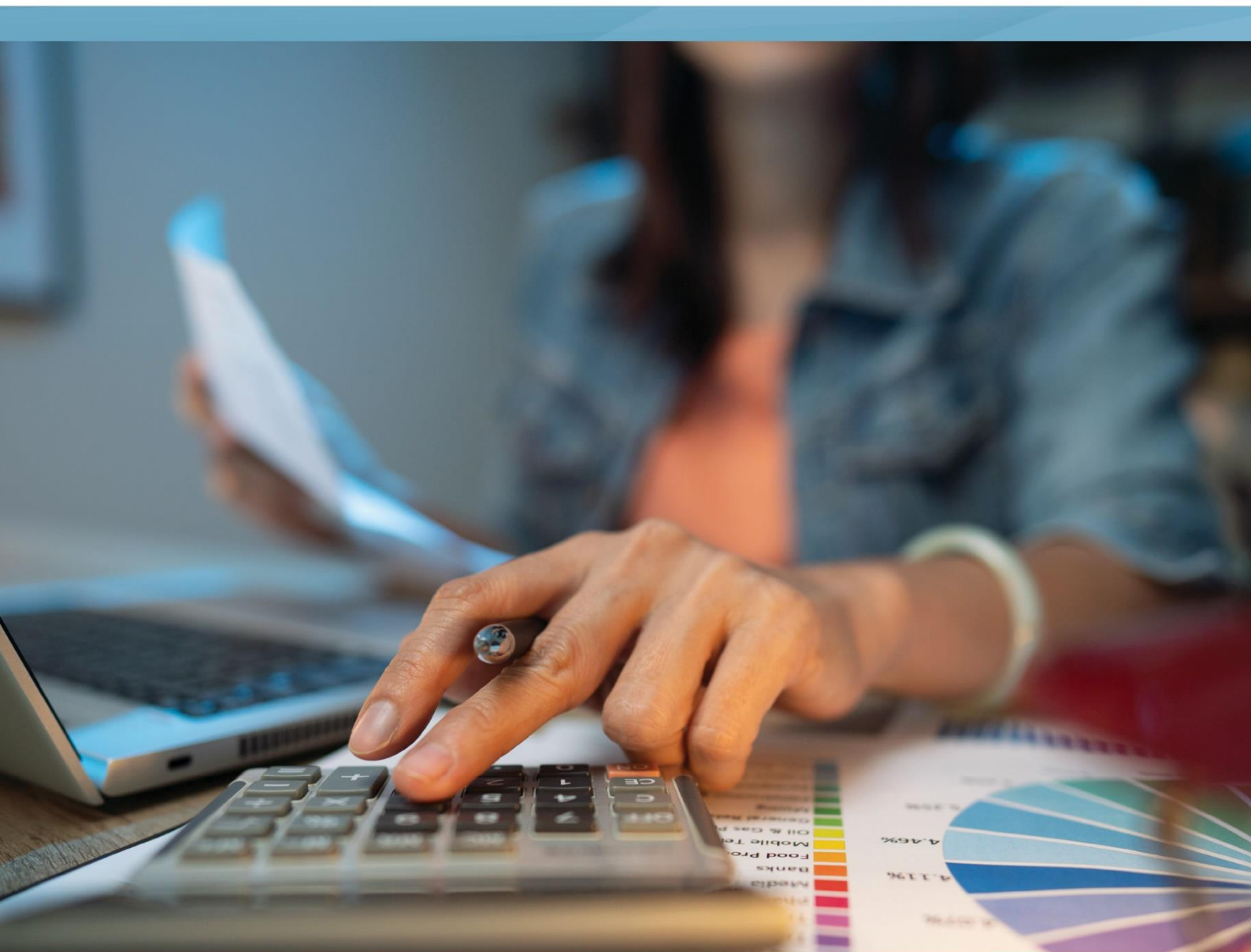


Australian Government

Quality of Advice Review

Final Report

December 2022



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16 December 2022

The Hon Stephen Jones MP
Assistant Treasurer and Minister for Financial Services

Dear Minister

I am pleased to provide you with my report.

With the help of the Review Secretariat, many of the participants in the financial services industry, the regulators, consumer associations and many others, I have considered the matters set out in the Terms of Reference. The purpose of the Quality of Advice Review is to improve the accessibility and affordability of quality financial advice. I have made recommendations for changes to the regulatory framework that apply to the provision of financial advice which I believe will achieve that purpose. If the recommendations are accepted, they will make it possible for people who are unable to access financial advice now to get financial advice which takes into account their personal circumstances. The recommendations will also help those who are able to access financial advice now to do so in a way that better suits their needs.

Yours sincerely

A handwritten signature in grey ink, appearing to read 'M Levy', written in a cursive style.

Michelle Levy

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Acknowledgements

At the risk of sounding like an awards ceremony, I want to thank the many people who have helped me to prepare the Report. Many people in the financial services industry have spent time writing careful submissions and attending consultation meetings. They have invited me to their conferences and other events. I have learnt a great deal from all of you and I hope it is reflected in the Report.

Lots of people at ASIC and APRA have been extremely generous with their time and an enormous help. The Australian Government Actuary team has done some fantastic work with all the data and made sense of it for me.

There is nothing like leading a Review to open doors and I am particularly grateful to the Honourable Kenneth Hayne for his generosity, his advice and the coffee.

I also need to (and would like to) thank my partners at Allens who have given me so much time to spend on the Review and who have lent an ear and provided advice and help along the way.

My secretary Bridget deserves an extra big thanks – I did not miss a single plane, as does my dear friend and colleague MM. No one could have been more generous or more helpful. To thank him I have included a quote from the Dude (the Big Lebowski) in the Report, so for the other fans, please read carefully.

Finally, the Secretariat – our fearless leader Mohita, the extremely diligent and thoughtful Sindy, my travelling companion and always optimistic Jordan, Stephen, Deepika, James, Marty, Isaac, Angad and the poet Julian – what a team. When I told a friend earlier today I had finished writing, she asked whether it was the first time in my life I had been on time. Well, without answering directly, let me just say, I could not have pulled the rabbit out of the hat without you. You have been wonderful to work with and I really am extremely grateful for all of your hard work, your help and your advice.

Thank you.

Abbreviations and Acronyms

Term	Definition
ADI	Authorised Deposit-Taking Institution
AFCA	Australian Financial Complaints Authority
AFS	Australian financial services
AML/CTF	Anti-Money Laundering and Counter-Terrorism Financing
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASIC v AGM Markets	<i>ASIC v AGM Markets Pty Ltd (in liquidation) (No 3) FCA [2020] 208</i>
ASIC v WSAL	<i>Australian Securities and Investment Commission v Westpac Securities Administration Limited [2019] FCAFC 187</i>
ATO	Australian Taxation Office
Casaclang	<i>Casaclang v Wealthsure Pty Ltd [2015] FCA 761</i>
CCI	Consumer credit insurance
CDR	Consumer data right
Code of Ethics	Financial Planners and Advisers Code of Ethics 2019
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	Corporations Regulations 2001
DDO	Design and distribution obligations
FAR	Financial Advisers Register
FCA	UK Financial Conduct Authority
FOFA	Future of Financial Advice
FSG	Financial Services Guide
FSR	<i>Financial Services Reform Act 2001</i>
GDP	Gross domestic product

Term	Definition
GWP	Gross written premium
IGR	Intergenerational Report
LIF	Life Insurance Framework
MaPS	UK Money and Pensions Service
NCCP Act	<i>National Consumer Credit Protection Act 2009</i>
PJC	Parliamentary Joint Committee on Corporations and Financial Services
Review	Quality of Advice Review
RG	ASIC Regulatory Guide
Ripoll Inquiry	The 2009 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Financial Products and Services in Australia
ROA	Record of advice
Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
RSE	Registrable superannuation entity
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SIS Regulations	Superannuation Industry (Supervision) Regulations 1994
SMSF	Self-managed superannuation fund
SOA	Statement of advice
TMD	Target market determination
TAS Act	<i>Tax Agent Services Act 2009</i>
TPB	Tax Practitioners Board
TPD	Total and permanent disability (a type of life insurance cover)
Wallis Inquiry	1997 Inquiry into the Financial System
WSAL	Westpac Securities Administration Limited

Executive Summary

Purpose of the Review

The purpose of the Quality of Advice Review (Review) is ‘to ensure Australians have access to high quality, accessible and affordable financial advice’. The Terms of Reference require the Review to consider how the regulatory framework could better enable the provision of high quality, accessible and affordable financial advice for retail clients (consumers).

The regulatory framework

The regulatory framework for financial advice is complex, difficult to understand and difficult to comply with. These are serious defects. They are an undoubted impediment to consumers being able to access affordable financial advice. They are also an impediment to consumers accessing high quality advice. The regulatory framework has not even proved effective in preventing consumer harm. The regulation applying to the provision of financial advice has accumulated with rapid succession over a short period of time in response to crises and scandals involving financial institutions and financial advisers with each one leading to more patching of the law. The result is not coherent and it is plainly not working.

High quality advice

High quality advice is not always, and perhaps not often, comprehensive advice – it is advice that responds to the needs of consumers. Many consumers need incidental, simple and limited advice, sometimes frequently. It is in the interests of consumers to be able to get financial advice as and when they need it. This will often be when they are dealing with their bank, superannuation fund or insurer, and these will often be the first places they turn to when they need financial advice.

Diversity of advice needs but an inflexible regulatory model

The regulatory framework does not accommodate this well. It makes it hard for institutions to give their customers simple personal advice and it makes it hard and expensive for financial advisers to give their clients the advice they want at a price they are willing to pay. This is because the obligations attaching to the provision of advice proceed on the basis that all advice is comprehensive advice and because of that the law requires any advice provided by an individual to be provided by financial advisers. There are about 16,000 financial advisers in Australia and they are professionals with the skills and expertise to provide complex advice.

There are about 25 million Australians and there are too few financial advisers to provide financial advice to all who need it. To a large extent this role will have to fall on financial institutions – banks, superannuation funds, insurers and wealth managers. Financial institutions benefit from the financial products their customers hold and, because of that (rather than in spite of that) they should provide them with the advice they need about those products. The law should encourage them to do so in a way that is not only safe but which serves the interests of consumers.

Digital advice tools

Calculators, online risk profilers and apps that provide tips and nudges are all examples of digital advice. They are easy to access and often free. There are also providers who are able to make more comprehensive digital advice services available to consumers for a modest fee. These have the capacity to provide valuable financial advice to people who would otherwise never get that advice.

Digital advice tools also have the capacity to make it possible for financial institutions to employ staff who are not financial advisers to provide advice to their customers and to help financial advisers do their jobs more efficiently.

The regulatory framework can and should help

The regulatory framework should support all of these things. The recommendations in this Report will. If they are accepted, they can improve the accessibility and affordability of quality financial advice. They will encourage and make it easier for financial institutions to give advice to their customers and they will make it easier for financial advisers to tailor their advice to the needs of their clients.

Self interest and conflicts

Financial institutions will have an interest in the financial advice they provide to their customers. Where a financial adviser accepts a commission from an insurer they will too. This does not mean financial institutions should not be able to give advice – that is unrealistic and is not in the interests of consumers. It also does not mean that all commissions should be prohibited. The Terms of Reference ask whether the exceptions to the ban on conflicted remuneration should be retained. Despite their shortcomings, there is a very real risk that banning insurance commissions would mean that fewer consumers would receive advice about insurance and that fewer people would have the insurance cover they need. A number of other exceptions are anomalous and should be removed.

The challenge for the regulatory framework is to permit the self-interested to give advice in a way which is not only safe but which also serves the interests of their customers and clients. The recommendations do this by focusing on the content and merits of the advice rather than the conduct of the provider. They also do so against a strong backdrop of consumer protection laws.

Strong consumer protection regulation

Financial institutions must act efficiently, honestly and fairly in giving advice to their customers and they must design and distribute financial products only if they are likely to be suitable for their customers. They cannot pay or be paid conflicted remuneration for investment products and superannuation funds must act in the best financial interests of their members. The law also prohibits the unsolicited ‘hawking’ of financial products. There are breach reporting obligations and significant penalties for breaches of the law. The regulators are more willing to take action in response to misconduct.

These are the fundamentally important foundations against which the recommendations in this Report are made.

We have lots of evidence about what consumers want

Consumers want direct answers to their questions. Where it is relevant they want advice that takes into account their personal circumstances and when they are speaking to their financial institution they expect that the advice they are given does so. A general advice warning does not change that expectation.

The recommendations in this Report will treat more financial product advice as ‘personal advice’ under the law. The advice must be good advice. Where the advice is given by an employee of a financial institution who is not a financial adviser, the institution rather than the employee will be responsible for ensuring the advice is ‘good advice’.

The definition of ‘good advice’ takes its lead from the Sale of Goods legislation and the Australian Consumer Law. Good advice is advice that is fit for the purpose for which it is given and is in all the circumstances good. The word ‘good’ is itself important because it is the adjective which best describes what consumers want and need – ‘good’ advice.

Professional advice and financial advisers

From time to time consumers might need comprehensive advice – a financial plan – or specialist advice. Some consumers will want to pay a fee for ongoing financial advice. This is the work of professionals with specialist skills. The recommendations preserve an exclusive role for those individuals who are financial advisers, financial planners and stockbrokers, who can be paid a fee for their advice (or who, in respect of insurance, may receive a commission). When they are engaged by a client they undertake to provide advice that is in the interests of their client. Under these recommendations, financial advisers will have a personal duty to give good advice and they will have a statutory duty to act in the best interests of their clients when they give advice.

Disclosure

Much of the existing framework focuses on disclosure and arming consumers with the information they need to make decisions in their own interests. This too does not work. Instead the law requires providers of financial advice to prepare documents their customers and clients pay for but rarely want or read. The recommendations will remove most of this and turn the current law on its head – providers of advice will have to ask themselves, and their customers and clients, how they would like advice to be provided to them.

Superannuation

Superannuation plays an important role in most people’s lives. It is a financial product that might be held for many decades and the relationship between a member and their superannuation fund might be one of the longest relationships of their lives. Superannuation is complex and people will have better retirement incomes if they make good decisions in their own interests throughout their working lives and then into retirement. Superannuation fund trustees have obligations to act in their members’ best financial interests and a specific duty to assist members with their retirement needs. In the main people trust their superannuation funds. The recommendations in this Report will help and encourage superannuation funds to give personal advice to their members. It also recommends some small changes to the regulatory framework to provide a firmer basis upon which the trustees of superannuation funds can exercise their powers in ways they decide are best able to serve the interests of their members.

The Royal Commission and Commissioner Hayne's 'six principles'

The genesis of the Review was the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. In the Final Report Commissioner Kenneth Hayne said there were 6 principles that underpinned the law. The recommendations in this Report have those principles at their heart. The first principle was to obey the law. Words cannot have that effect, but simpler and more plainly drafted law can help. The recommendations will, if accepted, simplify the regulatory framework that applies to financial advice.

The other principles were: do not mislead or deceive; act fairly; provide services that are fit for purpose; deliver services with reasonable care and skill; and when acting for another, act in the best interests of that other. These are all part of the law that applies now to the provision of financial services, including financial advice and they are the underpinning of the recommendations in this Report. At their core, the recommendations require financial institutions and financial advisers to ask themselves whether their financial advice is complete, accurate and fair, fit for purpose, provided with reasonable care and skill and, if they are acting for their client, in the best interests of their client. In short, the recommendations reflect Commissioner Hayne's 6 principles and, if interpreted in light of them, they will require providers of financial advice to take responsibility for providing their customers and clients with the advice they want and need.

Recommendations

Recommendation 1 – Personal advice

The definition of personal advice in the Corporations Act should be broadened so that all financial product advice will be personal advice if it is given to a client in a personal interaction or personalised communication by a provider of advice who has (or whose related body corporate has) information about the client's financial situation or one or more of their objectives or needs.

Personal advice means financial product advice prepared or adjusted for or directed to a particular client in circumstances where:

- a) the client tells the provider of the advice their financial situation or one or more of their objectives or needs; or
- b) the licensee responsible for the advice, or a related entity of the licensee, if the licensee is a body corporate, holds information about the client's financial situation or one or more of their objectives or needs.

Recommendation 2 – General advice

General advice should continue to be a financial service, but the requirement for a general advice warning to accompany general advice should be removed.

Recommendation 3 – Relevant providers

Amend the Corporations Act to provide that personal advice must be provided by a relevant provider where:

- a) the provider is an individual; and
- b) either:
 - i) the client pays a fee for the advice; or
 - ii) the issuer of the product pays a commission for the sale of the product to which the personal advice relates.

In all other cases, personal advice can be provided by a person who is not a relevant provider.

Recommendation 4 – Good Advice Duty

A person who provides personal advice to a retail client must provide the client with good advice. Good advice means personal advice that is, at the time it is provided:

- a) fit for purpose having regard to:
 - i) if the advice is:
 - 1) given in response to a request, question or inquiry from the client, the purpose of the client that the provider is aware of or should reasonably be aware of; or
 - 2) volunteered by the provider, the reason the provider reasonably considers the advice might be of use or benefit to the client;
 - ii) the scope, content and nature of the advice; and
 - iii) the likely relevant circumstances of the client; and
- b) in all the circumstances, good.

If the advice is provided by a financial adviser (relevant provider), this duty applies to the financial adviser. In all other cases, this duty applies to the AFS licensee.

Recommendation 5 – Statutory Best Interests Duty

The existing best interests duty and related obligations (the duty to give appropriate advice assuming the best interests duty is satisfied, the duty to warn the client if the advice is based on inadequate or insufficient information and the duty of priority if there is a conflict) should be replaced with a new statutory best interests duty.

The new best interests duty would be a true fiduciary duty that reflects the general law and will not include a safe harbour.

This duty will apply only to financial advisers (relevant providers).

Recommendation 6 – Superannuation advice

Superannuation fund trustees should be able to provide personal advice to their members about their interests in the fund, including when they are transitioning to retirement. In doing so, trustees will be required to take into account the member's personal circumstances, including their family situation and social security entitlements if that is relevant to the advice.

Superannuation fund trustees should have the power to decide how to charge members for personal advice they provide to members and the restrictions on collective charging of fees should be removed.

Recommendation 7 – Deduction of adviser fees from superannuation

Superannuation trustees should be able to pay a fee from a member's superannuation account to an adviser for personal advice provided to the member about the member's interest in the fund on the direction of the member.

Recommendation 8 – Ongoing fee arrangements and consent requirements

The current provisions which require a provider of advice to give a fee disclosure statement to the client, to obtain the client's agreement to renew an ongoing fee arrangement and the client's consent to deduct advice fees should be replaced. Providers should still be required to obtain their client's consent on an annual basis to renew an ongoing fee arrangement, but they should be able to do so using a single 'consent form'. The consent form should explain the services that will be provided and the fee the adviser proposes to charge over the following 12 months. The consent form should also authorise the deduction of advice fees from the client's financial product and should be able to be relied on by the product issuer. The form should be prescribed.

Recommendation 9 – Statement of advice

The requirement to provide a statement of advice (or record of advice) should be replaced with the requirement for providers of personal advice to retail clients to maintain complete records of the advice provided and to provide written advice on request by the client. Clients should be asked whether they would like written advice before or at the time the advice is provided and a request for written advice is required to be made before, or at the time the advice is provided.

This requirement will not apply to a person who is currently exempt from the requirement to provide statements of advice (e.g. a person who provides personal advice about general insurance products).

ASIC should provide guidance on how advice providers may comply with their record-keeping obligations.

Recommendation 10 – Financial Services Guide

Providers of personal advice should either continue to give their clients a financial services guide or make information publicly available on their website about the remuneration and any other benefits the provider receives (if any) in connection with the financial services they provide and their internal and external dispute resolution procedures (and how to access them).

Recommendation 11 – Consent requirements for wholesale clients

The Corporations Act should be amended to require a client who meets the assets and income threshold and who has an accountant's certificate to provide a written consent to being treated as a wholesale client.

The written consent should contain an acknowledgment that is given before they are provided with a financial product or service that:

- the advice provider is not required to be a relevant provider and accordingly they will not have to comply with the professional standards;
- the advice provider will not have a duty to give good advice or to act in the best interests of the client under the Corporations Act;
- the advice provider is not required to give the client a product disclosure statement or financial services guide; and
- the client will not be entitled to complain about the advice under the AFS licensee's internal dispute resolution procedures or to AFCA.

The existing consent requirements for sophisticated investors should be amended to require a written acknowledgement in the same terms.

Recommendation 12.1 – Design and Distribution Obligations (Distribution Requirements)

Amend the DDO distribution obligations in the Corporations Act to limit the exception to the requirement to take reasonable steps to ensure the distribution of a financial product is consistent with its target market to personal advice provided by relevant providers.

Where personal advice is provided by someone who is not a relevant provider, the AFS licensee should, like any other distributor, be required to comply with the distribution obligations and take reasonable steps to ensure the financial product is only recommended in accordance with the target market determination.

Recommendation 12.2 – Design and Distribution Obligations (Reporting Requirements)

Amend the DDO reporting requirements in the Corporations Act to remove the requirement for relevant providers to:

- report significant dealings outside the target market to the product issuer;
- comply with the additional reporting obligations specified by the product issuer in the target market determination; and
- report to the product issuer where there have been no complaints during the specified reporting period.

These exceptions will not apply to someone who is not a relevant provider.

All providers of personal advice (including relevant providers) will need to report the number of complaints received during a reporting period (if there have been any), as well as a description of the nature of these complaints to the product issuer.

Recommendation 13.1 – Benefits given by a client

Amend the conflicted remuneration provisions in the Corporations Act to explicitly provide that both monetary and non-monetary benefits given by a client to an AFS licensee or a representative of a licensee are not conflicted remuneration.

This means that the prohibition on AFS licensees, or their representatives accepting monetary and non-monetary benefits would only apply to benefits given by a product issuer, not to benefits given by a client.

Recommendation 13.2 – Client directed payments from superannuation funds

Remove the exception in section 963B(1)(d)(ii) and 963C(1)(e)(ii) of the Corporations Act and replace it with a specific exception that permits a superannuation fund trustee to pay an AFS licensee or its representative a fee for personal advice where the client directs the trustee to pay the advice fee from their superannuation account.

Recommendation 13.3 – Removing exceptions for benefits given by clients for issue, sales or dealings in financial products

If the recommendation that permits benefits (monetary and non-monetary) given by clients to an AFS licensee or a representative is accepted, the following exceptions to the conflicted remuneration provisions are no longer required and should be removed:

- section 963B(1)(d)(i) of the Corporations Act – monetary benefits given by the client for the issue or sale of a financial product;
- section 963C(1)(e)(i) of the Corporations Act – non-monetary benefits given by the client for the issue or sale of a financial product; and
- regulation 7.7A.12E of the Corporations Regulations – monetary benefits given to the provider by a retail client in relation to the provider dealing in a financial product on behalf of the client.

Recommendation 13.4 – Removing the exception for the issue of financial products where advice has not been provided in the previous 12 months

Remove the exception in paragraph 963B(1)(c) of the Corporations Act, which provides for monetary benefits given for the issue or sale of a financial product where the AFS licensee or representative has not given financial product advice about the product (or class of product) for at least 12 months prior to the date the benefit is given.

Recommendation 13.5 – Exception for agents or employees of Australian authorised deposit-taking institutions

Remove the exceptions in section 963D of the Corporations Act and regulation 7.7A.12H of the Corporations Regulations for benefits given to an agent or employee of an Australian authorised deposit-taking institution for financial product advice about basic banking products, general insurance products or consumer credit insurance.

Recommendation 13.6 – Time-sharing schemes

The Government should undertake a separate review of time-sharing schemes and their distribution to determine whether the regulatory framework for time-sharing schemes under Chapter 7 of the Corporations Act is appropriate. As part of this review, consideration should be given to whether the exception to the ban on conflicted remuneration for time-sharing schemes should be removed.

Recommendation 13.7 – Life insurance

Retain the exception to the ban on conflicted remuneration for benefits given in connection with the issue or sale of a life risk insurance product. Commission and clawback rates should be maintained at the current levels (60 per cent upfront commissions and 20 per cent trailing commissions, with a 2-year clawback).

A person who provides personal advice to retail clients in relation to life risk insurance products, who receives a commission in connection with the issue or sale of the life risk insurance product, must obtain the client's informed consent before accepting a commission. This consent should be recorded in writing and should be obtained prior to the issue or sale of the life risk insurance product.

In order for the client to make an informed decision, the advice provider must disclose:

- the commission the person will receive (upfront commission and trail commission) as a per cent of the premium; and
- the nature of any services the adviser will provide to the client (if any) in relation to the life risk insurance product (such as claims assistance).

Consent will be one-off and apply for the duration of the policy.

This requirement will only apply to life risk insurance products purchased after the commencement of this recommendation.

Recommendation 13.8 – General insurance

Retain the exception to the ban on conflicted remuneration for benefits given in connection with the issue or sale of a general insurance product.

A person who provides personal advice to retail clients in relation to a general insurance product who receive a commission in connection with the issue or sale of the general insurance product, must obtain the client's informed consent before accepting a commission.

This consent should be recorded in writing and should be obtained prior to the issue or sale of the general insurance product. Consent is not required for any renewals of the same type of cover provided the client's original consent applied to the commission payable on any renewed cover.

The advice provider must disclose details of the commission the provider will receive for the issue or sale of the general insurance product (including for subsequent renewals) and any services the provider will provide to the client (if any). The disclosure of the commission amount can be set out in the form of a per cent range of the premium.

Recommendation 13.9 – Consumer credit insurance

Retain the exception to the ban on conflicted remuneration for benefits given in relation to consumer credit insurance. The current cap on commissions in relation to consumer credit insurance (of 20 per cent) should continue to apply.

A person who provides personal advice to retail clients in relation to consumer credit insurance who receives a commission in relation to consumer credit insurance must obtain the client's informed consent before accepting a commission.

Chapter 1 – What I Have Been Asked to Do and My Conclusions

1.1 Purpose and objectives

1.1.1 The Terms of Reference

The Terms of Reference ask me to consider how the regulatory framework for financial advice could be changed to make quality advice more accessible and more affordable. They proceed on the basis that the law is an impediment to accessible and affordable advice. Having come to the end of the Review, I can confidently say: ‘I agree’.

1.1.2 A focus on providers and not consumers

The current regulation of financial product advice focuses on providers and not consumers. There are documents with prescribed content that few people want, warnings that few people understand, and a best interests duty that does not require the provider to give good advice. Those who defend the current regime say it is necessary to protect consumers from poor and harmful advice. But the evidence is that it does not do a very good job of that. In my view, the current regulatory framework is, as the Terms of Reference assume, an impediment to consumers getting useful guidance and good financial advice.

1.1.3 Reframing the regulatory regime to better suit consumers

The recommendations in this Report will make financial product advice more accessible and more affordable. They will create opportunities for a diverse range of advice providers and services and will lead to financial product advice that better suits the needs of consumers. They focus attention on what consumers want and not the processes that must be followed or the documents that must be given by the providers of advice. Personal advice will have to be good advice and that means providers will have to ask themselves what their customers and clients want and they will have to consider the purpose of their advice and the relevant needs and circumstances of their customers and clients. They will not be able to answer a specific question with a general response, a general advice warning and a recommendation to seek financial advice. I believe this will help improve the quality of advice that is available to consumers.

These are my objectives. They are not to help financial advisers, digital advice providers, banks, superannuation funds, platform providers, investment managers or insurers sell their products. To the extent the recommendations do so, that is because advisers, human and digital, and financial institutions have an important part to play in providing financial advice to consumers.

1.1.4 Making it easier to provide good advice

The recommendations will make it easier for financial advisers to give advice that is truly in their clients’ best interests. The recommendations might also make it easier for product issuers to distribute their own products. I think the people from whom we borrow, with whom we invest and who insure us should also provide us with good financial advice. I understand the challenges with that.

As Chief Justice Allsop said in *ASIC v Westpac Services Administration Limited & Anor (ASIC v WSAL)*,¹ there is no bright line between sales and advice and so my challenge is to encourage the self-interested to provide safe, appropriate and sound or, to use the adjective that was most often used in discussions during the Review, ‘good’ advice to their customers. I have recommended that the law do so in the most direct means possible – by saying that a financial institution, an Australian financial services (AFS) licensee or a financial adviser who gives personal advice to a retail client must give the client ‘good advice’.

1.1.5 Providing good advice

Good advice does not mean ‘okay advice’ or ‘good enough’ advice – it means what it says. It is unlikely to be good advice to recommend a poorly performing superannuation product. It will not be good advice to recommend that a person who is unable to pay their mortgage open a term deposit and it will not be good advice to recommend a life insurance product that does not provide the protection the customer needs.

The recommendations are made against a strong back drop of consumer protection regulation, a greater understanding of the responsibility of financial institutions to consumers, greater accountability for executives where the law is not complied with, regulators that are more willing to take enforcement action and potentially significant penalties.² It is important to keep this in mind when reading the recommendations.

1.2 The process

1.2.1 What have I been doing?

I was appointed to lead this review in March 2022. Since then, and with the help and support of the Secretariat, I have released an Issues Paper, a Proposals Paper and a short paper on conflicted remuneration. I have read hundreds of submissions and spoken to as many people. I have visited regulators, financial institutions and industry associations in Singapore, the United Kingdom and the United States of America. I have read research reports, academic articles, cases and determinations of the Australian Financial Complaints Authority (AFCA). I have listened to the concerns and criticisms about the proposals I have published and discussed. In light of those, I have adjusted some of the proposals. In other cases, I worried the criticisms were based on self-interest rather than a genuine

1 *Australian Securities and Investments Commission v Westpac Securities Administration Limited* [2019] FCAFC 187, Allsop J, page 8.

2 The Corporations Act was amended in April 2019 to introduce new and significant penalties for breach of the general obligations of an AFS licensee, including the efficiently, honestly and fairly (EHF) obligation. A contravention of the EHF obligation (and of the other general obligations) is a contravention of a civil penalty. The maximum pecuniary penalties for breaches of the EHF obligation (and other general obligations of licensees in subsection 912A(1)) are substantial: For individuals, the greater of: 5,000 penalty units (currently \$1.11 million) (if determinable by the court) 3 times the benefit derived and detriment avoided because of the contravention. For body corporates, the greater of: 50,000 penalty units (currently \$11.1 million) (if determinable by the court) 3 times the benefit derived and detriment avoided because of the contravention 10 per cent of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision, capped at 2.5 million penalty units (currently \$555 million).

concern for consumers. In other cases they overestimated the efficacy of the existing law and underestimated the value of advice. Where I have not changed my mind, I have sought to explain why.

1.2.2 Who have we heard from?

Most of the submissions and most of the people I have spoken to are participants in the financial services industry – they are financial advisers and representatives of financial institutions and their associations and regulators. I am conscious that we did not hear from consumers directly, although we did hear from consumer advocates. This is to some extent because of time, but also because it was difficult to know what could be usefully learnt from focus groups or surveys of consumers. There has been work done by the Australian Securities and Investments Commission (**ASIC**) and researchers on what consumers want by way of financial advice and we have considered that work. And, of course, I am also a consumer and the mother, child, sister, spouse and friend of consumers. And so, when I consider these reforms, I have each of us directly in mind.

1.2.3 Conflicts of interest

There are many conflicts in the financial services industry and one of the chief concerns of the regulatory framework is managing those conflicts. One of the chief criticisms of my proposals is that they will allow conflicts to not only continue but to flourish. Another is that they will allow non-qualified people to provide advice. In short, they raise the spectre of the conflicted and inept selling ('flogging' is a commonly used word) of products to unsuspecting consumers. I think the criticisms are unwarranted noting that regulation cannot of itself protect consumers. The law has to be enforced.

Not all conflicts are financial and so I think it is important that I am open about my own. You may recall the case study in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) of a gentleman living with Down Syndrome who was sold a life insurance policy on a telephone call. He could not afford the premiums, he lived on a disability pension and he had no dependants. In short, he did not need and would not benefit from the life insurance he was sold. I have a daughter who, like this gentleman, lives with an intellectual disability and his story added to the long list of fears I have for her.

She has a bank account – indeed 3 – 'living', 'fun' and 'holidays' (it's a pretty good life) – but she does not know the difference between \$10, \$100 and \$1,000, she does not understand how to use a credit card and she does not know what superannuation is. She should be able to rely on her bank and her superannuation fund to assist her by providing her with guidance and advice that takes into account her needs. She should be able to rely on an insurer not to sell her insurance that she does not need.

The conduct in that case study was unethical. Anti-hawking laws and design and distribution obligations (**DDO**) make it unlawful (if it was not at the time). My recommendations will go further – they will require financial institutions to think about their customers' circumstances and needs before recommending a product or providing advice. They do not expose the gentleman in the case study or my daughter to more risk – to the contrary, they will help them to get more help on financial matters. And so when I am told that these are retrograde recommendations for consumers, that they reduce consumer protections and walk away from Commissioner Hayne's 'six norms of conduct', I strongly and loudly disagree.

1.3 Banking Royal Commission

1.3.1 Hayne's six principles

In his Final Report, the Honourable Kenneth Hayne identified what he called 'six norms of conduct' which he said are 'well-established, widely accepted, and easily understood'. They are:

- obey the law;
- do not mislead or deceive;
- act fairly;
- provide services that are fit for purpose;
- deliver services with reasonable care and skill; and
- when acting for another, act in the best interests of that other.³

1.3.2 Obeying the law

Commissioner Hayne's first principle is something of a curiosity and, one hopes, goes without saying. But, while no one told me they would not comply with the law, many told me that they worried others would not. The recommendations proceed on the basis that regulated entities and professional financial advisers will comply with the law in the ordinary case and that, in the ordinary way, on occasion they will not. And because of that the law must and does include obligations to identify, report and remedy misconduct, breaches and errors and to compensate customers who suffer loss or damage. The law must also include penalties and regulators must be willing to take enforcement action when necessary. Many people have told me the regulators, ASIC particularly, are too willing to do so, even when the misconduct is minor. Leaving aside some strongly worded correspondence, I have not seen any real evidence of this. In AFCA, we also have a complaints body which is easy to access. None of this will change with my recommendations. And they provide an important backdrop to them.

1.3.3 The existing law

As to the remaining 5 principles, Commissioner Hayne noted that they all form part of the existing law, albeit they are scattered and not necessarily expressed so plainly.

Arguably, these should be enough and everything else is not only surplusage, but an impediment to complying with the principles. Commissioner Hayne criticised financial institutions for legalistic applications of the law – for asking 'can we' rather than 'should we'. But, with the best will in the world, it can be hard to stand back from the voluminous and complicated financial services regulation and ask whether particular conduct or a particular interpretation of a provision is consistent with the 6 principles. And when one does not have the best will and, when it suits, it can also be easy to rely on a narrow technical interpretation of the law and loopholes.

³ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Final Report Volume 1*, page 8.

A truly bold approach to the regulation of financial advice (and financial services more broadly) would be to start again and replace the whole framework with Commissioner Hayne's principles, expressed clearly and said once. This would combine an ethical code with simple rules of conduct. I have not been nearly so bold. Happily, that was not Commissioner Hayne's recommendation either. His Recommendation 7.4 was that:

As far as possible, legislation governing financial services entities should identify expressly what fundamental norms of behaviour are being pursued when particular and detailed rules are made about a particular subject matter.⁴

At their core, my recommendations require regulated entities and individuals to ask themselves whether their financial advice is complete, accurate and fair, fit for purpose, provided with reasonable care and skill and, if they are acting for their client, in the best interests of their client. In short, they reflect the 6 principles and, if interpreted in light of them, will require providers of financial advice to take responsibility for providing their customers and clients with the advice they want and need.

1.4 The problem

1.4.1 Advice is difficult to get and expensive

It can be difficult and expensive for consumers to obtain personal financial advice. This is because it is difficult and expensive to provide that advice. Financial institutions are unable or unwilling to provide personal advice, with some reasonably limited exceptions. Instead they provide general advice that is not based on the customer's needs or circumstances and which is accompanied by a warning to that effect and a recommendation that the customer obtain personal advice, even when it is fanciful to think they could or might. Indeed, there are only around 16,000 financial advisers in Australia. Their clients are typically people with whom they have an ongoing relationship and it is not feasible or sensible to think that they have the capacity to assist most people with their incidental questions or even a financial plan.

1.4.2 It matters

An initial question is whether this is a problem that should be fixed. The world is complicated and most of us need help with financial matters from time to time. Most of us would benefit from good financial advice. Often we need help on small matters – whether we should open a bank account, make a contribution to superannuation or pay more off a mortgage – and sometimes we have big questions – should we have life insurance and if so how much, what retirement product should we buy and so on.

4 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), Volume 1, page 496.

1.5 What is the answer?

1.5.1 First, what is not the answer?

Because it is easier, I will start with what in my view is not the answer.

A few people have said that advice should be freely available – particularly retirement advice. They have suggested that this advice could be provided by a government agency and they have pointed to the Money and Pensions Service (**MaPS**) in the United Kingdom as a model. I do think there should be more financial advice available from Government agencies. An obvious agency would be Centrelink, but I do not think that is the answer. Advice at retirement is very important, but it is potentially too late. I note that MaPS provides its clients with information and general advice and does not recommend products. It therefore leaves people better informed but still, often, needing to go back to financial advisers and their pension providers.

Financial information, guidance and advice should be available throughout our lives and it should respond to our needs and even anticipate them. In my view, this means there should be a variety of providers. Not all advice can be provided by financial advisers, and nor should it be. The 16,000 financial advisers are required to hold relevant degrees and to comply with professional standards. They are entitled to charge a fair fee for their advice. This fee will always be out of reach for some people and, even when it is not, not everyone will want to pay a financial adviser. Financial advisers themselves want to provide comprehensive advice to clients with whom they have an ongoing relationship, as they have studied and trained to do, rather than to provide incidental or piecemeal advice on financial products.

The only person who is likely to provide financial product advice without charging a fee for that advice is a person who benefits in some other way from providing the advice. The obvious candidates are the financial product issuers who charge fees for their financial products – banks, insurers, superannuation funds and investment managers. They will provide financial advice about their own products because they want to attract customers and retain existing customers. This raises vertical integration.

1.5.2 Vertical integration is part of the answer

I would like to say something about vertical integration – the combination in a single entity or group of entities of the manufacturer of the financial product and the distributor of the product.

At the heart of the definition and regulation of financial product advice is the term financial product. This is a somewhat curious term because one does not naturally refer to an interest in a superannuation fund, a bank account, an interest in a managed investment scheme, a share or an insurance policy as a ‘product’. None of them can be bought off the shelf or, to use a well-used analogy, from the car yard. All of them are brought into existence when the ‘issuer’ enters into a legal relationship with the customer. This too makes the regulation of financial product advice more complicated than the regulation of other products. It also means the discussion about vertical integration is somewhat more complicated too.

Product issuers will want to and do promote their own financial products and it is important when reading the recommendations to keep in mind that the law does not prevent them from doing so now. Product issuers recommend their products to customers every day. In many cases they are doing so using general advice. When a person provides general advice, they do not have a duty to consider any of the customer’s needs or circumstances and they do not have to act in their best interests. And, when they provide personal advice, the best interests duty does not guarantee good advice. These

proposals will improve the position of consumers by requiring providers of personal advice to provide good advice.

1.5.3 A simpler approach to regulation

The Terms of Reference ask me to consider whether financial services regulation should be more principles based. I am not confident I could distinguish a principles-based law from another kind (rules-based?). But I do say the law should make sense and it should focus on the outcomes which are intended to be achieved. On both measures the regulation of financial advice falls a long way short.

This is what Justice Buchanan said in 2015 in *Casaclang v Wealthsure Pty Ltd*:

The standards of conduct which are set out in the Corporations Act in general and in Chapter 7 in particular should operate as a reliable guide to conduct, readily ascertainable and capable of equally ready understanding. They should be accessible and comprehensible by those whose conduct is governed and by those whose interests might be affected – i.e. consumers and clients, small as well as big. The provisions with which I am dealing in this judgment fall short of that objective by a large margin, even for trained lawyers. That is unfortunate. The result is that the provisions of Chapter 7 do not, in my view, act as an effective guide to conduct at all. They represent a complicated catalogue from which to select instruments of retribution well after loss or damage has been suffered. The applicants in the present case have persevered, but justice for them and others (and for licensees) should not depend upon such complexities as Chapter 7 presents, and should not be endangered by the real possibility of misunderstanding or misapplication of its provisions.⁵

Unfortunate indeed. The recommendations I have made will simplify the law and they will direct its attention to what consumers want – not how the providers of advice get there.

1.5.4 Proposals Paper

I released a Proposals Paper on 29 August 2022 and a short paper on conflicted remuneration on 31 October 2022. While there has been some attention given in the media to the differences of opinion between some stakeholders about the merits of the proposals, there has in fact been broad support for the proposals as a whole. And they should be taken as a whole because they work together.

I have adjusted some of the proposals. However, I have not changed my views that more financial product advice should be personal advice and that not everyone who gives personal advice must be a ‘relevant provider’. I have also not changed my view that providers of personal advice should be required to give ‘good advice’.

⁵ *Casaclang v Wealthsure Pty Ltd* [2015] FCA 761, Buchanan J, paragraph 236.

1.6 What does the future look like?

1.6.1 Quality and quantity

The recommendations in this Report will treat more opinions and recommendations about financial products as personal advice. This will have the effect of improving the quality of advice that is available. Then, they will make it easier for product issuers and advisers to provide personal advice to their customers and clients. That means that more people will be able to ask their bank, insurer, superannuation fund or investment manager for advice that takes into account their relevant personal circumstances. This will improve the accessibility of advice.

For people who want professional advice, it will continue to be available from professional financial advisers with a duty to act in their best interests. The recommendations will make it less costly for financial advisers to provide advice and it is therefore possible that more people will be able to afford the services of a financial adviser.

1.6.2 Variety and diversity

Financial advisers are professionals and they have skills and expertise for which they are entitled to charge a fair fee. For that reason they cannot provide the answer to the advice needs of all Australians. We need a regime that permits variety and diversity. Contrary to what some people have told me, not all financial advice is difficult and digital advice tools will help even when it is.

The Review has provided an opportunity to rethink how we can access financial advice. In my view there is a real opportunity to do things differently and to remove some of the regulation that applies now to the provision of financial product advice. It is not utopian. It is based on other important changes to the regulation of the provision of financial services in Australia. The ban on conflicted remuneration is important as too is the obligation of an AFS licensee to provide their financial services efficiently, honestly and fairly. Properly applied and enforced this obligation will prevent financial institutions exploiting changes to the regulation of financial advice in ways that would be to the detriment of their customers.

1.6.3 A focus on what consumers want and need

If implemented, the recommendations will focus the attention of the law on what consumers want and need. It will give providers of advice greater flexibility and more room for creativity. More kinds of advice will be able to flourish and disclosure and reporting will turn on what consumers want and need.

In the rest of this Report I set out the detailed recommendations.

Chapter 2 – Current Regulatory Regime

Chapter Summary

- The provision of financial product advice is governed first and foremost by Chapter 7 of the Corporations Act. The regime has been subject to frequent reform, particularly over the last decade.
- Many of the obligations imposed on providers of financial product advice by Chapter 7 of the Corporations Act are unclear, overlapping and difficult to comply with.
- There has also been a rapid increase in the consumer protection provisions in the financial services regulatory regime more broadly. These are relevant to the recommendations about the regulation of financial advice.
- There are many people interested in the provision of financial advice by financial advisers including ASIC, AFS licensees, AFCA and product issuers. They all influence the way financial advisers understand the law and they all affect the way financial advisers provide financial product advice to their clients.
- Australia is not alone in the challenges we face in making good financial advice readily available to consumers. There is no foreign jurisdiction that provides a regime which deserves to be copied in Australia.

2.1 Current regulatory framework

2.1.1 This Chapter

I have been asked to consider whether changes are required to the regulatory framework applying to the provision of financial product advice to improve the accessibility and affordability of quality financial advice. Before answering that question, it is useful to describe the existing framework. This Chapter provides an overview of the law that applies to the provision of financial product advice. It also includes some commentary about how it is working.

2.1.2 Financial Services Reform Act

The current regulatory framework starts with and centres around Chapter 7 of the *Corporations Act 2001* (**Corporations Act**) and the associated regulations. It was introduced into the Corporations Act in 2002 by the *Financial Services Reform Act 2001* (**FSR**). The title of the Chapter is 'Financial Services and Markets'. It is the financial services part that is relevant to the provision of financial product advice.

As recommended by the 1997 Inquiry into the Financial System (**Wallis Inquiry**)⁶ FSR created:

*...a single licensing regime for financial sales, advice and dealings in relation to financial products, consistent and comparable financial product disclosure, and a single authorisation procedure for financial exchanges and clearing and settlement facilities.*⁷

The objects of Chapter 7 of the Corporations Act at commencement on 11 March 2002 relevantly included promoting ‘confident and informed decision making by consumers of financial products’ and ‘fairness, honesty and professionalisation by those who provide financial services’.⁸ These continue to be the relevant objects of Chapter 7 of the Corporations Act, except that since 5 April 2021, they have also included ‘the provision of suitable financial products to consumers of financial products’.⁹ This was added with the introduction of the DDO regime.¹⁰

While financial sales and financial advice were included in the financial services regime regulated by Chapter 7 of the Corporations Act it is noteworthy that the objects do not include encouraging good quality advice nor even protecting consumers from harmful advice.

2.1.3 AFS licensing and financial services

And so, as recommended by the Wallis Inquiry, the Corporations Act requires a person who carries on a financial services business in Australia to hold an AFS licence or to satisfy an exemption.

A person carries on a financial services business if they are in the business of providing financial services. Financial services include relevantly:

- providing financial product advice;
- dealing in a financial product;
- operating a registered scheme;
- providing a custodial or depository service; and
- providing a superannuation trustee service.¹¹

A person is covered by an exemption if they are a representative of an AFS licensee. A representative of a licensee is a person who acts on behalf of the licensee and who has been appointed by written notice as an authorised representative of the licensee¹² or who is an employee or director of the licensee or its related body corporate.¹³ The AFS licensee is responsible for the conduct of their representatives.

The licensing regime applies equally to financial sales and financial advice, and so product issuers and advice licensees hold AFS licences. Financial advisers themselves rarely hold their own AFS licence and are usually representatives of an advice licensee and sometimes a product issuer.

6 Commonwealth of Australia (1997), *Financial System Inquiry Final Report*.

7 Revised Explanatory Memorandum to the Financial Services Reform Bill 2001, paragraph 1.4.

8 Corporations Act, ss 760A(a) and (b).

9 Corporations Act, s 760A(aa).

10 The commencement of the DDO regime was delayed until 5 October 2021.

11 Corporations Act, s 766A.

12 Corporations Act, s 916A.

13 Corporations Act, s 910A.

2.1.4 Definition of financial product advice

Financial product advice is defined as:

- a recommendation or a statement of opinion, or a report of either of those things, that:
 - a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
 - b) could reasonably be regarded as being intended to have such an influence.¹⁴

The first thing to say about the definition is that financial product advice requires a recommendation or a statement of opinion to be provided. While a recommendation or opinion can be implied, a mere statement of fact is not a recommendation or statement of opinion and is not financial product advice. The second is that the reference to advice in the defined term (financial product advice) does not import any particular formality or any level of expertise or skill into the recommendation or opinion.¹⁵ As a consequence, marketing is just as capable of being financial product advice as comprehensive financial advice. Again this is consistent with the recommendation of the Wallis Inquiry that a single licensing regime apply to both financial product sales and advice.

2.1.5 Two types of financial product advice

There are 2 types of financial product advice: personal advice and general advice.

Personal advice is defined as:

financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

- a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs (otherwise than for the purposes of compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF)* or with regulations, or AML/CTF Rules, under that Act); or
- b) a reasonable person might expect the provider to have considered one or more of those matters.¹⁶

General advice is defined as financial product advice that is not personal advice.¹⁷

Again, it is worth emphasising that it is not possible to give either personal advice or general advice without giving a recommendation or expressing an opinion (that is, without giving financial product advice) and that the provision of information – no matter how personalised – is not financial product advice.

Having said this, I acknowledge that it can be difficult to distinguish information from recommendations and opinions in some cases.

14 Corporations Act, s 766B(1).

15 *Australian Securities and Investments Commission* [2019] FCAFC 187, Allsop J.

16 Corporations Act, s 766B(3).

17 Corporations Act, s 766B(4).

2.1.6 Obligations of AFS licensees

All AFS licensees must comply with the general obligations in the Corporations Act. Among other things they must:

- do all things necessary to ensure the financial services covered by the licence are provided efficiently, honestly and fairly;
- have in place adequate arrangements for the management of conflicts of interest;
- comply with the conditions of the licence;
- comply with financial services laws;
- take reasonable steps to ensure their representatives comply with the financial services laws;
- ensure that their representatives are adequately trained and are competent to provide those financial services;
- have an internal dispute resolution that complies with ASIC's requirements; and
- be a member of AFCA.¹⁸

AFS licence conditions can incorporate ASIC Regulatory Guides and in that way Regulatory Guides can be imported into the law. In all other cases, ASIC Regulatory Guides are just that – the regulator's guidance about its interpretation of the law and how it will enforce the law. Despite that, it became apparent during the consultation process that many licensees and advisers treat ASIC guidance as the law. They also looked to ASIC to tell them what the law says. ASIC is (in my view, rightly) cautious about doing so. Ultimately it is the role of the courts to interpret the law. I have not recommended that ASIC have a power to make binding rulings in the same way the Commissioner of Taxation can. This is because so much of the law affects the rights of consumers and therefore its interpretation should ultimately lie (as it does) with the courts.

2.1.7 Obligations of AFS licensees who give personal advice

An AFS licensee who provides personal advice to retail clients also has additional obligations under Chapter 7 of the Corporations Act. Until the Future of Financial Advice (**FOFA**) reforms of 2012, the AFS licensee or its authorised representative (the 'providing entity') was required to have a 'reasonable basis' for their advice. They were also required to give the client a product disclosure statement for each financial product they recommended, a Financial Services Guide (**FSG**) and a statement of advice (**SOA**). Any remuneration and other benefits the provider would receive in relation to the advice were required to be disclosed.

These requirements proceeded on the basis that if consumers were armed with all the relevant information they would make well informed choices in their own interests. The collapses of the advice firm Storm Financial and the securities broker Opes Prime during the Global Financial Crisis led to an inquiry into the advice provided by their respective advisers and provided stark evidence that consumers rely on their advisers' recommendations and do not make well informed choices.

¹⁸ Corporations Act, s 912A.

2.1.8 FOFA and other reforms

In 2009, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) conducted an inquiry into financial products and services in Australia (**Ripoll Inquiry**).¹⁹

The PJC recommended ‘*an explicit legislative fiduciary duty on financial advisers requiring them to place their clients’ interests ahead of their own*’.²⁰ In thinking about the recommendations in this Report about the good advice duty and the best interests duty it is relevant to keep in mind that Justice Edelman in *ASIC v Cassimatis*²¹ decided that there was no reasonable basis for the advice provided by Storm Financial to its clients. The misconduct was not caused by a defect in the duty to have a reasonable basis for advice.

Following the Ripoll Inquiry, the FOFA legislation²² amended the Corporations Act in 2012 by introducing bans on conflicted remuneration, volume-based shelf-space fees and asset-based fees on borrowed amounts and requiring advisers to act in the best interests of their clients when providing them with personal advice. The best interests duty applies to individual advisers personally and it replaced the prior obligation for providers (AFS licensees and authorised representatives) to have a reasonable basis for their advice. It was a far more interventionist approach to the regulation of financial advice than that recommended by the Wallis Inquiry in 1997 reflecting the PJC’s view in 2009 that disclosure does not protect consumers against poor and conflicted financial advice. And yet, the best interests duty and the ban on conflicted remuneration apply in addition to the original disclosure obligations. There is no reason to think those obligations are more effective now.

Before setting out the best interests duty and associated obligations introduced by FOFA (the conflicted remuneration provisions are discussed in Chapter 9), I note that they have not been the end of the changes to the regulatory regime applying to the provision of financial product advice. There have been further changes to that regime, each responding to yet another example of misconduct and consumer harm. And just as FOFA was layered on top of the requirements of FSR, in large part each further reform has been overlaid on what was already there, resulting in a complex regulatory regime with sometimes overlapping and inconsistent requirements. The many examples of misconduct and the many changes to patch up perceived defects in the law tend to indicate that the regulatory framework is not working well.

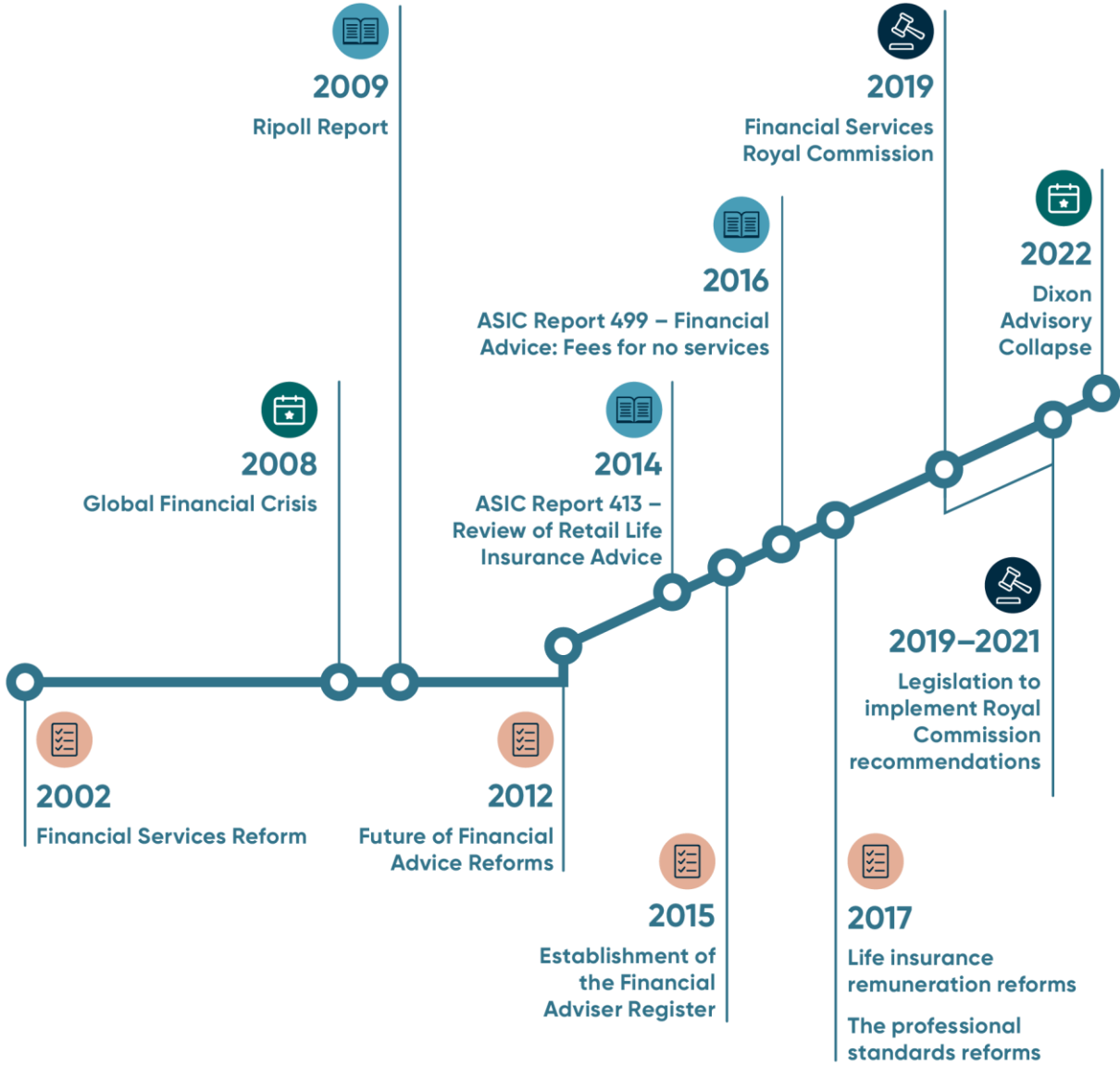
19 Parliamentary Joint Committee on Corporations and Financial Services (2009), Inquiry into financial products and services in Australia.

20 Parliamentary Joint Committee on Corporations and Financial Services (2009), page 110.

21 *Australian Securities and Investments Commission v Cassimatis* [2016] FCA 1023.

22 The FOFA legislation comprises of 2 Acts: *Corporations Amendment (Future of Financial Advice) Act 2012* and the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*.

Diagram 2.1: Trend of increasing regulatory requirements for financial advice



2.2 Existing personal advice regime

2.2.1 Best interests duty, safe harbour and associated obligations

Chapter 7 of the Corporations Act requires a person who provides personal advice to a retail client to:

- act in the best interests of the client in relation to the advice;
- provide advice that is appropriate to the client assuming the best interests duty is satisfied;
- give a warning to the client if the advice is based on inadequate or insufficient information; and

- give priority to the client’s interests if there is a conflict between the interests of the client and the provider or the interests of the client and the interests of an associate of the provider.²³

A provider is taken to have complied with the duty to act in the best interests of the client in relation to the advice if they prove they have done each of the following:

- identified the objectives, financial situation and needs of the client;
- identified:
 - the subject matter of the advice that has been sought by the client; and
 - the client’s relevant circumstances;
- made reasonable inquiries to obtain complete and accurate information;
- assessed whether the provider has the expertise required to provide the client advice sought and, if not, declined to provide the advice;
- if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:
 - conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and
 - assessed the information gathered in the investigation;
- based all judgments in advising the client on the client’s relevant circumstances;
- taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances.²⁴

These are the ‘safe harbour’ steps. There are fewer steps in the safe harbour for advice given by Australian authorised deposit-taking institutions (ADIs) about basic banking products, general insurance products and consumer credit insurance.²⁵ There are also fewer steps in the safe harbour for advice given by anyone about general insurance.²⁶

2.2.2 Fiduciary-like, not fiduciary duties

The best interests duty and the duty of priority are intended to impose fiduciary-like duties, but despite the recommendations of the PJC in the Ripoll Inquiry they are not fiduciary duties. They do not prohibit an adviser acting in their own interests.

The Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 explains the Corporations Act best interests duty in the following way:

Whether a provider has acted in the best interest of the client will be tested according to what would objectively and reasonably be considered appropriate for the client, as outlined in section 961G (as is the case under the existing section 945A of the Corporations Act). Issues around what is expected of providers when faced

23 Corporations Act, ss 961B, 961G, 961H and 961J.

24 Corporations Act, s 961B(2).

25 Corporations Act, s 961B(3).

26 Corporations Act, s 961B(4).

with a conflict of interest are dealt with under the obligation to give priority in section 961J. To a certain extent, the process of providing advice (as regulated in section 961B), the quality of advice (as regulated in section 961G) and conflicts of interests (as regulated in section 961J) are interrelated issues. Together, the provisions operate to implement the policy framework for ensuring financial advisers act in all circumstances in the best interests of the client.²⁷

And so, from inception it might be said that what is required by these duties is unclear. While the best interests duty is directed to the adviser's conduct and the safe harbour steps set out the relevant steps²⁸, the legislature says that compliance will be tested by reference to the appropriateness of the advice. But even assuming this is a correct statement of the law, it is circular because the appropriate advice limb of the Corporations Act best interests duty is tested on the assumption the best interests duty itself has been satisfied. The adviser must ask themselves – if I had complied with my best interests duty, would my advice be appropriate? And so advisers, ASIC and the courts are back where they started. What does the duty to act in the best interests of the client in relation to advice require of an adviser?

As many people have written, including Commissioner Hayne in his Final Report, if you thought the clues were in the language of acting in the client's interests, the safe harbour steps suggest otherwise. These steps are the steps a careful adviser might take in discharging their duty of care. They have nothing to say about acting without a conflict or not taking an unauthorised profit and so one may wonder in what way the formulation in the Corporations Act is fiduciary-like.

2.2.3 Safe harbour steps

Commissioner Hayne was critical of the safe harbour steps because they encouraged a narrow checklist based approach rather than a genuine consideration of what an adviser should do to comply with their duty to act in the best interests of the client, although according to the Explanatory Memorandum, the steps are meant to inform the answer to that question. After considering and rejecting whether the section should be more prescriptive Commissioner Hayne suggested removing the safe harbour steps. He said:

In my view, such a change would not be without merit. As I have said, the safe harbour provision currently has the effect that, in practice, an adviser is required to make little or no independent inquiry into, or assessment of, products. By prescribing particular steps that must be taken, and allowing advisers to adopt a 'tick a box' approach to compliance, the safe harbour provision has the potential to undermine the broader obligation for advisers to act in the best interests of their clients. Having

27 Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, paragraph 1.24.

28 Paragraph 1.25 of the Revised Explanatory Memorandum: The steps set out in subsection 961B(2) are not intended to be an exhaustive and mechanical checklist of what it is to act in the best interests of the client. A provider may be able to demonstrate that it has, in fact, acted in the best interests of the client under subsection (1), without having recourse to subsection (2). However, as a general principle of statutory interpretation, it is expected that the interpretation of the general obligation in subsection (1) will be informed by the steps set out in subsection (2). Those steps provide an indication of what, as a minimum, is expected of providers in order to be considered to have acted in the best interests of the client.

*said that, I am not convinced that it is necessary or appropriate to remove the safe harbour provision at this stage.*²⁹

I note that this is not how many industry participants understand the safe harbour steps. They say they require a review of the marketplace of relevant financial products and, consistent with that, some of the submissions we have received say that removing the safe harbour would improve access to advice because advisers would be free to ‘scale’ their advice such that an assessment of available products is not required.

I do not think this view is correct. It understates what is required by the primary obligation – to provide advice in the best interests of the client. Where that advice includes a product recommendation, there is no basis for saying that that duty requires anything less than the adviser recommending what they honestly consider is likely to be the best financial product for the client at the time. It is not clear how an adviser could do so without having regard to the available products. And so, in my view it is the best interests duty rather than the safe harbour which makes it difficult for advisers to provide advice on a single financial product. This is consistent with the view expressed by Commissioner Hayne.

The question for me is whether, in light of the objectives of this Review, it is desirable. I consider this question in Chapter 6.

2.2.4 Duty of priority

The duty of priority is particularly perplexing. It applies where there is a conflict between the interests of the adviser and the client; it also applies where there is a conflict between an associate of the adviser and the client. In either of these circumstances, the Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 introducing the duty says the duty of priority tells providers what is expected of them.³⁰ That I think assumes far too much about the clarity of the section.

In one of the few cases which considers the duty of priority in the Corporations Act, the judge noted that the licensee and employed adviser would both receive a financial benefit if the clients followed the recommendations of the adviser. The judge observed that this created a conflict for the purposes of the duty of priority and went on to conclude that the duty had been breached.³¹ To similar effect, in proceedings being brought against AMP Financial Planning (and others), the plaintiffs allege that the advisers breached their duty of priority to clients by not ‘dialling down’ or ‘rebating’ commission on life insurance.³²

The implication in both of these cases (noting there is no decision in the main proceedings against AMP Financial Planning at this stage) is that the duty of priority prohibits an adviser having a conflict and that the only way to comply with the duty of priority is to avoid the conflict – to receive no benefit in the first case, or to rebate the benefit to the client in the second. This interpretation is inconsistent with the plain words of the section and of the Explanatory Memorandum. The law proceeds on the basis that it is possible for an adviser to provide advice in the best interests of the client despite having

29 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019) Volume 1, pages 176–177.

30 Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, paragraphs 1.63 to 1.70.

31 *Australian Securities and Investments Commission v Forex Capital Trading Pty Ltd, Forex Capital Trading Pty Ltd* [2021] FCA 570 at 48 to 52.

32 *Stack v AMP Financial Planning Pty Ltd (No 2)* (2021) 401 ALR 113 at 105.

a conflict of interest provided that in doing so they give ‘priority’ to the interests of the client. That is what the section tells the provider to do. Arguably then the provider can accept a benefit provided the client benefits a little more than the provider. How that can be measured is a more difficult problem.

Before leaving this particular topic, it is worth noting that in all of the submissions we received and in all of the discussions we have had about the best interests duty and the safe harbour steps no one from the financial advice industry referred to the duty of priority. I think it is fair to say this reflects the fact that as a practical matter it is largely ignored rather than well understood.

2.2.5 Advice disclosure obligations

In addition to complying with the Corporations Act best interests duty, a person who provides personal advice to a retail client must provide the client with a:

- financial services guide; and
- statement of advice, or, in some circumstances, a record of advice (**ROA**).³³

This topic is considered further in Chapter 8 of this Report. However, for the moment, I note that while these obligations are themselves straightforward, preparing a statement of advice is time consuming and therefore adds to the cost of providing advice. The consumer benefit is questionable.

2.2.6 Relevant provider

In addition to these requirements, where the provider of personal advice is an individual, they must be a ‘relevant provider’. A relevant provider must meet the prescribed professional standards, which includes the education and training standards and the Financial Planners and Advisers Code of Ethics 2019 (**Code of Ethics**)³⁴ and be listed on ASIC’s Financial Adviser’s Register (**FAR**).

The Government is separately reviewing the education and training standards. The Code of Ethics is a legislative instrument which contains 12 standards, including obligations to:

- act with integrity and in the best interests of each of the adviser’s clients (Standard 2);
- not give advice, refer or act in any other manner where the adviser has a conflict of interest or duty (Standard 3);
- act for a client only with the client’s free, prior and informed consent (Standard 4);
- provide advice and financial product recommendations in the best interests of the client and that are appropriate to the client’s individual circumstances (Standard 5); and
- take into account the broad effects arising from the client acting on the advice and actively consider the client’s broader, long-term interests and likely circumstances (Standard 6).

The Code of Ethics therefore covers the same topics as the best interests duty in the Corporations Act and uses some of the same terms, but it does so in different ways. Many submissions have pointed to the inconsistencies between the 2 sets of duties. I agree – there are inconsistencies and it is possible that an adviser may comply with the Corporations Act best interests duty but not the equivalent requirement in the Code of Ethics. This is undesirable. The Government has announced that it intends

³³ Corporations Act, ss 941A and 946A.

³⁴ The education and training standards for relevant providers and the requirement to comply with the Code of Ethics are prescribed in sections 921B and 921E of the Corporations Act.

to review the Code of Ethics in 2023, after it has considered the outcomes of this Review. I suggest that review consider whether it continues to be necessary to import the Code of Ethics into the Corporations Act and whether the duplication and inconsistency between the 2 can be removed.

2.2.7 Broader regulatory changes to the financial system

At the same time as there has been a rapid increase in changes to the regulation of financial product advice, there have been an equally rapid increase in consumer protection provisions in the financial services regulatory regime more broadly. These are important in considering the effect of the recommendations in this Report.

Three things underpin them – one from each of the last 3 decades of reform:

- The first has been in the law since FSR commenced and is the obligation for the AFS licensee to do all things necessary to ensure the financial services covered by its licence are provided efficiently, honestly and fairly. It is the first among a long list of general obligations of AFS licensees, but that does not mean it is not a standalone obligation. It is now getting more attention and it is not a stretch to say that it is and should be treated as the chief obligation of an AFS licensee. If they comply with this obligation, it is difficult to see how they could not serve the interests of their customers and clients. ASIC has demonstrated a much greater willingness to commence proceedings where it believes a licensee has breached the obligation and if they have, there are now significant penalties which can apply.
- The second commenced with FOFA and is the ban on conflicted remuneration. It is fundamental. It removes the incentive for AFS licensees and their representatives to sell investment products issued by other providers.
- The third commenced with the Royal Commission reforms and are the design and distribution obligations. They shift the focus of the regime from disclosure and advice to product design and distribution. Product issuers must consider the suitability of their financial products for their customers over the life cycle of the products and they must take responsibility for their distribution.

These obligations are combined with enhanced personal accountability for banking executives and, if the Financial Accountability Regime is passed, for executives of other Australian Prudential Regulation Authority (APRA) regulated institutions as well.

Broader Financial System Reforms

Stronger controls governing the sale of financial products

- *Design and distribution obligations*: requires product issuers to make target market determinations (TMDs) for their financial products (including consumer credit products) and distributors to distribute financial products in accordance with the TMDs. These obligations are intended to improve the quality of financial products and prevent financial products being sold

to people for whom they are unlikely to be suitable. As at December 2022, ASIC has issued over 20 interim stop orders under the DDO regime.³⁵

- *Product intervention power*: allows ASIC to issue stop orders and take other actions to protect consumers from poorly designed or harmful financial products (including consumer credit products) where there is a risk of significant consumer detriment. To date, ASIC has used this power in relation to the issue and distribution of contracts for difference and short-term credit and continuing credit contracts.
- *Deferred sale of add-on insurance*: prohibits the sale of an add-on insurance product for 4 days after the sale of the principal product or service. After this time, there is a limited window during which the add-on insurance product can be sold to the customer before the anti-hawking requirements apply.
- *Strengthened anti-hawking requirements*: the anti-hawking provisions in the Corporations Act have been strengthened to reduce instances of mis-selling or pressure selling of financial products by introducing a broader prohibition on offers to sell or issue financial products made in the course of, or because of, unsolicited contact.

Stronger controls for superannuation products

- *Performance testing*: default superannuation products are subject to an annual performance test. A performance test is scheduled to also apply to some 'choice' superannuation products (investment strategies) in 2023. Superannuation products that fail the performance test twice cannot accept new members. This is designed to remove underperforming superannuation products from the market.
- *Reducing balance erosion*: the *Superannuation Industry (Supervision) Act 1993 (SIS Act)* has been amended to introduce fee caps on low balance superannuation accounts, prohibitions on default insurance for under 25s and low balance and inactive accounts and a requirement for inactive accounts to be transferred to the Australian Taxation Office (ATO). These measures are designed to protect superannuation balances from erosion by fees and insurance premiums.

Retirement income covenant: superannuation fund trustees are required to formulate a retirement income strategy and publish a summary of the strategy on their website. The purpose is to shift the focus of trustees and members from accumulating superannuation to the draw down stage and to encourage funds to develop products and strategies to improve outcomes for their members in retirement.

35 ASIC (2022), 22-338MR ASIC takes civil penalty action against American Express Australia in first court case alleging breaches of design and distribution obligations.

Stronger governance and accountability requirements

- *Higher penalties*: AFS licensees and their representatives face significantly higher penalties for a broader range of misconduct including the obligation for licensees to provide financial services ‘efficiently, honestly and fairly’.
- *Strengthened breach reporting requirements*: the 2021 changes to the breach reporting regime allow ASIC to identify and address systemic issues that can lead to poor consumer outcomes more quickly.
- *Financial accountability regime (yet to be enacted)*: the Banking Executive Accountability Regime is proposed to be extended to include insurance and superannuation entities. The regime is designed to improve the risk and governance cultures of financial institutions by imposing a strengthened responsibility and accountability framework on their directors and executives.

2.3 Oversight of the providers of financial advice

2.3.1 The regulatory framework is more than the law

Having described the law, it is important to note that the financial advice that is provided and how that advice is given is not merely a function of the law – there are a lot of facets, a lot of interested parties. Chief among them are ASIC, AFCA, the advice licensees and product issuers (in particular, platform operators and superannuation fund trustees).

Each of them has a very real effect not only on the way advisers provide advice but also on the way the law is interpreted. In some ways, they have added to the difficulty of providing advice and in some ways the result is that law reform has not had the effect that was intended.

2.3.2 ASIC

ASIC is the primary regulator with responsibility for the regulation of financial advice providers. AFS licensees must report breaches of the law, including by their representatives, and other matters to ASIC.

ASIC also undertakes surveillance of the sector and takes enforcement action if it considers it appropriate to do so. ASIC issues regulatory guidance to assist industry in their interpretation of the law. In the main regulatory guidance is not the law, but it is clear that many advice licensees and advisers treat it as such. Throughout the Review, stakeholders told us on many occasions that ASIC takes enforcement action for what they saw as minor infractions. We have not seen any evidence of ASIC taking punitive action which is disproportionate to the misconduct and risk. Nevertheless, the belief and fear that it will is real. This is not something that legislative change can fix, although it might be alleviated in part if the regulated community has greater confidence that there is a common understanding of what the law requires. More simply drafted regulation should assist.

2.3.3 AFS licensees and AFCA

All AFS licensees who provide financial services to retail clients are required to be members of AFCA. A retail client may make a complaint to AFCA about an advice licensee or an adviser (for which the licensee is responsible).

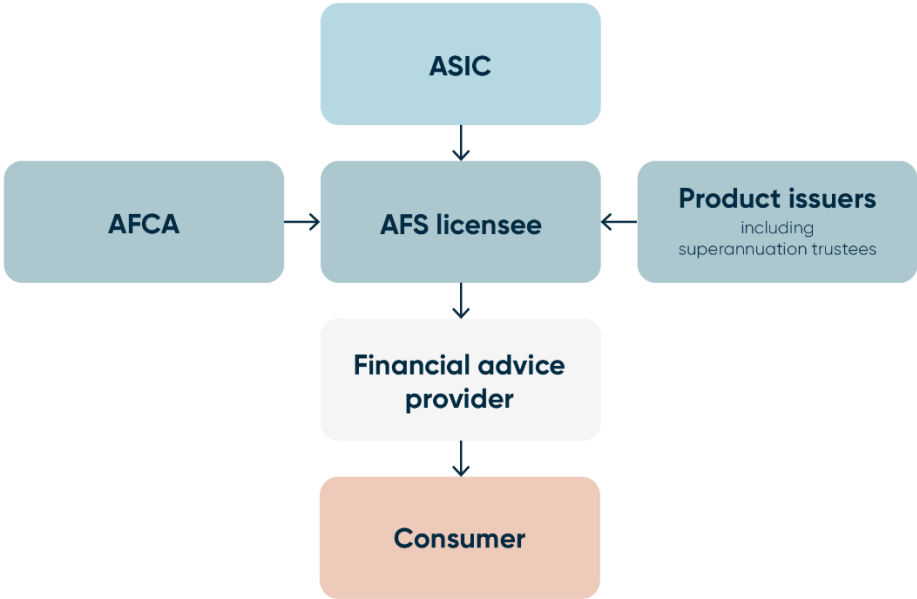
AFCA will investigate the complaint and encourage the parties to reach an agreement. Failing that, AFCA will make a determination. In doing so, the AFCA decision-maker is authorised to make a decision which they consider 'is fair in all the circumstances' having regard to legal principles, industry codes, good industry practice and previous determinations. The determination is binding on the AFS licensee and is not subject to appeal to a court.

AFS licensees are required to have systems in place to ensure their representatives comply with the law. As the law changes, as ASIC takes enforcement action, as cases are decided and as AFCA makes determinations, AFS licensees may adjust what they require their representatives to do when providing advice to clients. And so, an AFCA decision-maker's views on what, in a particular case, they considered fair (or not), might become part of what advisers must do when providing advice to their clients.

2.3.4 Product issuers

Product issuers, particularly platform operators and superannuation fund trustees, also play a role in how and what financial product advice is provided to consumers. This is in large part because financial products continue to be the major source of advice fees.³⁶ Where that product is a superannuation product, the trustee has an obligation to ensure not only that the advice for which the fee is paid has been provided but also that the advice relates to the member's interest in the superannuation fund. And so, they will require some means of overseeing the advice that is provided by advisers and in turn this will affect an adviser's practice. Of course, this could be answered by adviser service fees being paid directly by the client.

Diagram 2.2: Entities involved in the oversight of financial advice



36 The Review's Financial Adviser Survey found that 61 per cent of respondents were paid advice fees from their client's financial products (see Appendix 3).

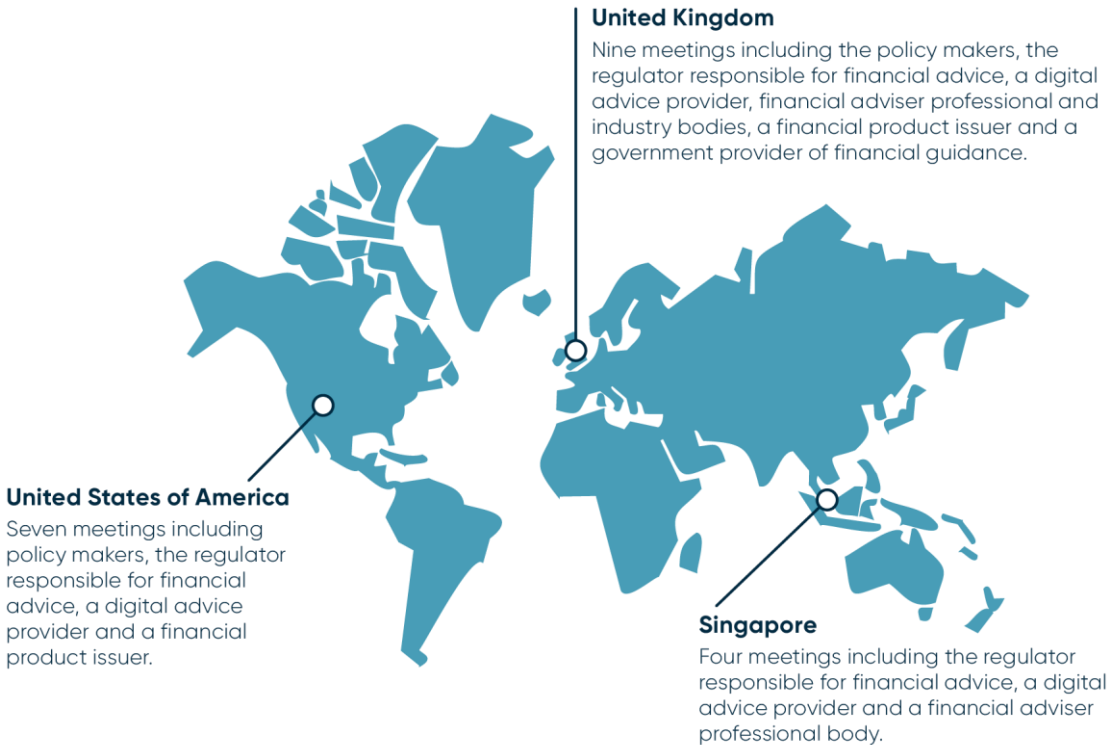
2.4 International comparisons

2.4.1 What we were asked to do

The Terms of Reference asked us to look at the regulatory frameworks for financial advice in other jurisdictions. Accordingly, we met with regulators, financial institutions and industry associations in Singapore, the United Kingdom (UK) and the United States of America (USA) to better understand the advice markets in these jurisdictions and how they are regulated. We have also done research on the regulation of financial advice in Europe, Canada and New Zealand.

What we learnt is that there is no other regulatory regime that can or should be copied.

Diagram 2.3: International meetings



2.4.2 Challenges and responses

We learnt that Australia is not alone in the challenges we face in trying to protect consumers from poor and harmful advice on the one hand and on making quality financial advice accessible and affordable on the other.

We also learnt that there was a greater tolerance for advice to be combined with sales in Singapore, the UK and the USA. There were also more or less stringent rules according to the kind of product (e.g. in the USA, advice about 401(k) plans were subject to higher duties (and a different regulator) than advice about other investment products). It is also possible that poor advice went unidentified more often in Singapore, the UK and the USA than it does in Australia.

The UK is addressing the risk of harmful advice with a broader principles based consumer duty that will when it commences require all financial firms to ‘act to deliver good outcomes for retail

consumers'.³⁷ The obligation is direct and clear. It plainly tells financial firms with what purpose and how they must conduct their businesses. It has been in some ways an inspiration for the good advice duty I recommend in this Report.

We also learnt that the other jurisdictions we visited have been more successful in encouraging the development and provision of digital advice. The regulators in Singapore and the UK have it appears actively engaged with digital advice providers.

In October 2018, the Monetary Authority of Singapore released its *Guidelines on the Provision of Digital Advisory Services*.³⁸

In the UK, the Financial Conduct Authority (**FCA**) established an Advice Unit in 2016 which provides a 'general toolkit' and individual guidance and support to firms that are offering automated advice to consumers. As at December 2020, the Unit had received 137 applications for regulatory feedback of which it had accepted 65 of those applications.³⁹

These activities have no doubt helped, but the existing regulatory regime in each jurisdiction is I think more likely to have been influential. There are more providers in each place offering helpful advice and guidance – personal advice – to consumers than there are in Australia and more 'full service' digital advice providers. In many cases these providers are associated with the issuers of financial products. This is consistent with the greater willingness in all 3 jurisdictions to marry advice and product (vertical integration). The question for me is whether this can be done safely in Australia in a way that serves the interests of consumers.

37 *Consumer Duty Instrument 2022* (UK) FCA 2022/31.

38 Monetary Authority of Singapore (2018), *Guidelines on Provision of Digital Advisory Services*.

39 FCA (2020), *Evaluation of the impact of the Retail Distribution Review and Financial Advice Market Review*, page 16.

Chapter 3 – Issues Identified in Consultations

Chapter Summary

- We have engaged extensively with industry and consumer representatives throughout the Review.
- We have issued 3 consultation papers, attended over 100 meetings with stakeholders, conducted a survey of financial advisers, attended site visits at adviser practices and collected data from the life insurance and general insurance sectors.
- Industry consultation identified 5 major themes: regulation is too complex; regulation is focused on processes, not outcomes; regulation is a barrier to accessible and affordable advice; regulation is a significant factor in the cost of financial advice; and regulation puts at risk the sustainability of the advice industry.
- A number of common issues which were outside the Terms of Reference were also raised by stakeholders as barriers to more accessible and affordable advice, including the education and training requirements and the Code of Ethics which make up the professional standards for relevant providers.
- Consumers have a diversity of advice needs, and they are often not able to get the financial advice they want. Sometimes that is because of their perceptions about financial advice and financial advisers and sometimes it is because of the cost of advice.

3.1 Consultation with stakeholders

3.1.1 The consultation process

Throughout the Review, the Secretariat and I (we) have engaged extensively with stakeholders across the financial services industry. We wanted to understand the issues the existing regulatory framework creates for consumers, financial advisers (noting that they come with a range of specialisations and titles), AFS licensees and product issuers. We also wanted to get their views on the proposals for reform before forming the recommendations and so it was necessary and helpful to publicly discuss the proposals.

On 25 March 2022, we released an 'Issues Paper', which sought feedback on the current regulatory system and opportunities for reform. It also invited ideas about how the regulatory framework could help make quality financial advice more affordable and accessible for consumers. We received 134 submissions on the Issues Paper, including 17 confidential submissions. In addition to the submissions, we attended over 40 meetings with stakeholders on the Issues Paper.

On 29 August 2022, after considering the findings from the consultation on the Issues Paper, we released a 'Proposals Paper' which included 12 proposals for reform. The consultation on this paper

sought views from stakeholders on any risks associated with implementation of the proposals. We received 178 submissions on the Proposals Paper, including 29 confidential submissions. We also conducted 17 roundtable meetings with stakeholders during a 3-week period in September on the Proposals Paper.

On 31 October 2022, we released a brief ‘Conflicted Remuneration Paper’ for targeted consultation. This paper included a snapshot of the data we had collected on general insurance and life insurance (including the assessment of life insurance advice file reviews) and 7 proposals for changes to the exceptions to the ban on conflicted remuneration. We received 29 submissions on the Conflicted Remuneration Paper, including 6 confidential submissions. We also conducted a further 4 roundtable meetings with the stakeholders most likely to be affected by the proposed changes to the exceptions.

Overall, we have attended over 100 meetings with industry, including the roundtable meetings. We attended conferences and we received demonstrations of digital advice tools. These meetings involved a broad range of participants in the financial services industry, including financial advisers, AFS licensees, superannuation funds, life insurers, general insurers, consumer groups, accounting bodies and each of their respective industry associations. I have also presented at conferences, webinars and podcasts and spoken to the media. The purpose of doing so was to ensure the proposals were widely discussed and understood before the recommendations were settled.

A member of the Secretariat and I also visited Singapore, the UK and the USA between 16 May 2022 and 3 June 2022, to meet with foreign regulators, government agencies, industry bodies and financial services companies. We wanted to know whether there were ideas to be adopted or copied at home.

Members of the Secretariat also spent time with financial advisers in their practices, which ranged in size and licensing structures. During these visits, the team gained first-hand experience of the day-to-day work of advisers and licensees. They saw how their systems and processes worked and how they interacted with their clients.

We also conducted a survey of financial advisers currently on the FAR.⁴⁰ Of the 14,328 financial advisers on the FAR who received the survey, 3,326 advisers responded to the survey. This is a response rate of 23 per cent. The results from the survey can be found in Appendix 3.

In summary it has been an intense and worthwhile consultation.

3.1.2 A few things to keep in mind about the themes

In the rest of this Chapter we set out the main themes we identified from our consultation with stakeholders on the Issues Paper and then the main themes drawn from research on consumer needs. Before doing so it is important to make a point about the themes from the stakeholders. During consultation we learnt a great deal about how the regulatory framework that applies to financial advice affects the people who provide that advice – the financial advisers. This was not surprising – the regulatory regime affects their day-to-day work and their livelihoods and the Review has the potential to do so too. I understand this.

Nevertheless, the Review is about consumers. They want more advice from their financial institutions and those financial institutions have the capacity, and I would say the responsibility, to help their customers including by providing them with some financial advice. This is not a substitute for the

40 See Appendix 3, Quality of Advice Review Financial Adviser Survey.

advice that financial advisers provide, but it is an important part of solving the problem of the Review – making financial advice more accessible and affordable. And so, we consulted as much with financial institutions and their associations as we did with financial advisers and their AFS licensees.

But there are around 16,000 financial advisers in Australia and several hundred financial institutions, and so the themes in this Chapter reflect the views of the financial advisers and AFS licensees and their associations more than they do the views of financial institutions or consumers. This does not mean we have not taken the views of the latter into account in forming the recommendations and preparing this Report. They were all important.

Diagram 3.1: The consultation process



3.1.3 Thematic Issues Identified

Consultation on the Issues Paper helped identify the following key themes:

- the regulatory regime is too complex;
- the regulatory regime is focused on processes, not outcomes;
- the regulatory regime is a barrier to more accessible and affordable advice;
- the regulatory regime is a significant contributor to the cost of advice; and
- the regulatory regime puts at risk the sustainability of the advice industry.

What is summarised below in large part reflects what we were told. It reflects the perception of the stakeholders. This perception is important and relevant because it reflects lived experience and it influences the application of the regulatory framework. Nevertheless, it is clear from the consultation that there are a number of areas in which there is a divergence between what the law requires and what industry participants think it requires. While I comment on these areas throughout the Report, I do not do so in this Chapter.

Theme 1: Complexity of regulation

The complexity of the regulatory framework for financial advice was the most common theme raised during consultation.

Boundaries between general advice and personal advice

- Stakeholders said the boundary between general advice and personal advice is too uncertain. Many thought the decision in *ASIC v WSAAL* expanded the definition of personal advice and that the High Court’s interpretation was inconsistent with the industry’s understanding of where the boundary between general advice and personal advice was intended to sit.
 - Stakeholders said personal advice should be defined more narrowly by requiring more active consideration of an individual’s circumstances or by increasing the scope of general advice.
- Stakeholders pointed to the significant difference between obligations applying to a person who gives general advice and obligations applying to a person who gives personal advice.
 - A provider of personal advice must comply with the best interests duty and give the client a statement of advice, and if they are a relevant provider (as most of them must be) the requirements to comply with the professional standards (the education and training standards and the Code of Ethics). The large gap between the obligations means that some providers of financial advice limit the type of advice they give to their customers and clients to general advice.
 - Stakeholders suggested dividing financial product advice into more categories of advice to better reflect the risk associated with different types of advice and then adjusting (‘scaling’) the obligations according to risk. ‘Strategic advice’, which does not include a specific product recommendation, was consistently raised as a low risk category.
- Research indicates that general advice is not well understood by consumers and that they believe that general advice has been tailored to their circumstances when it has not.⁴¹
- Some stakeholders suggested relabelling general advice as either general information or product information.

41 ASIC (2021a), *Findings from consumer research on ‘general advice’ label*.

Overlapping regulation

- Stakeholders said the layering of new regulation over existing regulation especially over the last 10 years has resulted in a regulatory system which is difficult to navigate, lacks certainty and sometimes attempts to regulate the same thing twice. They said that this has led to an increasing regulatory burden on advice providers, which has increased the cost of providing financial advice without a clear benefit to consumers.
- Stakeholders pointed to the following examples of what they saw as overlapping regulation:
 - The best interests obligations and the ban on conflicted remuneration introduced by FOFA over the top of the disclosure requirements introduced by FSR.
 - The Code of Ethics which deals with the same topics as the Corporations Act best interests duty, but in differing and somewhat conflicting ways. They say that even if the Corporations Act best interests duty permits limited advice, the Code of Ethics may not.
- Stakeholders acknowledged that the regulatory framework has sought to promote better outcomes for consumers and to encourage advice providers to adopt better advice processes.

Inconsistent interpretation and application of the existing law

- Stakeholders said different participants in the provision of financial advice frequently had different views about what was required by the regulatory regime which added to the compliance costs for financial advisers and led to poor consumer experiences. The example most frequently given is the different interpretations of the requirements for ongoing fee arrangements adopted by product issuers, resulting in a multiplicity of consent requirements and forms.
- Financial advisers said that the fear of adverse actions or determinations from ASIC and AFCA have resulted in AFS licensees imposing compliance obligations on them which go beyond what is required by the law.

Theme 2: Process focussed regulation

The current framework focuses too much on processes and not enough on the needs of customers and clients.

Best interests duty safe harbour steps

- Financial advisers and AFS licensees have said that the safe harbour steps have caused the best interests duty to become a process-driven obligation rather than one focussed on the client. Financial advisers and AFS licensees are risk averse and think that they are required by ASIC and AFCA to comply with the safe harbour steps in order to demonstrate they have complied with the best interests duty even when doing so is prejudicial to the client, for

example because of the cost or because it is disproportionate to what the client wants. They say this flows on to the cost and effort involved in preparing a statement of advice and maintaining appropriate records.

- Stakeholders have said they worry about the uncertainty created by the final step of the safe harbour (which requires advice providers to take ‘any other step’). Even if they follow the other steps, they say they have no certainty about whether they have complied with the best interests duty because they do not know what additional steps they should take to comply with this last step.

Barriers to providing limited advice

- The safe harbour steps and the statement of advice requirements have been identified by stakeholders as the key barriers to providing more limited or episodic advice to meet the needs of clients.

Disclosure obligations

- Stakeholders said that the disclosure obligations, especially statements of advice, increase the cost of providing advice but do not meet consumers’ needs.
 - While the law requires these documents to be ‘clear, concise and effective’ we have been told that many statements of advice are over 60 pages and contain information that is neither relevant nor useful for clients, such as extensive product comparisons.
- Stakeholders also said the overlap between the FSG content requirements and other prescribed disclosure added an unnecessary compliance burden.
 - Stakeholders pointed to remuneration arrangements, fee disclosure and disclosure about conflicts of interest as examples of content which must be provided in more than one document provided to clients.
- Financial advisers said the implementation of ongoing fee arrangements is an area of significant complexity and cost. Clients might be required to sign multiple forms annually and there is no flexibility in when the forms must be signed.
 - Stakeholders said the ongoing fee arrangement requirements interfered with the quality of the service they could provide their clients with (on one view) more time spent on completing forms than providing advice.

Theme 3: Accessibility and affordability of advice

- Some stakeholders said that declining financial adviser numbers is negatively affecting the affordability and accessibility of quality financial advice.
- Some other stakeholders said that a decline in the number of financial advisers does not have to mean that fewer consumers are able to access financial advice. They told us that financial

advisers should not be the only source of financial advice for consumers, but that this might require a change in consumer behaviour and expectations.

Digital advice

- Providers of digital advice said that constant regulatory change and uncertainty are impediments to the development and adoption of technology and digital advice services.
 - Digital advice providers did not ask for any separate or special treatment under the regulatory system. However, they did ask for a period of regulatory stability to give them an opportunity to build digital advice tools and take them to market.
- Many digital advice providers also said additional regulatory guidance and more engagement with ASIC would help with the introduction of new digital advice models.

Benefits of access to consumer data

- Stakeholders said that improving access to consumer data held by financial institutions and Government agencies, such as the ATO and Centrelink, would help to reduce the cost of advice and increase accessibility.
 - Stakeholders said that this would assist them with ‘fact finds’, which is often one of the most time consuming and expensive parts of the advice process.
 - Stakeholders said that better access to data would also mitigate the risk that clients do not provide their financial adviser with complete and accurate information.

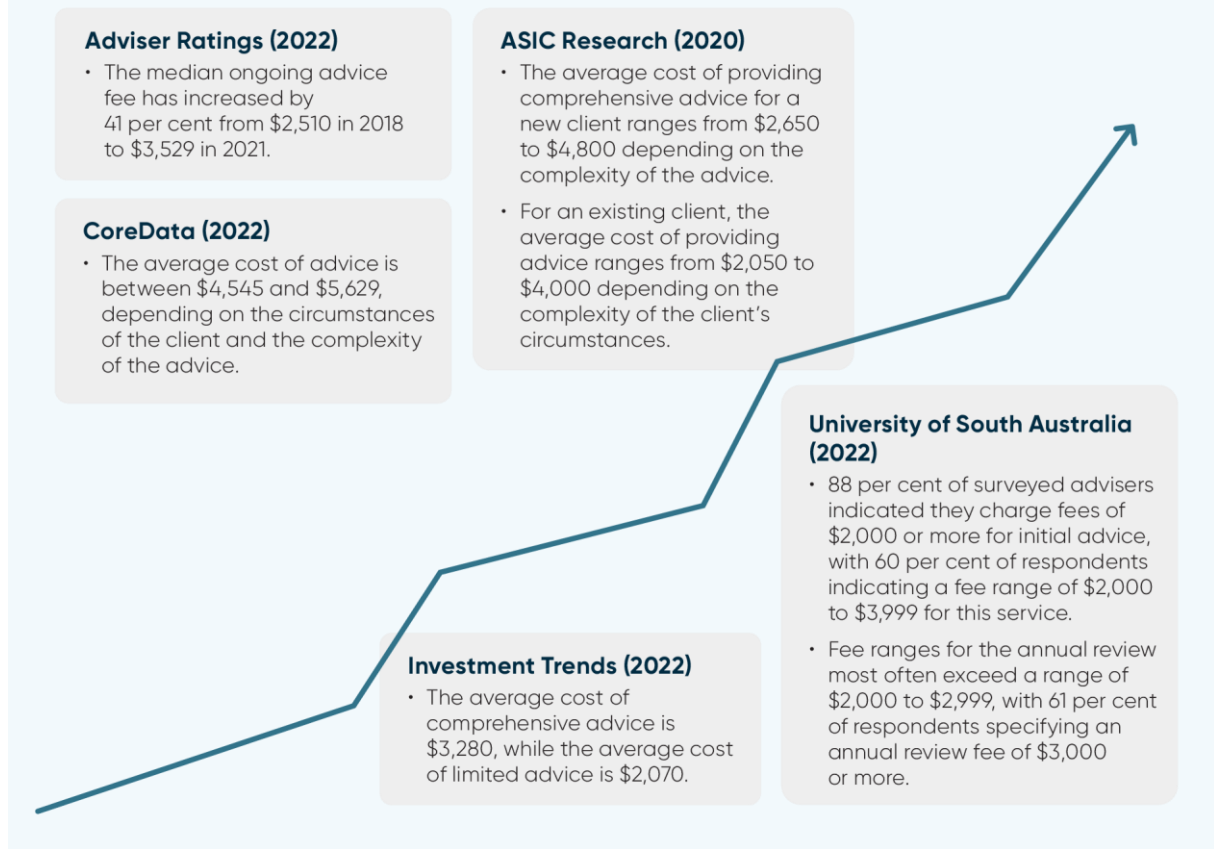
Retirement advice

- Stakeholders said there were an increasing number of people who were unable to access financial advice about retirement even though that advice could lead to a higher income in retirement.
 - Stakeholders said that financial advisers alone are insufficient to service this group of consumers.
 - Superannuation funds said the current law is a barrier to them providing retirement advice to their members.
- Superannuation funds said that in order to comply with the new retirement income covenant they needed a more detailed understanding of the needs and financial circumstances of their members than the current law permitted.

Theme 4: Cost of advice

- Financial advisers and advice licensees said that the regulatory burden they face is a significant factor in the cost of advice for consumers.
- Research shows that the average cost of advice puts it out of reach for many Australians.

Diagram 3.2: The increasing cost of financial advice⁴²



42 Sources: Adviser Ratings (2022), *2022 Australian Financial Advice Landscape*, page 39; CoreData (2022), *Data presented to the Quality of Advice Review*; ASIC (2020a), *ASIC Cost of Advice Research* provided to the Quality of Advice Review; Investment Trends (2022), *Data provided to the Quality of Advice Review*; and University of South Australia (2022), *Financial Advice Regulatory Reform*, page 19.

Theme 5: Sustainability of the advice industry

- Financial advisers and advice licensees said the regulatory regime was affecting the sustainability of financial advice practices and their business models.

Fear of non-compliance

- Stakeholders said that fear about a heavy handed response to minor breaches of the law has led to a low risk tolerance within the industry, which in turn makes it more difficult for consumers to access affordable financial advice.
 - Stakeholders said this has been driven by ASIC enforcement action and AFCA determinations, which has led to many advice licensees imposing additional compliance processes on their representative advisers, adding to the cost of providing advice.
 - Stakeholders said ASIC’s enforcement of the law is too strict, with minor breaches resulting in significant compliance action.

Trends in advised clients

- Financial advisers and advice licensees said that the increasing cost of advice, and the falling number of financial advisers, mean that those who remain in the industry increasingly provide advice only to high net worth individuals.
 - These clients are more likely to need ongoing advice and are more likely to pay ongoing advice fees than less wealthy clients who may have more discrete advice needs and fewer assets to invest.
 - Stakeholders have provided mixed views on whether this trend will shift if the costs of providing advice are reduced.

Role of advice licensees

- Advice licensees said they were concerned about their role in the provision of financial advice. Many said that their traditional business models may not remain viable.
 - Advice licensees said they played an important role in assisting financial advisers provide advice to their clients, but noted that their responsibilities for supervision, monitoring, and breach reporting were heavy and potentially disproportionate to the fees advisers were able to pay for their services.
 - Advice licensees said they were concerned about the viability of their businesses since FOFA and the end of grandfathering, and they referred to the exit of some large advice licensees.

3.1.4 Other factors outside the regulatory framework

Over the course of consultation, we were told about a number of issues which are impediments to more accessible and affordable advice but which are outside the Terms of Reference. Nevertheless, the feedback is summarised here because the matters raised deserve further consideration.

Financial advisers and advice licensees consistently raised 2 matters affecting the cost of advice and the viability of their businesses, namely:

- the ASIC industry funding model; and
- premiums for professional indemnity insurance.

Both are plainly significant and important issues which deserve consideration by the Government.

They also consistently raised concerns about the current professional standards for financial advisers (both the education and training standards and the Code of Ethics). Financial advisers worry about the overlap and inconsistency between the Code of Ethics and the best interests duty in the Corporations Act. In particular, they see Standard 6 of the Code of Ethics as a barrier to providing limited or scaled advice, because it requires them to take into account the client's broader long term interests. They say that unless the Code is changed, the recommended changes to the Corporations Act best interests duty may not be sufficient to let them provide limited or scaled advice.

Many financial advisers also said the current education and training requirements are a leading contributor to both the recent decline in the number of advisers listed on the FAR, and the difficulty in attracting new financial advisers. Others said the requirements did not appropriately address the range of specialists who provide personal advice to retail clients.

I note the Government is separately considering these issues.

3.2 Consumer experience with advice

3.2.1 Understanding consumers' needs

As well as speaking to consumer associations, we reviewed the extensive research on the needs of consumers, and the barriers to consumers accessing financial advice.

The research has been undertaken by regulators, consumer groups, industry stakeholders, research houses and academics. Our analysis of the research has identified the following themes:

- consumers have a diverse range of needs for financial advice;
- consumers benefit from receiving financial advice; and
- there are common barriers which stop consumers getting financial advice.

Advice needs of consumers

Our financial system requires consumer engagement, but it is complex

- Australia's financial system, especially our superannuation system, requires individuals to act as 'financial citizens' and take responsibility for important financial decisions, such as which superannuation investment strategy to choose, what life insurance cover they need and how

to draw down on their superannuation.⁴³ The need to make decisions means there is a greater need for financial advice.

There is a gap in the demand and availability of advice for consumers

- In 2019, ASIC found that 27 per cent of survey participants had previously received advice, of which 12 per cent did so in the previous 12 months. Also, 41 per cent intended to get financial advice in the future and 25 per cent intended to get advice in the following 12 months.⁴⁴
- In 2021, Investment Trends estimated that 61 per cent of consumers had ‘unmet’ advice needs with only 16 per cent having seen a financial adviser in the last 12 months.⁴⁵
 - This gap is larger for younger people, especially for the 18 to 34-year-olds, where 74 per cent were found to have unmet advice needs but with only 15 per cent having seen a financial adviser in the past 12 months.⁴⁶

Consumers want to receive advice from a wide range of providers

- Research from Investment Trends indicates that consumers are willing to look to a range of providers for financial advice, including financial advisers, their superannuation fund, accountants and financial institutions.
 - Approximately 35 per cent of consumers would turn to their superannuation fund, while between 20 and 30 per cent would turn to a financial adviser (not related to their superannuation fund).⁴⁷
- A 2019 ASIC report found that only one per cent of participants had used digital advice services but 19 per cent said they were open to doing so.⁴⁸
 - 37 per cent of consumers who said they had recently thought about getting financial advice, but who did not, also said they were open to using digital advice.⁴⁹
- Research from the Conexus Institute found that most Australians ranked receiving in-person advice as their preferred option.
- Two in five Australians found it valuable when there was a person available to explain the results from online calculators and other digital advice tools.⁵⁰
 - The Conexus Institute also found that digital advice needs to overcome low levels of awareness, with only 18 per cent of people aware of digital advice tools and even fewer

43 Kingsford Smith, D (2009), *Regulating Investment Risk: Individuals and the GFC*, UNSW Law Journal Volume 32(2), page 514.

44 ASIC (2019a), Report 627: *Financial Advice: What consumers really think*, page 10.

45 Investment Trends (2022).

46 Investment Trends (2022).

47 Investment Trends (2022).

48 ASIC (2019a), page 5.

49 ASIC (2019a), page 5.

50 Conexus Institute (2022), *Transforming financial advice report*, page 25.

using them (3 per cent). There also needs to be an improvement in the level of trust in digital advice (scored 5.5/10).⁵¹

- Digital advice users identified their key reasons for using digital advice as the usefulness and relevance of the information provided (65 per cent), ease of access (49 per cent) and its provision of opinions or recommendations (47 per cent).⁵²
- Social media is emerging as a source of financial advice with one in 20 consumers relying on it for all of their financial information and 28 per cent indicating they follow at least one influencer and of them 64 per cent having changed a financial behaviour as a result.⁵³

Some consumers want limited advice while others prefer comprehensive advice

- Research by the Conexus Institute found that 40 per cent of consumers wanted advice on a topic-by-topic basis, while 35 per cent wanted a comprehensive plan which was reviewed from time to time. A smaller proportion (22 per cent) wanted a comprehensive plan that they could follow for the next few years.⁵⁴
- Research by Investment Trends in 2021 found that 11 per cent of consumers wanted comprehensive advice, while 38 per cent wanted limited advice, with 50 per cent indicating that they wanted to look for information themselves.⁵⁵
- The desire for limited advice has been a persistent theme, a 2010 ASIC report found that a third of consumers preferred piece-by-piece advice rather than comprehensive advice.⁵⁶

Retirement advice needs

- Investment Trends research found that among those with unmet advice needs, 28 per cent wanted help with making their money last for their lifetime and 24 per cent wanted help with retirement planning.⁵⁷
- Research by the Conexus Institute found that managing superannuation issues was in the top 3 financial matters for people aged 50 and over.⁵⁸

51 Conexus Institute (2022), page 25.

52 Conexus Institute (2022), page 25.

53 ASIC (2021b), *MoneySmart Young People and Money – Survey Snapshot*, page 9.

54 Conexus Institute (2022), page 23.

55 Investment Trends (2022).

56 ASIC (2010), Report 224: *Access to financial advice in Australia*, page 19.

57 Investment Trends (2022).

58 Conexus Institute (2022), page 19.

Potential barriers to advice

Lack of trust in financial advisers and institutions

- A Melbourne University study found that when people were asked what stops them from improving their financial situation, the most common response was that they do not trust financial institutions or advisers.⁵⁹
- This research also found that more than half of Australians had experienced one or more negative experiences with financial services providers.⁶⁰
- This is supported by research from the Conexus Institute which reported 40 per cent of their research participants identified that their level of trust in financial advice had decreased.⁶¹
- These findings on trust are supported by academic literature. Research indicates that trust in financial advisers in Australia (score of 42/100) is well below the global average for financial advisers (score of 54/100).⁶²
- CPA Australia also reported that 17 per cent of consumers said a lack of trust prevented them seeking help with their finances.⁶³

Mismatch between the cost of advice and what consumers are willing to pay

- Research by ASIC found that the cost of advice was the most commonly identified reason for participants not seeking financial advice. Sixty-four per cent of participants agreed that financial advisers were too expensive.⁶⁴
- These findings are supported by research from the Conexus Institute, which found that 44 per cent of respondents said they could not afford advice and 29 per cent stated advice did not represent value for money.⁶⁵
- In addition, research by the University of South Australia found that 70 per cent of its participants said their value range for advice was \$0–\$999, while only 6 per cent indicated that an advice fee of \$3,000–\$4,999 was reasonable.⁶⁶
- In 2021, Investment Trends found that, on average, consumers were willing to pay \$600 for advice, when the average fee for limited advice was \$1,760 and the average fee for comprehensive advice was \$3,060. This increased slightly in 2022, when on average,

59 Melbourne University (2019), *How Australians feel about their finances and financial service providers*, page 7.

60 Melbourne University (2019), page 3.

61 Conexus Institute (2022), page 22.

62 Westermann, S, Niblock, S.J., Harrison, J.L, Kortt, M.A (2020), *Financial Advice Seeking: A Review of the Barriers and Benefits*, Economic Papers Volume 39(4), page 373.

63 CPA Australia (2020), page 16.

64 ASIC (2019a), page 31.

65 Conexus Institute (2022), page 21.

66 University of South Australia (2022), page 14.

consumers were willing to pay \$770 for advice while the average fee for limited advice is \$2,070 and the average fee for comprehensive advice is \$3,280.⁶⁷

- Finally, Adviser Ratings found that 4 in 5 Australians aged 45–54 said they need financial advice, but do not have the capacity to pay for it.⁶⁸
- This increased to more than 80 per cent of retirees in the 75 plus age bracket who wanted advice but did not have the capacity to pay for it.

67 Investment Trends (2022).

68 Adviser Ratings (2022), page 22.

Chapter 4 – What Should Be Regulated as a Financial Service?

Chapter Summary

- The disparity between the obligations that apply to personal advice and general advice encourages financial product issuers and distributors to limit the advice they give to general advice.
- Consumers have a reasonable expectation that where they have shared personal information with a financial institution that information will be considered when the consumer asks the institution for advice.
- The current definition of personal advice should be amended so that it applies when an individualised recommendation or opinion is given to a retail client about a financial product and the advice provider holds information about the consumer’s financial situation or one or more of their objectives or needs.
- Expanding the definition of personal advice will also expand the interactions between financial institutions and their customers which are subject to the personal advice obligations.
- Many consumers do not understand the limitations of general advice and mistakenly believe the advice takes into account their personal circumstances.
- General advice should continue to be regulated as a financial service. However, the general advice warning should no longer be required. Providers of general advice should consider on a case-by-case basis whether a warning is warranted and if so what it should say.

Objectives

The objectives of the recommendations in this Chapter are:

- for consumers to receive better quality advice from financial service providers;
- for more personal interactions between consumers and advice providers to be covered by an appropriate level of consumer protection;
- to increase regulatory certainty by making the boundary between general advice and personal advice more certain; and
- to reduce consumer confusion associated with the concept of general advice.

4.1 Terms of Reference and some observations

4.1.1 Financial advice and financial product advice

The Terms of Reference ask me to recommend changes to the current regulatory regime to make quality financial advice more accessible and affordable. Before considering how one might go about doing so, I want to make some observations about financial advice and the regulatory regime I have been asked to consider.

Financial advice is not a term defined in legislation, nor is it a term of art. Instead, it has a readily understood meaning, namely advice about financial matters. The word ‘advice’ is itself a commonly used and understood word and most of us would agree that ‘financial matters’ range from budgeting, saving, investing, superannuation and, possibly, insurance. But the regulatory framework does not apply to financial advice, it applies to ‘financial product advice’.

In contrast to financial advice, financial product advice does not have a readily understood meaning, nor even a single meaning. Instead it is a term used and defined in the Corporations Act and the *Australian Securities and Investments Commission Act 2001 (ASIC Act)* and, relevantly for the Review, financial product advice is not the same as financial advice.

4.1.2 Financial products in financial product advice

First, the subject matter of financial product advice is ‘financial products’ and not financial matters.

In the Corporations Act, a financial product includes, for most but not all purposes, a basic deposit product (a bank account or a term deposit), an insurance policy (general insurance or life insurance), an interest in a managed investment scheme, an interest in a superannuation fund, a derivative and a foreign exchange contract.⁶⁹ For some purposes it includes shares in a company. For most but not all purposes a financial product does not include a credit card, a personal loan, a home loan or an investment loan, except to the extent the loan is a ‘margin lending facility’.⁷⁰ A financial product does include credit facilities under the consumer protection provisions in the ASIC Act⁷¹ and for the purposes of the design and distribution obligations in the Corporations Act.⁷²

And so, a person could provide financial advice that is not regulated at all or that is regulated but not under the Corporations Act. A mortgage broker is a good example. The broker provides advice to their client about a home loan. They may also provide advice about budgeting. In neither case will the broker provide financial product advice and if this is all they do, they would not need an AFS licence. However, if the broker’s advice about the loan amounts to ‘credit assistance’, they will need to hold an Australian credit licence under the *National Consumer Credit Protection Act 2009 (NCCP Act)* or be authorised to act on behalf of someone who does. If the mortgage broker also provides advice about life insurance or consumer credit insurance to their client, they will provide advice about a financial product and they also will need to hold an AFS licence under the Corporations Act or be authorised to act on behalf of someone who does. The broker’s obligations under each regime (the Corporations Act and the NCCP Act) will overlap and differ.

69 Corporations Act, s 764A.

70 Corporations Act, s 765A.

71 ASIC Act, s 12BAA(7).

72 Corporations Act, s 994AA.

A financial adviser may also give advice about budgeting. In this case, they would not need to be licensed under the Corporations Act or the NCCP Act. However, if the same adviser recommends that their client open a bank account, the adviser will provide financial product advice and will need to hold an AFS licence or be authorised by an AFS licensee and the personal advice obligations will attach to the recommendation about the bank account, but not (under the Corporations Act) to the advice about budgeting and debt management.

In 1997, the Wallis Inquiry recommended a single regulatory regime for the provision of financial services across different industries. That led to Chapter 7 of the Corporations Act and the AFS licence. However, when considering financial products and credit, there are different regimes that apply within the same industry. This adds more complexity for providers that issue, or provide advice to their clients about, credit facilities and financial products. It is also undesirable for consumers. It makes little sense for an adviser to have a duty to act in the best interests of their client for part of their advice but not to have the same duty for another part of their advice.

A better outcome would be for credit facilities to be regulated for all purposes as financial products under the Corporations Act. This could be done by replacing the definition of financial product in the Corporations Act with the definition of financial product in Division 2 of Part 2 of the ASIC Act. In that way, a single licensing regime and a single set of obligations could apply to more of the matters that fall within the meaning of financial matters and the regulatory framework would truly apply to the provision of financial advice. Commissioner Hayne made a similar recommendation when he said that mortgage brokers should be subject to the same regulatory regime as financial advisers (Recommendation 1.5 of the Royal Commission). This is outside my Terms of Reference, but while I hold the pen I would encourage the Government and the regulated community to think about whether there is merit in doing so.

4.1.3 Selling v advice

The second way in which financial advice and financial product advice might differ is in the ordinary meaning of advice. Many financial advisers have told us there is a difference between selling a financial product and providing advice about a financial product. They say the word advice incorporates a level of skill, expertise and professionalism which are not necessary components of selling. They then say that only people who have these attributes should be able to provide financial product advice.

In *ASIC v WSAL* the argument was made that because the calls that were the subject of the proceedings, were plainly part of a marketing campaign they could not be financial product advice (and therefore could also not be personal advice).

In rejecting the argument, Chief Justice Allsop said:

The provisions are directed at the giving of advice that is contained in an express or implied recommendation or statement of opinion. That it may have some marketing or sales purpose is not the point. It is sterile to seek to draw a line between “advice” and “marketing” or “advertising”, or to engage in abstracted defining of those things. It is a question of characterisation in all the circumstances ... The question is whether, on its proper characterisation, the communication or exchange was a recommendation or statement of opinion given by someone to another for that other’s consideration in connection with making the decision in s 766B(1) ... The proper process is to examine the communication and exchange in its whole context to ascertain whether it is a recommendation or statement of opinion to the person. One does not add to this process by considering some further limitation of advice and

imbuing that limiting characteristic with some element of evaluation or degree of consideration, as Westpac’s submissions sought to do. There is certainly no bright line distinction to be made between “sales” and “advice”. The communication or exchange may have a heavy “sales” purpose. That will not mean that it does not contain a recommendation or opinion that was intended, or could reasonably be regarded as intended, to influence a person in making a relevant decision.⁷³

Or, as expressed with greater brevity by Justice Beach in *ASIC v AGM Markets Pty Ltd (in liquidation) (No 3) [2020] FCA 208 (ASIC v AGM Markets)*:

...there is no super-added “advice” component to “recommendation” or “statement of opinion.”⁷⁴

I have been asked to consider whether changes should be made to the law and some people have asked me to recommend changes to the regulatory framework in order to distinguish advice from sales. The suggestions are that a different term could be used to identify and distinguish sales from advice and different rules could then be applied to each. To borrow from Chief Justice Allsop, I think it would be ‘sterile’ to attempt to do so. Financial advisers do sell financial products and financial product issuers do give advice and trying to draw a line between the 2 would in my view introduce more complexity into the regime without providing a benefit to consumers. Suggestions to the same effect were made to the Ripoll Inquiry in 2009. The PJC did not think there would be a benefit in the law doing so then and I agree now.

Financial product advice is, as noted earlier, a term defined in legislation. Its purpose is to draw a boundary around regulated activities, not to create a consumer facing description of the activity. Given this, I do not think there is any utility in either adopting a different term or dividing financial product advice into more categories. To the extent an adviser or another provider of advice is worried that the term might lead a consumer to expect something they should not, I would encourage providers not to use the term or to only do so in conjunction with an explanation if that will assist the consumer. Financial advisers, financial planners and stockbrokers (all ‘relevant providers’ under the Corporations Act) will be able to distinguish their financial product advice by their professional title – financial adviser, financial planner or stockbroker – and by charging a fee for their advice.⁷⁵ No one else will be able to do either.

4.2 Making quality advice accessible and affordable – the task at hand

4.2.1 Impediments to accessible and affordable quality financial advice

And so, returning to the task at hand – how to make quality financial advice more accessible and more affordable?

⁷³ *Australian Securities and Investments Commission* [2019] FCAFC 187, Allsop J, paragraph 22.

⁷⁴ *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) (No 3)* [2020] FCA 208, paragraph 165.

⁷⁵ Sections 923B and 923C of the Corporations Act restrict the use of a range of terms to only persons who satisfy specified requirements. These terms include (but are not limited to) stockbroker, financial adviser and financial planner. Unauthorised use of these terms is an offence.

We have been told about the many difficulties and impediments in the submissions and during the consultation process. We have been told the law is too complex and the compliance burden is too great. We have been told that these make many people reluctant to provide advice and means that for those who do, it is time-consuming and costly.

4.2.2 Three impediments in the existing regime to accessible affordable quality advice

The difficulties and impediments to making quality financial advice accessible and affordable might all be said to stem from 3 things:

- the division of financial product advice into general advice and personal advice;
- the large gap between the obligations applying to a person who provides general advice on the one hand and the obligations applying to a person who provides personal advice on the other; and
- the inflexibility and, in some cases, unsuitability of the obligations applying to a person who provides personal advice.

I consider each of these further in this Report.

4.3 The division between general and personal advice

4.3.1 A recap of the definitions

As set out in full in Chapter 2, personal advice is financial product advice where the provider has considered one or more of the person's objectives, financial situation and needs or a reasonable person might expect the provider to have considered one or more of those matters.⁷⁶ General advice is financial product advice that is not personal advice (that is, financial product advice where the provider has *not* considered the person's objectives, financial situation or needs and a reasonable person would not expect the provider to have considered these matters).⁷⁷

Many people have told us that the distinction between general advice and personal advice is too uncertain. They say that what it means to *consider* a person's objectives, financial situation and needs is ambiguous and that even when the provider of advice has not considered any of those things, a court might later say a reasonable person might think the provider has.

While there is no doubt there are difficult cases,⁷⁸ I am sceptical about whether the distinction between general advice and personal advice is as uncertain as people say. In *ASIC v AGM Markets*

76 Corporations Act, s 766B(3).

77 Corporations Act, s 766B(4).

78 The distinction between general advice and personal advice was the subject of the proceedings in *ASIC v WSAI* which ultimately went to the High Court. In that case Justice Gleeson, the judge at first instance, decided the financial product advice provided by Westpac call centre operators to the members of a Westpac superannuation fund was not personal advice (and was therefore general advice) because the call centre operators had not considered members' personal circumstances and because a reasonable person would not think that they had. In the Court of Appeal and the High Court the finding was overturned with the judges in both courts unanimously finding that, in all of the circumstances, a reasonable person might have thought that the call centre operators had considered their personal circumstances.

Justice Beach had to consider whether financial product advice given by call centre operators was personal advice or general advice. His Honour said:

.... I have only needed to resort to the applicable statutory language construed in context. No resort to meta-themes has been necessary. Any commercial judge tempted to engage in overly nuanced intellectualisation in this area should heed what Francis Bacon warned about philosophers: “their discourses are as the stars, which give little light because they are so high.” But “delusive exactness”, to use Oliver Wendell Holmes’ robust phrase, is also to be avoided.⁷⁹

I worry that those who do not resist the temptation are in the main those who seek to rely on general advice models to sell financial products to their customers. I also worry that in some cases, an honest and fair application of the statutory language (the definition of personal advice) to the conduct might reveal that many people who think they are providing general advice are in fact (like WSAL) providing personal advice. In my view, the problem is not so much with uncertainty about the distinction between general advice and personal advice but with what turns on it. Too much turns on whether financial product advice is general advice or personal advice and, for a person who holds an AFS licence, much more turns on this distinction than whether they provide information or financial product advice.

4.3.2 General advice obligations

Under the current law, an AFS licensee who provides general advice to a retail client must:

- comply with the general obligations of an AFS licensee under the Corporations Act (and so they must provide general advice efficiently, honestly and fairly);
- provide a general advice warning with their general advice; and
- comply with the consumer protection provisions in the ASIC Act (and so their general advice must not be misleading or deceptive).⁸⁰

While the obligations are on one view slim, obligations to provide advice efficiently, honestly and fairly and to ensure it is neither misleading nor deceptive are well suited to their intended purpose and omit nothing. If a provider of general advice provides advice to their customers that is honest and fair and not misleading or deceptive, it is hard to see that it would not be useful and entirely fit for purpose, or even that a duty to act in the client’s best interests in providing that advice could add anything.

As to the obligation to provide a general advice warning – I would put this in a different category. It is not only poorly suited to its purpose but it can be harmful. I have more to say about this later.

4.3.3 Personal advice obligations

In contrast to the obligations attaching to general advice, the obligations attaching to personal advice are neither slim nor, in my view, well-suited to their intended purpose. A person who provides personal advice to a retail client must also comply with the general obligations of an AFS licensee and the consumer protection provisions in the ASIC Act and so they too must provide personal advice

⁷⁹ Australian Securities and Investments Commission [2020] FCA 208, paragraph 15.

⁸⁰ Corporations Act, ss 912A and 949A; and ASIC Act, s 12DA.

efficiently, honestly and fairly and they must not provide advice that is misleading or deceptive.⁸¹ So much is sound.

In addition to this a provider of personal advice must:

- act in the best interests of the client in providing advice;
- give advice that is appropriate to the client, assuming the best interests duty has been complied with;
- provide a warning if the advice is based on inaccurate or incomplete information;
- give priority to the interests of the client if there is a conflict between the interests of the client and the interests of the provider (or an associate of the provider); and
- give or record their advice in a statement of advice (or in some cases a record of advice).⁸²

Further, where the advice is provided by an individual, the individual must be a ‘relevant provider’ under the Corporations Act.⁸³ A relevant provider must comply with the professional standards, which include minimum education and training requirements and the Code of Ethics.

The obligations are intended to ensure that clients receive financial product advice that is suited to their objectives, financial situation and needs, but in practice they are often an impediment.

On the one hand, product issuers avoid giving personal advice because they do not want to or cannot comply with the obligations and, on the other hand, financial advisers are required to follow what can be a time-consuming, difficult and expensive process whether or not it is suited to the nature of the advice and the needs or wishes of their client. The best interests duty and the duty of priority, in particular, are not readily understood and easily applied and a statement of advice is often time-consuming and expensive to prepare. The personal advice obligations have not even proved very successful at ensuring consumers who are able to access personal advice get good quality advice. I consider the first issue (the efforts made to avoid giving personal advice) in section 4 of this Chapter and the second (whether the obligations contribute to the quality of advice) later in Chapters 5 and 6.

Diagram 4.1: Comparison of personal advice and general advice obligations



81 ASIC Act, pt 2, div 2, sub-div D.

82 Corporations Act, ss 961B, 961G, 961H, 961J and 946A.

83 ‘Relevant provider’ is defined in section 910A of the Corporations Act.

4.4 Product issuers and distributors avoiding personal advice

4.4.1 Consequences of the disparity in the obligations

The disparity between the obligations attaching to general advice on the one hand and to personal advice on the other encourages financial product issuers and other distributors of financial products to limit their advice to general advice. To make the point more starkly – there is an incentive in the regulatory regime for product issuers and distributors to provide recommendations to their customers that do not take into account their objectives, financial situation or needs.

Again, *ASIC v WSAL* provides the perfect case study. In that case, call centre staff acting as representatives of the trustee of a Westpac superannuation fund recommended that members consolidate their superannuation into their Westpac superannuation account. WSAL designed its procedures, training and scripts so that the call centre operators speaking to members would provide general advice only. It appears a great deal of time and effort went into avoiding personal advice. While ultimately they failed (and the call centre staff gave personal advice), the approach – careful scripting and artificial conversations to avoid giving personal advice – is commonplace.

In many cases the intention is benign – it is difficult, time consuming and costly to comply with the best interests duty and to provide a statement of advice. It can also be difficult to recruit staff with the necessary qualifications to meet the education and training standards for providing personal advice. In other cases, the provider will deliberately give general advice which looks like personal advice in order to sell a financial product more effectively. Whatever the intention, general advice is often not what customers want or think they are getting and in some cases it can cause real harm.

In *ASIC v WSAL* the court in the first instance concluded that the call centre operators did give general advice. However, the judge also concluded that doing so was, in all of the circumstances, a breach of WSAL's obligation to act efficiently, honestly and fairly. Put another way, it was not efficient, honest and fair to recommend to a member that they consolidate their superannuation into their Westpac superannuation account without taking into account their personal circumstances or drawing the member's attention to the matters that were relevant to the decision. For some members the advice was poor (they rolled their superannuation over into a more expensive fund), for others it was harmful (they lost their insurance), but in no case did the call centre operator know.

A review of AFCA determinations, ASIC enforceable undertakings and other cases identify many examples of financial products being promoted or distributed through general advice models (successfully or otherwise) leading to poor outcomes for consumers.⁸⁴ In many of these examples the consumer relied on that advice but the provider argued that they should not have done so because the advice was general advice and the consumer had been told as much (they had been given a general advice warning). Consistent with these examples, research commissioned by ASIC found that, even when consumers are given a general advice warning, many people do not understand the limitations of general advice. In fact, despite the warning, some consumers think the provider has considered their personal circumstances when giving their advice.⁸⁵

4.4.2 Narrowing personal advice

We have been asked to consider proposals to narrow the definition of personal advice so that more advice falls within the definition of general advice and to introduce more categories of advice (product

⁸⁴ See, for example, AFCA case numbers 841218, 851401 and 839285.

⁸⁵ ASIC (2021a).

advice, strategic advice, limited advice and product guidance are some of the suggested categories). In either case, the intention is to expand the advice that can be provided to consumers without the attendant personal advice obligations.

While both of these proposals would allow more people to obtain advice, I do not think it is in the interests of consumers for more financial product advice to be treated as general advice and I think more categories and more definitions would create more regulatory boundaries, more complexity and bring with them more cost and more risk. In my view, the regulatory framework would benefit from fewer defined terms and fewer boundaries and the definition of personal advice is not too broad.

4.4.3 Consumers want more personal advice

The feedback we have received and research that we have undertaken confirms what one would expect – consumers want and benefit from specific, direct and straightforward advice which considers their relevant personal circumstances. They often want more advice on a topic-by-topic basis, and often assume when receiving advice that their financial circumstances are being considered.

This is also consistent with what we have been told by financial institutions, that customers often call looking for advice and they want and expect that advice to take into account the information the institution holds about them or which they volunteer. Financial institutions have also told us they would like to provide more personal assistance to their customers and many are building digital tools to do so.

Despite this, the current regulatory framework is such that many providers cannot or do not want to provide personal advice. Instead, they try to shoehorn what would more naturally be personal advice conversations with customers into general advice. The result is often scripted conversations during which providers deliberately avoid asking questions and studiously avoid considering information they have about their customers. They might refer to what customers ‘in general’ find helpful and customers will be warned the advice does not take into account the customer’s personal circumstances and told that they should consider whether the advice is in fact appropriate for them (even when there is no realistic prospect the customer will do so). Sometimes they might even be told they should consider obtaining the advice they want from a financial adviser (again, even when there is no realistic prospect the customer will do so).

And so the customer gets less helpful advice than they otherwise could (we have been told that customers often complain about not being able to get advice from financial institutions) because providers are not prepared to use information they have to tailor advice. They are worried (rightly) that by doing so they will provide personal advice and attract the coincident obligations. And, as noted above, in some cases the consumer will think the advice has taken into account their personal circumstances despite the general advice warning.

This is undesirable.

4.5 A new definition of personal advice

4.5.1 Quality advice

We received many views in the submissions on the Issues Paper about what constitutes quality advice. Most people said that quality advice is advice which responds to the needs of the consumer. I agree. In many cases, in order for advice to respond to the needs of the consumer, the provider must consider the relevant circumstances of the consumer. In my view it is in the interests of consumers to have access to more advice that considers their personal circumstances, where doing so is relevant.

Often, financial institutions have a great deal of information about their customers. In many cases they use that information for their own purposes. Some are making use of that information now to provide more tailored information and guidance to their customers. In some cases, there is a real risk they are unknowingly providing personal advice. Financial institutions should be encouraged to use this information for the benefit of their customers including by providing advice to their customers that in fact considers their relevant objectives, financial situation and needs. Therefore, rather than narrowing the definition of personal advice or introducing further categories, the definition of personal advice should be expanded, so that it is harder for institutions to provide general advice when consumers want and expect advice that takes into account their personal circumstances. At the same time, a broader definition will provide greater certainty and with it less room for providers to exploit any ambiguity.

And so my first recommendation is that a wider category of financial product advice should be treated as personal advice under the law. This recommendation is the foundation of my other recommendations – it will contribute to better quality advice, not poorer quality advice. In doing so, the recommendation will address one of the great mischiefs of the existing regime – it will stop providers giving general advice in circumstances where customers want and expect personal advice.

4.5.2 Breaking the link with the consideration of a client’s circumstances

Currently the definition of personal advice turns on whether a provider *considers* one or more of the client’s objectives, financial situation and needs or whether a reasonable person might think they have. In *ASIC v W/SAL Justice Jagot* said that the definition of personal advice required the financial product advice to be ‘connected to the consideration of one or more of the person’s objectives, financial situation and needs’.⁸⁶ The definition I am recommending will deliberately break that connection.

The Corporations Act should be amended to say that if the provider provides financial product advice to an individual client in circumstances where the provider or a related body corporate has information about one or more of the client’s objectives, financial situation or needs they will be giving personal advice.

This will remove some of the difficulty people have now with what is sufficient to amount to consideration for the purposes of the definition and it will also mean that providers cannot deliberately ignore information they have about their customers when providing them with advice. If the customer gives the provider information or if the provider holds information, each time they provide a personal recommendation to the customer they will provide personal advice and the personal advice obligations will apply. These obligations are discussed in Chapter 6.

4.5.3 Feedback on the proposal to expand personal advice

This proposal was included in the Proposals Paper. Most financial advisers supported the proposed expansion of personal advice because it would bring greater regulatory certainty. It would also result in more consumers being protected by the personal advice framework. Of course, financial advisers are in the business of providing personal advice, and will therefore be largely unaffected by this change.

Some of the financial institutions that currently rely on a general advice model to sell their products worried about whether they could comply with personal advice obligations (the good advice duty),

⁸⁶ *Australian Securities and Investments Commission* [2019] FCAFC 187, at paragraph 242.

both as a practical matter and because of what they anticipated to be an additional cost. They said this proposal may mean that they would stop providing financial product advice to their customers except to the extent they do so in advertising or broad-based marketing. I doubt this will be the case. The same institutions have told us they want to provide more advice to their customers and the other recommendations in this Report will make it easier for them to do so. But if I am wrong, it will not be a poor outcome for consumers who can suffer a great deal of harm from unsuitable general advice.

Stockbrokers also worried about the effect of expanding personal advice. Stockbrokers provide research reports to their clients on the basis that the recommendations in those reports are general advice. They told us they were worried that the broader definition of personal will mean these reports contain personal advice. Whether that is the case will turn on whether the reports are personalised. If they are, the stockbroker will be providing personal advice to each of their clients who receives the report (in saying this, I note there is a real risk that this is already the case today).

However, this does not mean the content of the advice will need to change in order to satisfy the good advice duty. What is required by the duty will adjust with the nature and content of the advice. There is a difference between:

- a recommendation addressed to client A to sell share X; and
- a recommendation to client A to sell share X *if* they are looking to sell any of their portfolio.

Both are personal advice, but in order to satisfy the good advice duty, the first will require consideration of the client's needs and objectives and financial situation, and the latter will not. It will be good advice if the recommendation is soundly based. There is no reason to think the advice would not also be in the best interests of the client.

Others worried about seminars. Any financial product advice provided in a seminar will in the ordinary course be general advice. This will continue to be the case even where the seminar provider holds information about the financial situations of the people attending the seminar. Again, whether this is the case will turn on whether the content of the seminar has been individualised for each of the attendees.

4.5.4 Adjustments to the recommendation

I acknowledge that expanding the definition of personal advice in the way that I am recommending will mean that, in very large part, all one to one conversations and interactions between a customer and their bank, superannuation fund or insurer will be personal advice conversations *if* they include a recommendation or opinion about a financial product or a class of financial product. The 'if' is important.

However, it was not and is not my intention that all financial product advice become personal advice merely because the provider has information about the recipient. It was not and is not intended to convert a widely broadcasted recommendation into personal advice. It was and is intended to better align the law with the expectations of consumers. If financial product advice looks and feels like personal advice, it should be treated by the law as such. If a customer would reasonably expect their financial institution to use information they have about them when they give them financial product advice, the law should require the institution to use that information in doing so.

The definition in my recommendation is slightly different to the one in the Proposals Paper so that it is clearer that financial product advice will only be personal advice if it is 'personal' to the client or, expressed in another way, if it is individualised. Advice will be individualised if it is prepared or adjusted for or directed to a particular individual. If an email is sent to a customer's email address and the customer's name is used, it will be directed to the customer. If the customer's name is not used in

the same email, it may not be directed to the customer (although it will depend on whether the content has been individualised). While this might on its face appear to be an artificial distinction which can easily be manipulated, it is an important one because the customer who is addressed by their name might reasonably expect personal advice. The law would align to those expectations.

This still means that much of the general advice that is provided by financial institutions and other financial services providers today will be personal advice. However, the recommendation does not mean that financial institutions are required to give personal advice to their customers. What it does mean is that institutions will need to consider whether they hold (or are likely to hold) information about a customer's financial situation or one or more of their objectives or needs before providing a recommendation about a financial product to the customer.

4.5.5 Financial situation, objectives or needs

A name, address and date of birth do not constitute a person's objectives, financial situation and needs. A provider might assume that a customer of a certain age has particular objectives and needs, but they do not know. This is not enough to fall within the definition of personal advice. Limited information about a customer's financial situation is also not sufficient to answer the description of information about the customer's financial situation. Something more will be required. This is the law now. However, the phrase 'one or more of the client's objectives, financial situation and needs' is somewhat difficult grammatically (as was discussed in *ASIC v WSAL*) and I have recommended the formulation be changed so that the law is clearer that a provider of advice will not have information about a customer's financial situation if they have limited information going to one aspect of it. Having said that, in many cases, a customer's bank, life insurer and superannuation fund will have a deal of information which is likely to answer the description of the customer's financial situation.

If a financial institution or other provider does hold such information (or if they think it is likely that they hold such information), they will need to choose between providing information and giving advice that takes into account such of the customer's objectives, financial situation and needs as are relevant to the advice. In many cases, where the advice is simple, what is relevant will be narrow. If the information is difficult to access, and depending on the nature of the interaction with the customer, the provider may need to ask the customer for that information again, before providing a recommendation. In some cases, the recommendation may not be able to be made. That is a good thing because no advice is better than poor advice.

The changes would not mean conversations which merely provide information, even tailored information, become personal advice. They are not financial product advice today and they would not be financial product advice under this recommendation. The changes would also not mean that all financial product advice provided in seminars, on websites, in newsletters and research reports would be personal advice. If the advice is broadcast widely and is not individualised (by being directed to or adjusted for a particular customer), it will be general advice.

In saying this, I do recognise that there will be cases in which it will be difficult to determine whether information that is tailored to the customer might contain a recommendation and therefore whether it would meet the definition of personal advice. The changes I am proposing to the duties which attach to giving personal advice will, I hope, encourage providers to assume they are providing personal advice when they are in doubt. The changes are also intended to protect consumers from receiving poor and harmful recommendations that do not take into account their relevant personal circumstances. Both will be to the benefit of consumers.

4.5.6 Recommendation

I recommend that the existing definition of personal advice in the Corporations Act be replaced with the following:

Personal advice means financial product advice prepared or adjusted for or directed to a particular client in circumstances where:

- a) the client tells the provider of the advice their financial situation or one or more of their objectives or needs; or
- b) the licensee responsible for the advice, or a related entity of the licensee, if the licensee is a body corporate, holds information about the client's financial situation or one or more of their objectives or needs.

The provider of the advice in paragraph (a) refers to the individual providing advice, if any, and otherwise means the AFS licensee. It will be important for the definition to extend to information that is held by a related entity of the AFS licensee (where the licensee is a body corporate) because financial institutions often comprise of a group of companies which provide different products and services to the group's customers. Often the customers are not aware of the group structure and do not know which entity they are dealing with and again, as is reflected in privacy policies, it is commonplace for companies within a group to share customer information.

The definition of financial product advice and general advice would remain the same and so general advice would continue to be financial product advice which is not personal advice.

Diagram 4.2: Effect of personal advice recommendation



Recommendation 1 – Personal Advice

The definition of personal advice in the Corporations Act should be broadened so that all financial product advice will be personal advice if it is given to a client in a personal interaction or personalised communication by a provider of advice who has (or whose related body corporate has) information about the client's financial situation or one or more of their objectives or needs.

Personal advice means financial product advice prepared or adjusted for or directed to a particular client in circumstances where:

- a) the client tells the provider of the advice their financial situation or one or more of their objectives or needs; or
- b) the licensee responsible for the advice, or a related entity of the licensee, if the licensee is a body corporate, holds information about the client's financial situation or one or more of their objectives or needs.

The objectives of this recommendation are:

- for consumers to receive better quality advice which takes into account their personal circumstances;
- for more personal interactions between consumers, financial institutions and other providers to be subject to the greater obligations that will apply to personal advice than to general advice; and
- to increase regulatory certainty by making the boundary between general advice and personal advice more certain.

4.5.7 Costs v benefits

Consumers will benefit from the wider definition of personal advice. Financial institutions will not be able to use general advice to sell financial products in personal interactions with their customers. This will improve the quality of advice their customers receive. It will also give financial services providers greater certainty about when they are providing general advice or personal advice.

As noted above, we have been told by some stakeholders that there will be a cost associated with this change for those financial institutions that currently rely on general advice in their customer interactions. If they wish to continue to provide financial product advice to their customers, they will in the most part be giving them personal advice and they will have to satisfy the higher standard of the good advice duty. Systems may need to be developed, staff may need to be trained and in some cases financial advisers may need to be recruited to give personal advice to customers. However, the obligations will not be as onerous as the obligations attaching to personal advice are now. The obligations are addressed in Chapters 5 and 6.

There is a risk that some financial institutions will not be willing or able to provide personal advice in circumstances where they currently give general advice. However, in my view, a recommendation that is given to a customer that is unsuitable for that customer is not fit for purpose and should not be given. And so, I believe the benefits this recommendation promises consumers will exceed the difficulty and expense that might be borne by financial institutions.

Before turning to who should be able to provide personal advice in Chapter 5 and to the obligations attaching to the provision of personal advice in Chapter 6, I will say something about general advice and its regulation.

4.6 General advice

4.6.1 There will still be general advice

While expanding the definition of personal advice will bring more financial product advice into the personal advice definition, it is not intended to and it will not convert all financial product advice into personal advice. There will still be circumstances in which a person will be able to provide general advice to a client. This will primarily be where they do not talk to the client on a one-to-one basis and where they do not hold information about the client. This will be general advice.

There will continue to be an important place for general advice in the regulatory framework for financial advice. Widely broadcasted advertising of financial products will also continue to be general advice (if it is financial product advice). Research reports, seminars and newsletters that are not individualised – directed to individual clients or adjusted or otherwise personalised for individual clients – will continue to be general advice.

4.6.2 Regulation of general advice and the Proposals Paper

In the Proposals Paper I had suggested that general advice be removed from the AFS licensing regime. I did not say and do not say that what is currently general advice cannot be valuable. I accept that general advice can be valuable in appropriate circumstances.

Rather, my reasons for proposing that general advice not be separately regulated as a financial service were because it would:

- simplify the regulatory framework;

- neatly address the question about whether general advice was aptly named (there would be nothing to name); and
- remove the obligation to provide a general advice warning.

I did not think it would cause any harm to consumers because most providers of general advice also provide other financial services and so they would continue to hold AFS licences and they would continue to be regulated as such. For those few (111 as at December 2022) AFS licensees authorised to only provide what is now regulated as general advice, they would not require an AFS licence but their conduct would continue to be subject to the consumer protection laws in the ASIC Act (because the general advice would be connected with the issue of a financial product). Therefore, in either case, the providers of general advice would not be able to provide a recommendation that was misleading or deceptive. The greatest risk of consumer harm from general advice is that it is misleading or deceptive and so leaving the regulation of this conduct to the misleading or deceptive conduct laws seemed to me appropriate.

4.6.3 Concerns about the proposal to remove general advice from AFS licensing

In consultations on the Proposals Paper, stakeholders raised concerns with removing general advice from the AFS licensing regime. These concerns focused largely on the increased risk of financial product advice provided by unlicensed providers (including financial influencers or ‘finfluencers’) and consumers who receive this type of advice no longer having access to AFCA. The potential for consumer harm would be heightened if this also allowed unlicensed advice providers to be able to receive conflicted remuneration.

Research houses were also concerned that deregulating general advice would enable unregulated entities to enter the market with the associated risk that the quality of research reports would be compromised.

There were concerns that the changes would make it more difficult for ASIC to take action against unscrupulous operators seeking to sell high-risk products under general advice models. ASIC pointed to the difficulty of commencing proceedings for misleading or deceptive conduct and compared that with the regulatory efficiency of taking administrative action to stop an unlicensed provider undertaking a regulated activity without a licence.

Having listened to this feedback, I have been persuaded that there is merit in retaining the requirement for providers of general advice to hold an AFS licence or to be the representative of an AFS licensee and so I have not recommended its removal from the regulatory framework. I accept that the obligation to hold an AFS licence is a regulatory barrier to mis-selling.

4.7 The regulation of general advice

4.7.1 Three issues

Retaining general advice as part of the regulatory framework, raises the following issues:

- whether general advice should be called something else;
- whether a provider of general advice should continue to be required to give a general advice warning; and

- how general advice should be regulated, noting it will be a smaller category of financial product advice than it is today.

4.7.2 Renaming general advice

Many people have told us that general advice is misunderstood and should be renamed. Research commissioned by ASIC and previous reviews have confirmed as much. However, none has identified a better term. Suggestions made to us include renaming general advice as ‘general information’ and ‘product information’. Neither is, in my view, an improvement because they ignore the fact the definition of general advice applies (and will continue to apply) only where there is a recommendation or opinion, and therefore where there is something other than mere information.

On 4 May 2021, ASIC released a report which said that there was no evidence a change in the label will change consumer understanding and there were no better labels.⁸⁷

Given this conclusion, I have not recommended a change to the defined term ‘general advice’. However, given its shortcomings, I do not think it is a term that should be given any prominence with consumers, and there is no reason for doing so. Like the term financial product advice, it has utility for purposes of the regulatory regime only.

4.7.3 General advice warning

Other than the obligations that apply to the provision of financial services, the sole obligation that applies to a person when they provide general advice is to provide the general advice warning. It requires the consumer to be told (warned) that the advice does not take into account their personal circumstances and that they should therefore consider whether it is appropriate to them in light of their personal circumstances.⁸⁸

I suspect because it is easier to give a warning than to decide whether it is required, it is commonplace for information that does not contain a recommendation at all (and therefore it is not general advice) to be accompanied by a general advice warning. In these cases consumers can be forgiven for assuming the information is in fact advice, or merely ignoring the warning whenever they see it. More problematic is that the general advice warning is sometimes used in an effort to present personal advice as general advice. All can be harmful and they are not answered by a recommendation that the consumer seek personal advice from a financial adviser when it is highly unlikely they will.

ASIC’s research on general advice confirms that not only do many people not understand general advice warnings but the prescribed warning can be counterproductive – an explanation that ‘any advice’ does not take into account the person’s personal circumstances is in fact understood by some consumers to do just the opposite – to take into account the person’s personal circumstances, especially where the advice was provided in a personal (one-to-one) communication.

I therefore recommend that the obligation to give a general advice warning whenever general advice is provided be removed. It seems clear not only that a general advice warning does not serve the intended purpose – consumers are neither warned nor likely to in fact consider the appropriateness of the advice to their own circumstances – but it can be harmful.

87 ASIC (2021a).

88 Corporations Act, s 949A.

In saying this there will be cases where general recommendations about financial products may require warnings about its limitations. However, this is a matter that should be considered on a case by case basis and the law should not prescribe the terms of any warning. If a warning is required, it should be crafted having regard to the advice and the audience. I would also suggest that providers of general advice think carefully about recommending that a customer seek personal advice where it is unlikely or not even feasible they would do so. Providing such a warning in these cases would be disingenuous and providers should turn their minds to whether they are complying with their general AFS licensee obligations when they provide general advice just as much as they must when providing any other financial service.

Recommendation 2 – General Advice

General advice should continue to be a financial service, but the requirement for a general advice warning to accompany general advice should be removed.

The objective of this recommendation is to reduce the unnecessary prescription in the regulation of financial product advice and remove a source of confusion for consumers

4.7.4 Obligations attaching to the provision of general advice

An AFS licensee who provides general advice will continue to be required to comply with the obligations that apply to AFS licensees more broadly, as well as the ban on conflicted remuneration. While they are not a long list of obligations, I think they are well designed for their purpose. A provider of general advice will need to ask whether it is efficient, honest and fair to provide general advice in the relevant circumstances and, if the answer to that question is yes, they will need to go on to ask whether their recommendations and opinions are accurate, honest and fair. If they are not, they will breach the law.

Chapter 5 – Who Should Provide Personal Advice?

Chapter Summary

- An individual who provides personal advice must be a financial adviser (relevant provider) and satisfy the professional standards under the Corporations Act.
- The number of financial advisers is declining, and there are not enough financial advisers to meet consumers' financial advice needs.
- To make personal advice more accessible and affordable, the range of people who are able to give that advice needs to expand.
- Some personal advice does not need the skills, expertise and judgment of a financial adviser and should be able to be provided by other people (and entities). Where this is the case, an AFS licensee must determine what education and training is required for their representatives to provide personal advice.
- Where the client pays a fee for the advice, or the product issuer pays a commission for the issue of a product to which the advice relates, the personal advice should only be able to be provided by a financial adviser who meets the professional standards.

Objective

- The objective of the recommendations in this Chapter is to increase the supply of personal advice, so that personal advice is more accessible and affordable for consumers. The recommendations will also serve to increase the professional standing of financial advisers who are professionals and who are entitled to charge a fee for their advice.

5.1 A reminder of the purpose of the Review

The purpose of the Review is to recommend changes to the regulatory framework that will increase the accessibility and affordability of quality financial advice. The purpose of the recommendation to expand the definition of personal advice is to improve the quality of financial advice. Advice is more likely to be quality advice if it responds to the objectives, financial situation and needs of the consumer, and so this means the obligations attaching to personal advice must require the provider to consider such of them as are relevant to the advice.

This in turn raises the question of accessibility and affordability. The law requires a person who gives personal advice now to consider the client's objectives, financial situation and needs, but too few are willing or able to do so. And so, the purpose of the Review would be undermined by my recommendation to expand personal advice unless more providers are willing and able to provide personal advice.

I set out my recommendation for who can provide personal advice to retail clients in this Chapter. I set out my recommendations for how the provision of that advice should be regulated in Chapter 6. While the topics are addressed in separate chapters, to understand how they will assist to improve accessibility, affordability and quality, they need to be read together.

5.2 Not all personal advice needs to be provided by a relevant provider

5.2.1 What the law says now

A person who provides personal advice to retail clients must hold an AFS licence or be a representative of an AFS licensee.

Where the advice provider is an individual they must be a ‘relevant provider’ under the Corporations Act. Subject to the transitional requirements, a relevant provider must have an approved bachelor or higher degree, they must have passed an exam and have completed relevant work experience. They must also comply with ongoing professional development requirements and the Code of Ethics. The precise requirements are the subject of a separate review. However, the advisers I have spoken to have all impressed on me that they are professionals with specialist skills and expertise. My recommendations proceed on this basis.

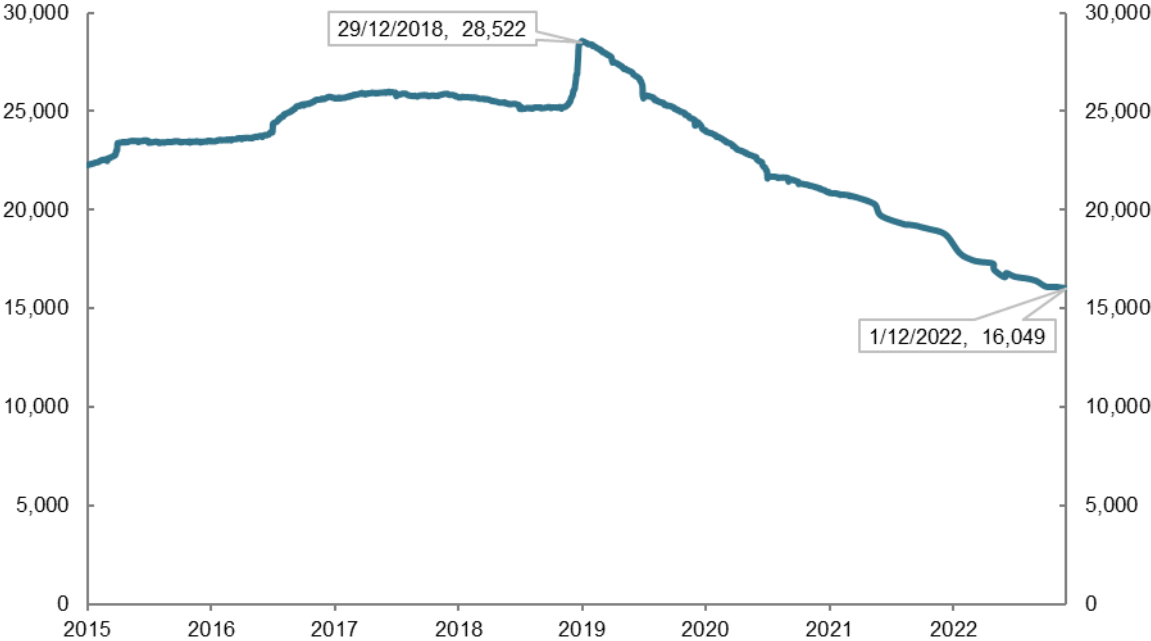
There are some exceptions to the regime just described which apply where personal advice is provided about a basic deposit product, general insurance product or consumer credit insurance (or any combination of these products),⁸⁹ but subject to those exceptions it means that all personal advice must be provided by a relevant provider unless the advice is provided by a body corporate. Relevant providers practise as financial advisers, financial planners and stockbrokers and as such they can have different skills and specialisations. Throughout this Report I sometimes refer to financial advisers when, strictly, I should refer to ‘relevant providers’. I do so because it is a more natural and better understood term than relevant provider. In doing so, I apologise to the financial planners and stockbrokers and would like to reassure you that, despite this, you have not been forgotten.

5.2.2 Who should be authorised to provide personal advice?

If the definition of personal advice is broadened as I have recommended (Recommendation 1), more advice will be personal advice and, under the current law, that advice would have to be provided by a financial adviser or a body corporate (for example, by online messages, superannuation calculators and digital advice tools). There are only around 16,000 financial advisers in Australia and their numbers are declining. If the regulatory framework continues to require all personal advice to be given by a financial adviser (where it is given by an individual), it would exacerbate the existing accessibility and affordability issues which are part of the reasons for this Review. Happily, I do not think it is necessary or in the interests of consumers to require all personal advice to be given by a financial adviser.

⁸⁹ See the definitions of ‘relevant provider’ and ‘relevant financial product’ in section 910A of the Corporations Act.

Chart 5.1: Number of financial advisers in Australia⁹⁰



The spectrum of financial product advice is very broad. There are simple questions which can be answered simply. There are also discrete issues which can be addressed by limited or episodic advice. In a report by the Conexus Institute, 40 per cent of surveyed consumers said that they wanted advice on a topic-by-topic basis as and when an issue arises.⁹¹ Consumers are seeking advice from their financial institutions in addition to financial advisers, with the number of members seeking advice from their superannuation fund rising.

It is also clear that even where the advice is not simple, many of us have common needs and so not all advice is unique. This means that technology and digital advice tools can be used to support people who are not financial advisers to provide personal advice, which without that support, could only be provided by financial advisers. Digital advice tools can also be made available directly to consumers. Some already are and improvements in technology mean that they are increasingly able to provide more sophisticated personal advice.

Financial advisers are professionals with skills and expertise which put them in a position to provide a real benefit to their clients and they will continue to play a vital role in providing personal advice. But the regulatory regime must allow other advice providers to provide personal advice to consumers to increase the accessibility of personal advice.

We have been told during the consultation process that, with the right regulatory framework, product issuers would like to provide more personal advice to their customers (or in the case of superannuation funds, their members). They should be encouraged to provide helpful personal advice to their customers and members. The regulatory framework should therefore assist them to do so. For the reasons set out above, it is both impractical and unnecessary to require them to recruit financial advisers to provide all of that advice.

90 Source: ASIC Financial Adviser Register (as at 1 December 2022).

91 Conexus Institute (2022), page 23.

5.2.3 When should advice be required to be given by a relevant provider?

If someone other than a relevant provider is able to provide personal advice to retail clients, 2 questions need to be answered:

- are there any circumstances in which only relevant providers should be able to give personal advice; and
- if so, what are they?

A relevant provider is a professional. They have skills and expertise which allow them to exercise discretion and judgment when providing financial advice to their clients. There will be many cases where an adviser is required to apply their expertise and exercise judgment in order to express an opinion or make a recommendation that meets the objectives and needs of the client. And so my answer to the first question is yes – there should be circumstances in which only relevant providers can give personal advice to retail clients.

The second question is more difficult because I do not think it is possible or desirable for the law to create a boundary between advisers on the basis of whether expertise and judgment is called for in providing particular financial advice or advice to a particular person. It will never be clear how much expertise or how much judgment is required nor will it be a constant. People have complained about the uncertainty of the law and so I do not want to introduce new areas of uncertainty without good reason.

In any case, I do not think it is necessary. In my view, it is possible to do indirectly what cannot be done directly. The relationship between the advice provider and the consumer provides a good indicator of the degree of expertise and judgment that is expected to be exercised by the advice provider. A consumer who pays a fee for personal advice, pays for the adviser's expert opinion or recommendation and, in forming that opinion or recommendation, the consumer is entitled to expect the adviser to apply their expertise and judgment.

The exception to these observations is the circumstance in which providers of advice are paid commissions. Financial advisers may be paid a commission for the sale of life insurance. Commissions are paid by the insurer for the sale of the product and not by the client for the advice they provide. Nevertheless, in this case, the commission is paid instead of an advice fee (or in some cases as well as) and the client is very likely to expect (and is entitled to expect) the adviser's opinion or recommendation to be of the same standard as it would be had the client paid an advice fee. So, for the purposes of determining the circumstances in which personal advice must be given by a financial adviser, I treat an advice fee and a commission in the same way.

The law should be able to draw a clear line between advice for which a fee is paid and advice for which it is not. It should also be able to identify when a commission is paid. In my view, these are the bright lines which should be used to separate advice that must be provided by a financial adviser (if the provider is an individual) and advice that may be given by someone who is not a financial adviser. Only a financial adviser will be entitled to charge a fee for their advice.

I acknowledge that this does not say that personal advice for which expertise and judgment is required must be provided by a financial adviser and it does not say that only advice that requires very little or none, can be provided by someone who is not a financial adviser. However, I think it will provide an effective way of achieving the same thing, in substance. It is unlikely that product issuers and other distributors of financial products would be willing or able to provide complex advice to customers without charging a fee for that advice.

The recommendation also recognises and rewards the knowledge and skills of financial advisers by not permitting any other person to charge a fee for their advice or to receive a commission where a product is sold as a result of their advice.

The recommendation (as with the current requirement to be a relevant provider) applies only where an individual provides personal advice and so it would not stop a fee being charged for digital advice.

5.3 Proposals Paper feedback

5.3.1 The proposal

In the Proposals Paper, I suggested that personal advice should only be able to be given by a financial adviser where:

- the client pays a fee for the advice, or the financial adviser (or their authorising licensee) receives a commission in connection with the advice; or
- there is an ongoing advice relationship between the financial adviser and the client, or the client has a reasonable expectation that such a relationship exists.

If neither limb was satisfied, personal advice could be provided by someone other than a financial adviser.

Some people said the second limb of the test was too ambiguous, turning on the consumer's perception. This was a particular issue for superannuation funds that worried their members may believe they had an ongoing advice relationship with the fund merely because they were a member. While I doubt this would have been right, after considering the feedback on this part of the proposal, I have decided that it is not only impractical but also unnecessary to include an ongoing advice relationship or the expectation of one in the test for when only a financial adviser may give personal advice. The work is done by the first limb – advice must be provided by a financial adviser (relevant provider) when a fee for advice or a commission is paid. This test is simpler and more certain than that which I proposed in the Proposals Paper.

Before coming to the recommendation, I set out below the concerns that were raised by some stakeholders on the first limb and my responses.

5.3.2 Product issuers distributing financial products

A few stakeholders did express concerns about the proposal because it would allow product issuers to use personal advice to distribute their own financial products, and even other issuers' financial products. They also expressed concerns that product issuers could employ people who were not relevant providers to give that advice. They noted that a product issuer would not have to charge a fee for the advice because they would profit from the associated product sales. In short, they worry about vertical integration.

Product issuers do sell their own products. They do this currently, either through general advice or by employing financial advisers and while that is no answer to the concerns that have been raised by some stakeholders, it does indicate that it is unrealistic to stop financial institutions selling their own financial products. In my view, it is also not desirable to stop product issuers distributing their own financial products where those products are useful and suitable for the issuer's customers. This is the work of the DDO regime.

5.3.3 Financial products are not really products

As I said in Chapter 1, financial products are not manufactured. They do not exist separately from the client's relationship with the issuer. And so an issuer must invite customers to acquire their financial products. In doing so, they will inevitably give financial product advice. An advertisement for a superannuation fund or an insurance product will include a recommendation to acquire the product and the issuer will intend that recommendation to influence the consumer to do so, or at least to consider doing so. That is in the ordinary course enough to constitute general advice. No one has told us that a financial institution should not advertise their own products and it follows that no one has said that a financial institution should not be able to give general advice.

And so, it appears that the critics of vertical integration think that financial institutions should not be able to give personal advice about their own products. They worry that that the advice will always be conflicted and therefore can never be in the interests of consumers. I agree that the advice will always be conflicted – it is highly unlikely that it would be in the interests of a financial institution to turn away customers. But that is not enough reason to say they should not be able to give personal advice. Rather it means the law should work harder at making it possible for them to do so safely and in a way that serves their customers' interests.

5.3.4 Marketing and advice

I do not think that personal advice provided by a product issuer can never be in the interests of consumers. It is in the interests of consumers for financial institutions to talk to their customers and provide them with advice. When a customer asks for advice, I do not think it is appropriate for the institution to provide general advice. While an advertisement can be harmless, we have seen in Chapter 4 that general advice given in a personal interaction can be unhelpful and even harmful. And so, in my view, the object of the regulatory regime should be twofold – it should encourage product issuers to design useful financial products with fair terms and conditions and it should encourage issuers and other distributors of financial products to provide advice about those products in a way that is honest, fair and helpful.

The relatively new design and distribution obligations in the Corporations Act go a long way to meeting the first objective. They require issuers of financial products to ensure their products are in fact useful and well suited for their customers before they can be distributed and ASIC has a product intervention power available to it when they are not. The recommendations in this Report are intended to meet the second objective by requiring providers to give honest, fair and helpful – that is, good – advice to their customers.

5.3.5 Financial advisers as consumer protection

Before leaving this topic, I should note that some people have also raised the possibility that financial institutions and other distributors of financial products will employ people who are not financial advisers to sell financial products whether or not the products are suitable for their customers. In short, they say these recommendations will allow mis-selling and consumer harm. My response to that is that all of these things have happened under the existing law. It is clear that financial advisers are as capable of breaking the law as other people. Some of the most egregious examples in the Royal Commission involved financial advisers and the recent case of Dixon Advisory provided another stark

example of financial advisers with a duty to act in the best interests of their clients selling products issued by a related entity to clients despite them being highly unsuitable for their clients.⁹²

The design and distribution obligations which commenced on 5 October 2021 adopt a very different approach to trying to stop self-interested mis-selling of financial products to consumers. ASIC's submission to the Senate Inquiry into the Sterling Income Trust⁹³ discusses how the design and distribution obligations could have stopped the mis-selling (and likely issuing) of interests in the group's managed investment schemes, had they been part of the law at the time. The ban on conflicted remuneration for investment products is also important – it is unlawful to provide an incentive (other than to assist one's customers, which is to be encouraged) for recommending another issuer's financial product.⁹⁴

And finally, in my view the recommendations in this Report will help. Whether or not a product issuer distributes a financial product with the assistance of a financial adviser, a customer service officer or an online advice tool, a recommendation to buy their financial product must be good advice. This is not a weak obligation.

5.3.6 New definition for relevant providers and where the line is drawn

Having said all of this, there was in fact broad support for the idea that not all personal advice should have to be given by a financial adviser. Many people recognised the benefit of expanding the supply of advice beyond financial advisers as a means to increase the affordability and accessibility of financial advice.

How that could be achieved was the subject of discussion. Financial advisers in particular queried whether:

- the right to charge a fee for advice was the right place to draw the line; and
- the law should require everyone who gives personal advice and who is not a financial adviser to meet prescribed education and training requirements.

At its most extreme they said that lowering the education and training requirements for a large group of personal advice providers would result in poor quality advice causing consumer harm. They did not say this would be due to intentional negligence on the part of the advice provider, but worried that it could follow from the provider's lack of expertise. They doubted that someone who was not a financial adviser could identify when the advice they were giving required more expertise than could be provided on the basis of their own training and skills or their script.

These financial advisers also told us that only financial advisers should be able to give complex advice, and that anyone else should only be able to give simple advice. Some suggested that someone who was not a financial adviser should only be able to give advice about specific topics or 'intra-fund advice'. I do not think any of these proposals are practical and nor do I think they are desirable.

92 *Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Ltd* [2022] FCA 1105.

93 ASIC (2021c), *Senate Inquiry in the Sterling Income Trust: Submission by the Australian Securities and Investments Commission*.

94 I note the decision in *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1149 has cast some doubt on the breadth of the conflicted remuneration provisions and assume that if the decision is not overturned on appeal, the law will be amended to ensure that conflicted remuneration extends to intra-group arrangements.

Again, as I noted earlier in this Chapter, it would be very difficult to legislate based on whether advice is simple or complex. It is likely that people will hold different views about what is complex and what is simple. Indeed, some people have told us there is no such thing as simple advice. Other stakeholders have suggested that a line could be drawn based on the subject matter of the advice, but I would worry that advice about a particular subject might be simple in some circumstances and complex in others. Drawing the line at intra-fund advice would create a special rule for superannuation funds which I think is unwarranted. Customers of all financial institutions will benefit from greater availability of personal advice about a full range of financial products, not only members of superannuation funds.

These suggestions also tend to ignore the fact that the law does not require a body corporate that provides advice now to be a relevant provider or even to employ a relevant provider.⁹⁵ More of this advice is provided digitally and there is every reason to think that the technology will continue to improve such that there will be more and more cases where the advice provider will be a computer program or algorithm, while the human adviser, where they are involved at all, will be the intermediary between the program and the customer. In many cases, I anticipate that it will be difficult to draw a clear line between advice given by individuals and advice given by a body corporate. By opening up the provision of some personal advice to people who are not financial advisers, these recommendations will mean it is less important to do so.

This then leaves the question about whether the law should require people who provide personal advice and who are not financial advisers to have any minimum education or training. Some stakeholders suggested all of these people should hold a relevant Certificate III or IV or Diploma. Some said the advice should be given under the supervision of a financial adviser. I do not think it is necessary or desirable to prescribe either.

Financial advisers have raised concerns that the professional standards are too rigid and that they do not take account of the breadth and variety of financial advice. And so doing so again for people who provide advice but who are not financial advisers would very likely repeat the same difficulty. The Corporations Act requires an AFS licensee to ensure that its representatives are adequately trained and competent.⁹⁶ This is a clear and unambiguous obligation which if complied with and enforced is entirely fit for the job. It will allow AFS licensees to look carefully at the advice they want their staff to provide and then to decide what training they need. Where the advice is narrow and simple, and the staff member can be guided by a script, that may be relatively little. Where the advice is complex and calls for an exercise of expertise and judgment, they may decide that the advice should in fact be given by a financial adviser (even in circumstances where a fee is not charged for that advice).

If there is a genuine need for greater assistance in determining the minimum education and training standards, this could be done through RG 146 (which requires updating) or by standards determined by relevant professional associations. In either case, minimum training or education requirements should recognise not only the wide variety of topics on which financial advice is provided but also the different circumstances which can apply to providers of that advice. For example, those who are assisted by a digital advice tool will likely need less and different training than someone who is entrusted to exercise some discretion when they provide advice.

95 It requires that the body corporate have one or more responsible managers who together have the skills and experience necessary to provide the financial services the entity is authorised to provide. The current definition of relevant provider in section 910A of the Corporations Act provides that only individuals (natural persons) are required or can be relevant providers.

96 Corporations Act, s 912A(1)(f).

5.3.7 Recommendation

And so, I recommend that the Corporations Act be amended to say that:

Personal advice must be provided by a relevant provider where:

- a) the provider is an individual; and
- b) either:
 - i) the client pays a fee for the advice; or
 - ii) the issuer of the product pays a commission for the sale of the product to which the personal advice relates.

The following points are relevant to the application and interpretation of the recommendation.

The existing exception for basic banking products, general insurance products and consumer credit insurance (and any combination of these products) would remain and so, personal advice about these products could also be provided by a person who is not a relevant provider even if a fee is paid for the advice or a commission is paid by the product issuer.

If this recommendation is adopted, in every case in which the Corporations Act does not require a relevant provider to give personal advice, it will be a matter for the AFS licensee to determine whether the personal advice can be provided by an individual who is not a financial adviser, if an individual is providing the advice at all. It is likely that there will be more and more cases where advice is given without an individual.

Advice is provided by an individual when the individual is dealing personally with the client and when the individual is formulating the advice. Advice is not provided by an individual merely because an individual provides assistance to a person who is receiving digital advice.

A client pays a fee for advice if they pay it personally (for example, using their credit card or bank account) or if they direct a product issuer to pay the fee (an adviser service fee paid from a superannuation fund for example). The fee does not have to be paid to the individual providing the advice, although it must be a fee paid for the personal advice and not for another service (investment management for example). The requirement to be a relevant provider will apply even if the advice fee is paid to another person, for example to the authorising licensee or a corporate authorised representative.

A fee for advice does not include a product fee, even where the product holder is entitled to receive personal advice from time to time at no additional cost. Therefore, where the cost of advice (for example intra-fund advice in superannuation) is bundled into an administration fee this would not be a fee for advice for the purposes of this recommendation (for example, intra-fund advice could be provided by a non-relevant provider). This for 2 reasons – first, it is an acknowledgement that there is a cost to providing all advice and second, because a financial adviser is entitled to be paid an express fee for their advice.

Recommendation 3 – Relevant providers

Amend the Corporations Act to provide that personal advice must be provided by a relevant provider where:

- a) the provider is an individual; and
- b) either:
 - i) the client pays a fee for the advice; or
 - ii) the issuer of the product pays a commission for the sale of the product to which the personal advice relates.

In all other cases, personal advice can be provided by a person who is not a relevant provider.

The objective of this recommendation is to increase the supply of personal advice, to make it more accessible and affordable for consumers.

5.3.8 Costs v benefits

This recommendation will mean that financial institutions and advice firms will be able to employ and train people with different backgrounds and experience to help them provide personal advice to their customers and clients. They will be able to answer customer questions more directly and more helpfully than they can now. With appropriate training, guidance and supervision, they will be able to give simple and limited scope advice as and when customers ask for it. As noted in Chapter 4, in very many cases, personal advice is more likely to meet the needs of consumers than general advice.

It is possible, but it is highly unlikely that financial institutions will use this recommendation to employ customer service officers or call centre staff to give comprehensive advice or to distribute products issued by other financial product issuers. In the first instance, unqualified staff will not have the expertise to provide the advice. In the second, there is little incentive for them to do so. There continues to be a ban on conflicted remuneration for investment products, there is the obligation to provide financial services efficiently, honestly and fairly and there will be the good advice duty. When it comes to selling a financial product, this will not be a light obligation.

Financial advisers will continue to provide more complex advice covering a broader range of topics and products than product issuers. That advice will have greater value for their clients than simply the products they recommend and only financial advisers will be able to charge a fee, or receive a commission, for their advice. Financial advisers have told us they want to give comprehensive and complex advice to their clients, it is what they are qualified to do.

And so, the changes that will follow from this recommendation will in my view, complement, not replace, the existing financial advice practices in Australia. Only a relevant provider is able to call themselves a financial adviser, financial planner or stockbroker (as the case may be). This will continue to be the case and these labels will become more valuable. Financial advisers will be able to promote their skills and expertise, as well as their independence (if they are) using these labels and it is my expectation that advice provided by financial advisers will be regarded differently and more highly than that provided by product issuers. This is not to say that the advice provided by financial institutions and other product issuers will be of a poorer quality. It too must be fit for purpose.

5.4 Accountants and financial advice

5.4.1 Background and current law

The Terms of Reference ask me to consider the application of the financial advice regulatory framework to ‘certain activities and professions’. The activities refer to advice about taxation matters and the professions refer to accountants. As part of this I have been asked to consider Recommendation 7.2 of the *Review of the Tax Practitioners Board*. That Review recommended that the Government review the advice accountants can give in respect of superannuation.

In 2022, changes were made to the law that removed the overlapping regulation of financial advisers who provide incidental tax advice.⁹⁷ These changes provide that financial advisers who also provide tax (financial) advice services⁹⁸ must be ‘qualified tax relevant providers’ and regulated by ASIC under the Corporations Act.⁹⁹ Prior to this they were required to be registered and regulated by both the Tax Practitioners Board (TPB) under the *Tax Agent Services Act 2009 (TAS Act)* and by ASIC under the Corporations Act. These changes are intended to make it easier and less costly for financial advisers to provide tax advice which is incidental to the financial advice they provide to their client. The tax advice they can give is limited.

The relief is only one way and so a registered tax agent (most accountants are registered tax agents although many registered tax agents are not accountants) is not able to give financial product advice unless they hold an AFS licence or are authorised to give that advice as a representative of an AFS licensee. There are a few exceptions to this. These include where advice is provided:

- on the tax implications of financial products (such as interests in self-managed superannuation funds (SMSFs));¹⁰⁰
- on establishing, operating, structuring or valuation of a superannuation fund, but does not relate to the acquisition or disposal of a superannuation product or the acquisition or disposal by the superannuation fund of a financial product (or class of financial product);¹⁰¹ and
- by a registered tax agent or BAS agent that is a reasonably necessary part of their ordinary activities.¹⁰²

Accountants were able to give limited advice about SMSFs prior to 1 July 2016 without needing to hold an AFS licence. After that date an accountant who wished to continue to provide advice that was broader than that permitted by the exemptions in the Corporations Act was able to apply for an AFS

97 The *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021*, which amended the Corporations Act and the *Tax Agent Services Act 2009*, implemented the Government’s response to recommendation 7.1 of the Tax Practitioners Board Review by introducing a single registration and disciplinary system under the Corporations Act for financial advisers who provide tax (financial) advice services and removing duplicate regulation.

98 ‘Tax (financial) advice services’ is defined in section 90-15 of the TAS Act as a tax agent service provided by an AFS licensee or their representative in the course of giving advice of a kind usually provided by licensees or their representatives (i.e. tax advice incidental to the provision of financial advice).

99 Section 910A of the Corporations Act defines ‘qualified tax relevant provider’ as a person who is a relevant provider and who has met the additional education and training requirements for providing tax (financial) advice services set out in a determination made under section 921BB(1) of the Act.

100 Corporations Regulations 2001 (**Corporations Regulations**), reg 7.1.29(4).

101 Corporations Regulations, reg 7.1.29(5).

102 Corporations Act, s 766B(5)(c).

licence, with authorisations limited to providing advice about SMSFs as well as class of product advice about superannuation products, securities, simple managed investment schemes, insurance products and basic banking products (an AFS licence with these authorisations is referred to as a 'limited AFS licence').¹⁰³ Limited AFS licence-holders are still required to meet all of the relevant obligations that attach to a licensee, including complying with the general obligations of an AFS licensee, holding professional indemnity insurance, being a member of AFCA and paying the ASIC levy and so, the benefits of a limited licence seem, well, limited. It is then unsurprising that few accountants or other tax agents have taken up the opportunity to hold a limited AFS licence.

5.4.2 Feedback from stakeholders

The associations representing accountants and SMSF professionals have said accountants should be able to provide advice more broadly about their clients' superannuation needs, including whether to establish a SMSF without an AFS licence, limited or otherwise, and without being a representative of an AFS licensee. They pointed to their education, their expertise and the fact that they are trusted advisers to their clients. They worried that the scope of the existing exemptions for tax advice (outlined above) were uncertain and insufficient

5.4.3 Role of registered tax agents in providing financial advice

Accountants play an important role in assisting their clients with their financial arrangements. They are a trusted source of advice for their clients, and for the many who are registered tax agents they are required to meet education and training standards under the TAS Act.

However, this does not mean they should be given an exemption from the framework that regulates the provision of financial advice. They have expertise in tax matters. Tax is a critically important aspect of superannuation, but the matters that are relevant to a decision to establish and maintain a SMSF and to rollover superannuation into a SMSF are much broader than those relating to tax. Advice on superannuation products, including interests in SMSFs, is financial product advice. And it should be regulated as financial product advice. I do not see any reason for making an exception. This will ensure that consumers who receive this advice will do so with the same protections as all other recipients of financial product advice, including that the advice is good advice (if it is personal advice), the requirement for advice providers to act in their best interests (if a fee is charged for the advice) and access to AFCA, just to name a few. These are important protections, which would not otherwise be available under the TAS Act or any other Act.

There is extensive research that shows that SMSFs are not suitable for many consumers. I agree. They should not be established lightly. Advice to establish a SMSF should only be given in circumstances where it would be good advice to do so.

That said, I am not unsympathetic to the concerns raised about the costs associated with providing this advice. They are high. Much of this relates to matters outside my Terms of Reference, such as the education and training standards, professional indemnity insurance and the ASIC levy and will need to be considered separately.

However, there are things I can do. The recommendations I make in this Report will make it easier for all advice providers, including accountants who are authorised by an AFS licensee to provide this advice, to provide personal advice to their clients. It will also make it easier for them to provide limited or one-off advice.

¹⁰³ Corporations Regulations, regs 7.8.12A and 7.8.14B.

For all of these reasons, I am not recommending any changes to the advice accountants (and more broadly registered tax agents) can give. I think there are sufficient exceptions and options that accountants and registered tax agents can choose from to adapt their business model as required, depending on what advice they want to provide to their clients.

Also, while there does not appear to be much merit in holding a limited AFS licence, my recommendations will not stop those who wish to do so (or take it away from those who already hold one).

Chapter 6 – How to Regulate Personal Advice

Chapter Summary

- The best interests obligations that apply to a person providing personal advice regulate the adviser's conduct rather than the adviser's advice, are difficult and costly to comply with and have not been effective in preventing consumer harm.
- A more effective approach to the regulation of financial advice will be to focus on the content of the advice rather than the process undertaken by the adviser in formulating the advice.
- The current best interests obligations should be replaced with a duty to give good advice. Good advice is advice that, at the time the advice is provided, is fit for purpose having regard to the scope, content and nature of the advice, the client's relevant circumstances and is, in all the circumstances, good.
- If personal advice is provided by a financial adviser, the good advice duty should apply to that individual. In all other cases, the good advice duty should apply to the relevant AFS licensee.
- In addition, financial advisers who meet the professional standards should be subject to a new statutory best interests duty. This should be a true fiduciary duty (without a safe harbour).

Objectives

The objectives of the recommendations in this Chapter are to:

- regulate the content of financial advice rather than the process which is followed by the advice provider;
- recognise that personal advice is given to consumers by financial institutions as well as financial advisers and ensure the regulation of financial product advice is fit for both; and
- impose a true fiduciary obligation on financial advisers who have undertaken to provide advice in the interests of their clients.

6.1 Regulating personal advice

6.1.1 The next part of making quality advice accessible and affordable

This Chapter brings me to the next element of the recommendations to make quality advice more accessible and affordable – the obligations that apply to the provision of personal advice. For the reasons set out below, I am recommending 2 obligations:

- a duty to give good advice that will apply to all providers of personal advice to retail clients; and
- a true duty for relevant providers (financial advisers) to act in the best interests of their clients.

These will replace the existing best interests obligations in Division 2 of Part 7.7A of the Corporations Act.

6.1.2 Current regulatory framework

The centrepiece of the current regulatory framework is the best interests duty and the related obligations in Division 2 of Part 7.7A of the Corporations Act. They require a person who provides personal advice to a retail client to:

- act in the best interests of the client in providing the advice, which the provider may satisfy by complying with the safe harbour steps;¹⁰⁴
- provide advice that is appropriate to the client assuming the best interests duty is satisfied;¹⁰⁵
- give a warning to the client if the advice is based on inadequate or insufficient information;¹⁰⁶ and
- give priority to the client's interests if there is a conflict between the interests of the client and the provider or the interests of the client and the interests of an associate of the provider.¹⁰⁷

These duties and their shortcomings are discussed in some detail in Chapter 2. Stakeholders have told us they are complex, difficult to understand and inflexible. The judiciary agrees. I refer you again to Justice Buchanan in *Casaclang* (see Chapter 1 above) who says:

*The ... provisions of Chapter 7 do not, in my view, act as an effective guide to conduct at all.*¹⁰⁸

This is a particularly damning assessment, especially for a regime that centres on the regulation of conduct. For the purposes of the Review, these duties are relevant because it is clear they are an impediment to product issuers and other distributors of financial products giving personal advice to their customers. They are also a barrier to financial advisers providing affordable advice, attracting new advisers and maintaining viable practices.

6.1.3 The best interests duty

In considering the difficulties and impediments to giving personal advice to consumers, the best interests duty in section 961B(1) of the Corporations Act deserves special mention. Many people see it as a bulwark against poor and even harmful advice. One stakeholder described it as 'totemic'. I understand a totem to be an object which has no intrinsic meaning but to which much meaning is attached – put differently, it is a symbol. And so I agree with the stakeholder, although I understand that this is not the kind of agreement they sought – the current obligation in the Corporations Act to act in the best interests of the client in relation to the provision of personal advice is totemic. It is in many ways just a symbol upon which its advocates project their own meaning. Its critics (among whom I include myself) say the duty bears little resemblance to a best interests duty in the general law and has nothing to say about the quality of advice provided to the client. Instead, it directs attention to the adviser's process in formulating their recommendations.

104 Corporations Act, ss 961B(1) and 961B(2).

105 Corporations Act, s 961G.

106 Corporations Act, s 961H.

107 Corporations Act, s 961J.

108 *Casaclang* [2015] FCA 761, paragraph 236.

The point is made starkly by Justice Charlesworth in *ASIC v MobiSuper Pty Limited* [2022] FCA 990:

*The [best interests duty] is concerned with the processes carried out by an adviser in relation to providing personal advice. Its concern is with the conduct of the advice provider and not the content of the advice ultimately given.*¹⁰⁹

To be clear, a fiduciary duty to act in the best interests of a client is a stringent and important obligation. It requires the fiduciary to exercise their powers and discretions solely for the benefit of the beneficiary and so that they are honestly and freely able to do so it says the fiduciary cannot have a conflict and cannot accept a personal benefit other than with the consent of the beneficiary. In my view this expresses perfectly the duty that should apply to a financial adviser who is paid a fee for their advice (and I discuss this later in this Chapter). However, it is ill-suited to an employee of a financial institution whose job it is to recommend and sell financial products on behalf of their employer. But the best interests duty in the Corporations Act treats the financial adviser and the employee in the same way and, perhaps because of that tension, the obligation is compromised. It borrows the language of a fiduciary duty, but the safe harbour steps and the duty of priority make it clear that it does not create or apply one.

And so, it is not surprising that it does not work well.

6.1.4 Consumer protection

We are all familiar with the financial advice case studies in the Royal Commission. Many of us are also familiar with the recent Dixon Advisory collapse. These all involved financial advisers with a duty to act in the best interests of their clients and they all provide evidence that the best interests duty and its related obligations have not been enough to prevent consumer harm.¹¹⁰ In his Final Report Commissioner Hayne said:

*Experience (too often, hard and bitter experience) shows that conflicts cannot be 'managed' by saying, 'Be good. Do the right thing'. People rapidly persuade themselves that what suits them is what is right. And people can and will do that even when doing so harms the person for whom they are acting.*¹¹¹

Duties which focus on the process of formulating advice rather than the content of advice in my view provide an opportunity for the adviser to persuade themselves that their advice is in the interests of their client. Of course, words (in this case the Corporations Act) cannot stop someone breaking the

109 *Australian Securities and Investments Commission v MobiSuper Pty Limited* [2022] FCA 990, paragraph 80.

110 *Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Ltd* [2022] FCA 1105 is a very recent example of poor and conflicted advice. In that case, advisers recommended interests in financial products issued by related parties. The parties to the proceedings accepted they were 'highly risky' investments. Justice McEvoy said:

In providing the advice the representatives were implementing an advice process established by DASS which recommended financial products for clients based on standard parameters and the clients' DASS risk profile.

It is noteworthy that the representatives adopted an approach which was very similar to the approach adopted by the representatives of Storm Financial, although they purported to do so using the safe harbour steps in s 961B(2) of the Corporations Act. Now in this case, they breached the law. It is noteworthy that the financial products were 'highly risky' investments. In short, the advice was not merely poor, but it was harmful.

111 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), Volume 1, page 178.

law and in many of the case studies and in the Dixon Advisory case, the law was broken. But these are extreme examples of a continuum and it is entirely feasible that an adviser might follow the safe harbour steps and provide poor advice. Indeed, the evidence suggests that this is still too common.

So much is clear in ASIC's review of 233 superannuation advice files in 2019.¹¹² The files were reviewed for compliance with the best interests duty and related obligations and the 'switching advice' requirements in section 947D of the Corporations Act. It says:

Overall, in 120 files (51%) we found that the advice provider did not demonstrate full compliance with the best interests duty and related obligations.

Of the files that did not demonstrate full compliance with the best interests duty and related obligations, in 36 files (15%) there was an indication that the member was at risk of suffering financial or non-financial detriment as a result of following the advice provided.¹¹³

ASIC's review of superannuation files took place more than 5 years after the commencement of the best interests duty and the ban on conflicted remuneration.¹¹⁴

The life insurance advice files assessed for this Review showed similar results – while the advice files improved between 2017 and 2021, the advice is often still not very good.

6.1.5 Process based obligation increases the cost of advice

In addition to being neither a genuine fiduciary duty nor particularly effective at protecting consumers from poor advice, financial advisers and AFS licensees have told us that the best interests duty not only increases the cost of providing advice but can be an impediment to providing personal advice to some clients at all.

It was clear from consultation and the survey of financial advisers that financial advisers focus more on the safe harbour steps than the primary duty – the duty to act in the best interests of their client. This has led to what Commissioner Hayne describes as a 'tick a box' approach to providing advice. This approach puts the cart before the horse.

They also worry, a lot, about the final step in the safe harbour steps – to take any other step reasonably regarded as being in the best interests of the client.¹¹⁵ With their focus on stepping through the steps, they are nervous about what else they might be required to do and, on one view, it undoes the purpose of the safe harbour (to in fact provide a safe harbour from a breach of the primary best interests duty).

112 ASIC (2019b), REP 639: *Financial advice by superannuation funds*.

113 ASIC (2019b), at paragraphs 110 and 113.

114 The best interests duty and the ban on conflicted remuneration were introduced as part of the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* and became mandatory from 1 July 2013.

115 Corporations Act, s 961B(2)(g).

Chart 6.1: Financial advisers perception of the value of ‘any other step’ in the best interests duty safe harbour

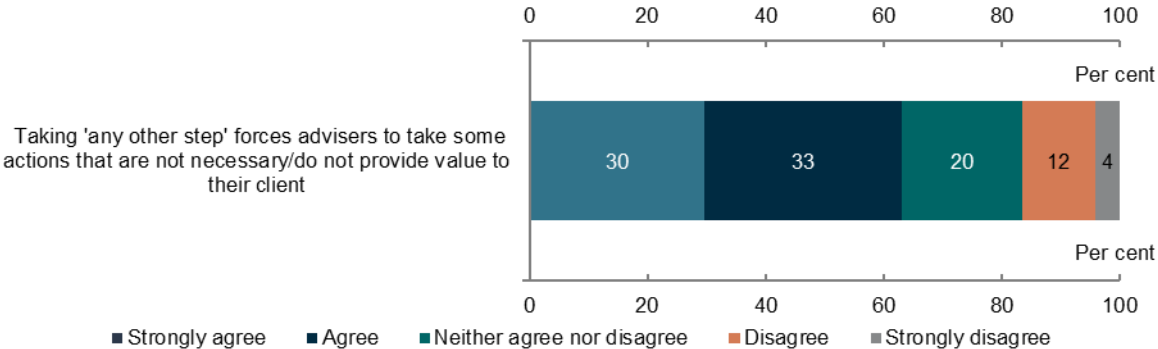
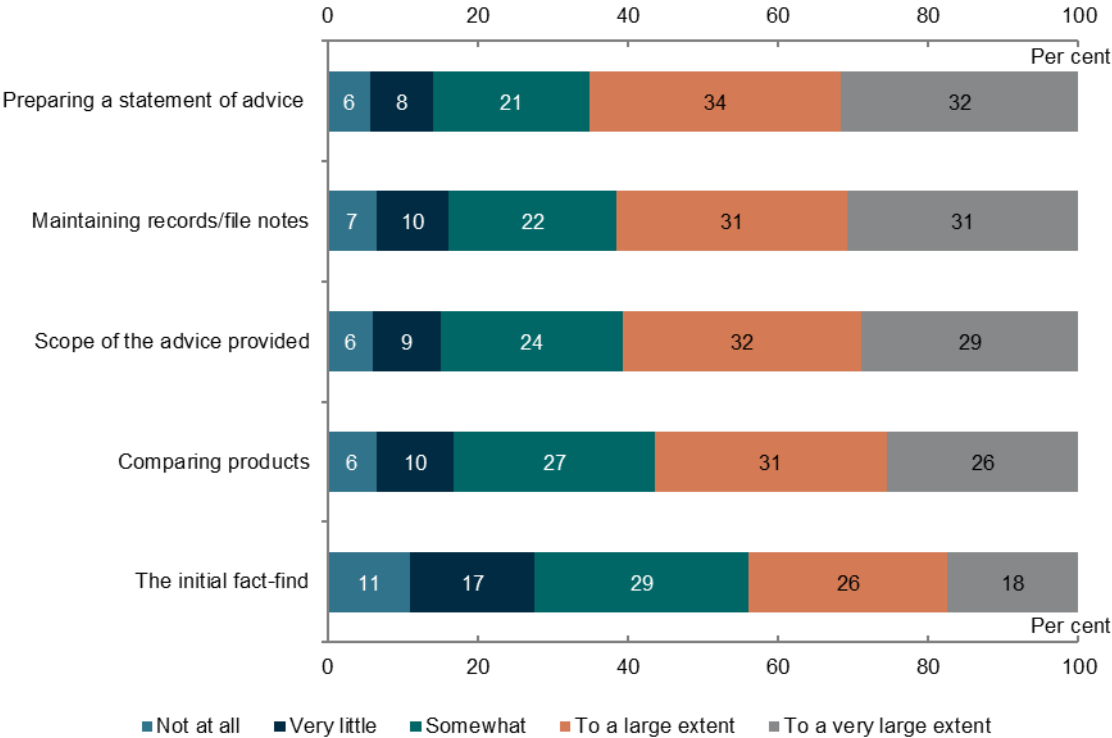


Chart 6.2: Impact of ‘any other step’ in the best interests duty safe harbour on other aspects of the advice process



6.1.6 ‘Merit’ regulation

In its November 2021 submission to the Senate Economics References Committee Inquiry into the Sterling Income Trust, ASIC said:

Conduct and disclosure regulation for financial products, including Australia’s own regulatory system, is not generally considered ‘merit’ regulation. Regulation has traditionally focused on the transparency of the sales process (through disclosure) and the conduct of the intermediaries involved in the sale. Unlike regulation for many non-financial products, conduct and disclosure regulation is typically not concerned

with the merit (i.e. 'safety' or quality) of a financial product and the services associated with it.¹¹⁶

I think the law should treat advice about financial products in the same way it treats services (sales and advice) associated with other products. It should in fact be concerned with merit.

And so, my next recommendation is that all providers of personal advice should have a duty to give good advice. While a duty to give good advice does not remove conflicts of interest and while, of itself it cannot compel a person to comply with the law, it is I think harder to justify poor advice when the focus of the law is squarely on the merits of that advice. The change from 'Be good. Do the right thing' to 'provide good advice' is, I think, one of substance.

6.2 Good advice duty

6.2.1 What do consumers want?

Consumers want and expect good financial advice. Consumers measure good advice by the merits of what is recommended and not by the process by which it was prepared. When they seek or obtain advice from a financial institution it seems very unlikely that they would expect the advice to be independent, unless it is presented as such (for example, when the institution makes the services of a financial adviser available).

In my view, the law should be clear and direct and say what it means: it should impose a duty on a person who provides personal advice to give good advice. An obligation to provide good advice would be a simpler and more direct approach to regulating advice. It will provide a plain statement of what is required by all personal advice providers and there is no reason why a product issuer (bank, insurer or superannuation fund trustee), digital adviser and financial adviser cannot all give good advice. What is good will turn on the circumstances – on what the client wants and needs, on the client's relevant circumstances and the circumstances in which the advice is given.

6.2.2 Why good?

I deliberately chose the term 'good advice' because it describes simply, clearly and directly what consumers want and what the law should require. In my view this would encourage better quality advice and provide consumers and advisers with a clear statement of what they can expect and what they are required to do.

Having said that, some people worry that it will lead to poorer quality advice and they say they do not know what good means. I do not think there is any reason for saying a duty to give good advice is a duty to give advice that may be of a lower standard than that required by the best interests duty as currently formulated in the Corporations Act. A duty to give good advice is not, and is not intended to be a duty to give 'okay' advice or 'good enough' advice. I think most people would agree that 'okay' and 'good enough' do not reach the level of 'good'. Nevertheless, I understand that knowing what is good in a particular case might be difficult and so I do accept there is a need for a definition of good advice.

¹¹⁶ ASIC (2021c), at paragraph 16.

6.2.3 A definition of 'good advice'

I recommend the following duty should be included in the Corporations Act. It should replace the existing best interests duty and the related obligations in Division 2 of Part 7.7A:

A person who provides personal advice to a retail client must provide the client with good advice.

Good advice means personal advice that is, at the time the advice is provided:

- a) fit for purpose having regard to:
 - i) if the advice is:
 - A. given in response to a request, question or inquiry from the client, the purpose of the client that the provider is aware of or should reasonably be aware of; or
 - B. volunteered by the provider, the reason the provider reasonably considers the advice might be of use or benefit to the client;
 - ii) the scope, content and nature of the advice; and
 - iii) the likely relevant circumstances of the client; and
- b) in all the circumstances, good.

The intention of a duty cast in this way is to focus attention directly on what the consumer needs and wants (good advice) rather than on what the provider of the advice does. And so the duty focuses squarely on the content of the advice. But this does not mean that a provider of advice will breach their duty if the intended outcome does not eventuate. The adviser would not be asked to guarantee an outcome. Instead, the law would require the provider of the advice to consider, at the time they provide the advice, whether the advice is sound, fit for purpose and good. That would be measured objectively.

6.2.4 Reasonably likely to benefit the client

In the Proposals Paper I had suggested a definition of good advice that was measured by whether the advice was reasonably likely to benefit the client. That formulation made it clear the quality of the advice was to be measured:

- at the time it was given and not with the benefit of hindsight; and
- by reference to a reasonableness test.

No one argued with these 2 propositions and neither has changed in the recommendation. But many people were concerned with the formulation 'reasonably likely to benefit the client'. They said it was too uncertain and was not always the right way to measure good financial product advice. This feedback was fair and I accept that the duty needs to be expressed more clearly and with more detail.

6.2.5 Fit for purpose

And so, at the suggestion of the Honourable Kenneth Hayne, I have looked at the formulations in the Sale of Goods Acts and the Australian Consumer Law. Their central proposition is that goods and

services must be ‘fit for purpose’.¹¹⁷ To paraphrase ASIC in its submission to the Senate Inquiry into the Sterling Income Trust quoted above: if the law says that personal advice about a financial product must be good advice, it will be directly ‘concerned with the merit (i.e. ‘safety’ or quality) of ... the services associated with a financial product’.¹¹⁸

The state and territory Sale of Goods Acts and the Australian Consumer Law contain statutory guarantees by the supplier and manufacturer of goods that the goods will be fit for purpose.

I recommended that, as is the case in the Australian Consumer Law, what is fit for purpose will be measured differently according to what the provider knows (or should reasonably know) about the client’s needs. And so, where the client asks for advice, the advice must be fit for the client’s purpose and the more particular or specific the request, the more the advice must be tailored for the client’s purpose. The client’s purpose is then the starting point for determining whether the advice is good advice.

The provider will need to ask what information is relevant to the advice they are giving and consider that information. If they do not already hold this information, or cannot access the information they (or their AFS licensee or related entities of the AFS licensee) hold about the client, they will need to ask the client for the information or they will not be able to give advice.

There will also be cases where the provider does not know the purpose of the consumer, chiefly where the advice is unsolicited. In these cases, the advice must still be fit for purpose – but in that case the relevant purpose will be determined by the provider. They will need to identify the relevance of the advice to the customer and decide in what way it is likely to benefit or otherwise assist the consumer. Having done that, the provider will then need to decide whether the recommendation or opinion will in fact meet the definition of good advice.

6.2.6 Scope, content and nature of the advice, and likely relevant circumstances of the client

What is fit for purpose will turn on all of the relevant circumstances. Advice is not provided in a vacuum and those circumstances are what should determine whether the advice is good advice. This is why I have included in the definition that the provider have regard to the ‘scope, content and nature of the advice’ and the ‘likely relevant circumstances of the client’. It not only tells the provider what to do, but it provides the measure of the quality of the advice.

The scope of the advice directs attention to the issue the advice addresses and the subject matter of the advice. The scope might be narrow or broad and either can be fit for purpose. What matters is that the scope of the advice addresses the intended purpose of the advice and the relevant circumstances of the client.

The content of the advice looks at the opinions or recommendations provided and its suitability for the client having regard to the purpose of the advice and the relevant circumstances of the client. The content of the advice will also, to a large degree, be determined by the scope of the advice. For example, advice on a narrow topic could be brief, while more would be expected for comprehensive advice.

¹¹⁷ For example, see section 19 of the *Sale of Goods Act 1923* (NSW) and section 54 of Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

¹¹⁸ ASIC (2021c), at paragraph 16.

The nature of the advice will focus on the circumstances in which the advice is provided. This means that what is required to satisfy the good advice duty will be influenced by, for example, whether the advice is:

- an unsolicited reminder or nudge via a banking app;
- provided on a telephone call between a superannuation fund and their member; or
- provided over a series of meetings between a financial adviser and their client.

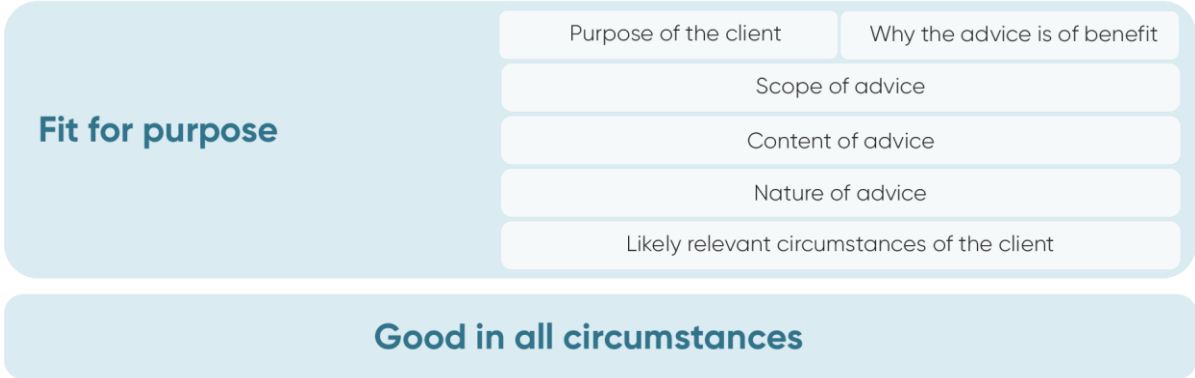
Finally, the requirement to have regard to the likely relevant circumstances of the client anchors the duty to the specific circumstances of the client, even if the advice is unsolicited. This means that advice providers cannot satisfy themselves that their advice is good unless they have taken into account the client’s objectives and needs and financial situation or their likely objectives and needs and financial situation, if they are relevant to the advice. In some cases, the advice provider may already have access to the relevant information, in others they will need ask for it from the client. This means that providers cannot turn a blind eye to the relevant circumstances of their clients whenever they provide them with personal advice.

6.2.7 But ‘good’ is still an important component of the duty

I have also considered the warning the High Court referred to in *ASIC v WSAL* that a defined term cannot be interpreted by reference to the term itself. The point was made so clearly by Justice Beach – that there is no ‘super-added’ advice component required in the definition of financial product advice. In formulating a good advice duty, I think it is important that there is in fact incorporated into the definition a ‘super-added’ ‘good’ component.

While I accept that there will be cases and perhaps many cases where there will be honest and genuine disagreement about whether a particular piece of advice is good or not (and so I have included the fit for purpose limbs in the definition which will provide the touchstone for what is good advice when the point is hard), I also expect that there will many cases in which it will not be difficult to determine whether the advice was good advice or not. There will be many cases where it will be plainly good advice to recommend, for example, that a person insure their car (or not) or make an additional contribution to superannuation (or not). And I do not want a definition to get in the way of those plain and clear cases. And for that reason I have included the word ‘good’ in the recommended definition.

Diagram 6.1: Overview of the good advice duty



6.3 Who the good advice duty applies to

6.3.1 The current regulatory regime

Unlike the other obligations applying to financial services providers in the Corporations Act, the best interests duty and related obligations apply to the individuals providing advice (where there is an individual) with the consequence that the obligation applies just as much to an employee of a financial institution as to a sole practitioner or a principal in an advice practice.

It is highly unusual to impose statutory duties on an employee. This reflects the fact that employees are required to act on the direction of their employer. It is unrealistic to think that an employee of a financial institution will or can do otherwise and it is unfair, I think, to ask an employee to act in the best interests of the client and to weigh the interests of their client with the interests of their employer and give priority to the interests of the client (as the duty of priority does).

It is of course possible for a financial institution to employ a financial adviser and direct them to provide independent and unbiased advice to their clients, but with some exceptions that is not a model that has worked well for consumers or financial institutions and it is unlikely to be repeated, even with the recommendations in this Report. This is because of the ban on conflicted remuneration, design and distribution obligations, the duty to provide financial services efficiently, honestly and fairly and the good advice duty I am recommending.

While my recommendation is that the best interests duty and related obligations in the Corporations Act be replaced by a good advice duty, I would still worry about imposing that duty directly on employees who are required to act on the direction of an employer (the licensee). In that case, it is appropriate that the person who is able to make decisions about the advice that is provided to customers is the person with the legal obligation to ensure the advice is good advice. Where the provider of advice is a financial adviser with professional and fiduciary obligations which override obligations to an employer, then the duty to provide good advice should lie with them. Again, in that case the duty should sit with the person who is in a position to decide what advice is given to the consumer. In all other cases, it should sit with the AFS licensee.

6.3.2 The recommendation

Accordingly, my recommendation is that the personal advice given to a retail client should be good advice. The duty to give good advice should apply to the AFS licensee unless the advice provider is a relevant provider. If the advice is provided by an employee of the AFS licensee who is not a relevant provider, the licensee will be responsible for ensuring the advice complies with this duty by ensuring that their employees give good advice to the customer or client. The AFS licensee must take responsibility for the advice and they must take the steps necessary to ensure the advice complies with the law.

Recommendation 4 – Good Advice Duty

A person who provides personal advice to a retail client must provide the client with good advice. Good advice means personal advice that is, at the time it is provided:

- c) fit for purpose having regard to:
 - i) if the advice is:
 - 1) given in response to a request, question or inquiry from the client, the purpose of the client that the provider is aware of or should reasonably be aware of; or
 - 2) volunteered by the provider, the reason the provider reasonably considers the advice might be of use or benefit to the client;
 - ii) the scope, content and nature of the advice; and
 - iii) the likely relevant circumstances of the client; and
- d) in all the circumstances, good.

If the advice is provided by a financial adviser (relevant provider), this duty applies to the financial adviser. In all other cases, this duty applies to the AFS licensee.

The objective of this recommendation is to re-direct the focus of regulation on the content of the advice, rather than the process followed by the advice provider.

6.3.3 Concerns that have been expressed

Risks and responsibility

I accept that a duty to give good advice will not remove all ambiguity from the law. I doubt that is possible. But in very large part, I also doubt that it will be hard for a provider of personal advice, acting in good faith and reasonably, to determine whether any proposed advice is fit for purpose. What is required to form that view will turn on the difficulty and complexity of the advice. That is deliberate.

I also accept that this merit-based duty would place a different kind of responsibility on providers of advice to satisfy themselves about the content of the advice. All advice providers will need to turn their minds to what investigations and inquiries they need to make before they can form the view that the personal advice they are minded to give will be good advice – that it is good and fit for the customer’s purpose, taking into account the customer’s likely relevant circumstances. That will turn on what the customer has asked or why the advice has been proffered.

Expanding personal advice based on whether the provider holds information

Some stakeholders, especially large institutions, have expressed concern about the law requiring them to give personal advice when they hold information about a customer, or when their related body corporate does. They have told us that they will not always know whether they hold information – they may even not know that a customer is a customer of another company within their corporate group – and they may not always be able to access that information at the time they provide advice. They point to privacy laws which prevent sharing of some information between related bodies corporate and system limitations. I do note that most privacy policies authorise the sharing of information between group companies and I also note that customer information is often used for the

purposes of advertising campaigns. Nevertheless, I accept that these will sometimes be genuine concerns. They are readily addressed.

It is important to keep in mind that a person will provide personal advice mainly (but not always) when they are providing advice to an individual (rather than to a group). In many cases, that will be in person, over the telephone or in live online interactions. In all of these cases, the customer will be able to explain what they are looking for (their objective) or what they need (their need). When they do, the provider will have information about the client's objectives or needs and any financial product advice they give will be personal advice. This is the case today. If it is relevant and if the provider does not already hold this information, or is not able to find or access the information it already holds, the provider will be able to or be required to ask the customer for information about their financial situation and circumstances.

In other cases, the personal advice will be initiated by the provider, noting that the Corporations Act prohibits the unsolicited hawking of financial products.¹¹⁹ Personalised letters, emails and 'nudges' provided via apps or in customer portals are examples of where advice might be lawfully initiated by the provider. Again, in these cases the provider will know that the recipient is a customer. It is nevertheless possible in these cases that the provider will not know or not be willing or able to access relevant information they hold about the customer. But the recommendations do not require the provider to give advice and they do not require the provider to use the information they have about their customer.

What the provider will need to do whenever they propose to proffer a personal recommendation to a customer is decide what information about the customer is likely to be relevant to the advice. If they hold that information and they can access it, I would expect them to use it without making further inquiries of the customer. If they hold relevant information or they suspect they hold relevant information, but they cannot access it, they will have 3 options:

- they might tailor the recommendation so it will be good advice irrespective of the customer's circumstances – the less information a provider has or is able to access the more generic the advice is likely to be (it might even look a lot like general advice, but the personal advice obligations will apply to it and so it must be good advice);
- they might ask the customer to provide information – in that case, it would be appropriate for the legislation to authorise the provider to rely on the information provided by the customer (assuming it was in fact reasonable to rely on the information); or
- they can decide not to make the recommendation or express an opinion, and can provide information instead.

In my view, any of these options will better assist consumers than unsuitable general advice.

6.3.4 Benefits and risks to consumers

These obligations are overlaid on strong consumer protection laws

Replacing the Corporations Act best interests duty with a 'good advice' duty would not mean the efforts of the last 20 years have been futile. To the contrary, many of the changes introduced by FSR,

¹¹⁹ Corporations Act, s 992A.

FOFA and the Royal Commission legislation provide a firm foundation of consumer protection which permits less prescription in the regulation of personal advice now.

The ban on conflicted remuneration, more diligent licensees and a more active regulator have helped, especially in stopping the more egregious advice practices. Following the implementation of the Royal Commission recommendations on anti-hawking and deferred sales of add-on insurance and the commencement of the design and distribution obligations, it has become more difficult to distribute financial products to consumers for whom they are not suited (or even for whom they are suited). Annual ongoing fee renewals and more vigilant superannuation fund trustees have reduced the risk of consumers paying fees for services they do not receive. The Royal Commission has also contributed to closer self-examination by many participants and a greater readiness to compensate customers when poor advice is identified. Strengthened breach reporting obligations make it more likely that those shortcomings will in fact be identified. These are all significant and important changes which are relevant in considering the likely effect of removing the Corporations Act best interests duty and advice disclosure obligations.

And finally, an obligation to give personal advice that is 'good advice' is itself a strong obligation which can provide critical protection for consumers. It will be a breach of the law to give poor advice or harmful advice. It will also be a breach of the law to give 'okay' or 'good enough' advice.

In what way will a duty to provide good advice help?

The duty to give good advice would apply whether the advice is provided by an individual, an algorithm or a digital advice service. It would also apply whether the advice is provided by an employee of a bank, insurer or superannuation fund or a financial adviser.

In my view, a duty to give good advice should make it easier for banks, insurers, superannuation fund trustees, and other product issuers, to give simple advice to their customers. This is because there is no prescribed process. The simpler the advice, the simpler the process. It is also because in many cases advice will be able to be provided by a staff member who is not a financial adviser. Again, where advice is simple and follows guidelines provided by the employer, the professional standards that apply to a financial adviser are unnecessary and would only act as an impediment to the accessibility of personal advice. Having said that, the AFS licensee will continue to have an obligation to ensure its staff are appropriately trained, competent and supervised.

Similarly, the good advice duty will make it easier for financial advisers to exercise their expertise and professional judgement when providing advice to their clients. They will no longer feel obliged to follow the safe harbour steps regardless of the nature, scope or content of the advice they are providing. They will be able to follow the process they consider will most effectively and efficiently allow them to comply with their obligation to provide good advice to their clients. This flexibility will also ensure that the good advice duty does not inhibit the provision of limited advice in the same manner as the current best interests duty, as relevant providers will be able to adjust their processes to better suit the advice being provided. However, at this point it is important to note that advisers have told us the Code of Ethics, especially Standard 6, is also an impediment to the provision of limited advice for financial advisers. While the contents of the Code of Ethics are outside the scope of this Review, I do urge the Government to consider this issue as part of its review of the Code of Ethics.

A duty to give good advice will also make it easier for AFS licensees and their representatives to provide digital advice to their customers and for digital advice providers to give personal advice to their customers. Again, the nature of the advice will dictate the process. For all providers of personal advice the duty provides a much clearer articulation of what the outcome of their advice should be.

Consumer benefit

In my view, there is likely to be a great deal of personal advice that providers can have a high degree of confidence will be ‘good advice’ without needing to undertake all of the steps, or perhaps any of the steps, that are in effect now required to comply with the Corporations Act best interests duty. And so, I have recommended the good advice duty replace the Corporations Act best interests duty and related obligations. In doing so it is with:

- the intention that providers will be willing and able to provide simple, sound and helpful – ‘good’ – personal advice to their customers; and
- the expectation that there will still be types of advice which AFS licensees will decide can only be given by a financial adviser in order for them to be confident the good advice duty will be met, even though a specific fee is not paid for that advice.

Enforcement

Irrespective of what the law says, people will from time to time breach the law. They might do so inadvertently, negligently or intentionally. A duty that focuses on the content of advice would in turn require ASIC, AFCA and the courts to look at the content of the advice, rather than the conduct of the provider, and ask whether the provider could reasonably have formed the opinion, at the time the advice was given, that the advice was good advice.

Indeed, despite the express terms of the best interests duty, this appears to be how, as a practical matter, ASIC considers today whether the best interests duty has been satisfied. In RG 175, ASIC says:

When assessing whether an advice provider has complied with the best interests duty, we will consider whether a reasonable advice provider would believe that the client is likely to be in a better position if the client follows the advice.¹²⁰

It is also hard to avoid the conclusion that, despite the terms of the best interests duty and the judicial statements about how the duty applies, the courts also start with the content or substance of the advice. In the dozen or so cases that have reached the courts (mainly for the determination of penalties after the defendant has agreed they have breached their statutory obligation), the advice is self-evidently poor and in each case the judges have no difficulty in finding that either or both of the best interests duty and the duty of priority have been breached. However, in the main, these findings are bare assertions. They do not contain an explanation or analysis of what was wrong with the adviser’s conduct, and so it appears the legislation has been turned on its head with poor advice providing the evidence of conduct that breaches the law.

While I do not think this approach is consistent with the existing formulation of the law (as explained in *ASIC v WSAL* by Justice O’Byrne and quoted above), it does strongly suggest that a duty which is directed to the substance or content of the advice is easier to enforce than a duty which is directed to ‘the actions taken by the provider’.

120 ASIC (2021d), Regulatory Guide 175: *Licensing: Financial product advisers – Conduct and disclosure*, paragraph 255.

6.4 Best interests duty for financial advisers

6.4.1 A fiduciary duty for financial advisers

Commissioner Hayne said that a person who acts for another person should have a duty to act in the interests of that person. This is consistent with the general law and I agree. A financial adviser, financial planner and stockbroker (all relevant providers under the Corporations Act) are professionals with skills and expertise. Many belong to professional associations and are bound by the Code of Ethics and sometimes other industry codes. But all of them have ethical obligations to their clients. They are entitled to charge a fee for their professional advice.

Consistent with this, a financial adviser who provides personal advice to a client should be required by the law to act in the best interests of the client in providing advice.

This duty should replace the existing Corporations Act best interests duties, which includes the best interests duty with the safe harbour steps and the duty of priority.

6.4.2 The duty would not apply to providers that are not financial advisers

This does not mean that everyone who provides personal advice should have an obligation to provide advice that is in the best interests of the client. While subject to some limited exceptions this is what is required by the Corporations Act now (even if only nominally), it is unworkable and unnecessary and it also appears to have been unintended.

The Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 says the Bill sets up a framework which includes:

...a best interests obligation for financial advisers requiring them to act in the best interests of their clients and to place the interests of their clients ahead of their own when providing personal advice to retail clients (best interests obligation).¹²¹

It is clear that the PJC in the Ripoll Inquiry and the drafters were thinking about financial advisers and not every person who provides financial product advice. Nevertheless, that is how the law has been applied.

Critics of my proposals have said I am ‘walking away from Hayne’ by recommending that a best interests duty apply only to financial advisers who are paid by the client to provide advice. That is not correct. In the Final Report, Commissioner Hayne said his 6 norms of conduct (which I have quoted in Chapter 1) are supported by some general rules. Relevantly the Rules say:

...intermediaries should act only on behalf of, and in the interests of, the party who pays the intermediary.¹²²

121 Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, page 3.

122 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), Volume 1, page 11.

Commissioner Hayne then goes on to say:

The point is much more important than a dry point of legal analysis. For whom the intermediary acts determines what duties the intermediary owes and to whom they owe them.

The general rule that should apply throughout the financial services industry is that an intermediary who is paid to act as intermediary:

- *acts for the person who pays the intermediary;*
- *owes the person who pays a duty to act only in the interests of that person; and*
- *ordinarily owes the person who pays a duty to act in the best interests of that person.*¹²³

And so, he applied his rule and went on to recommend that:

- mortgage brokers be paid by borrowers;
- lenders not be permitted to pay commissions to mortgage brokers; and
- mortgage brokers have an obligation to act in the interests of borrowers.

Commissioner Hayne noted that mortgage brokers promoted their skills to borrowers and offered to help their clients to get ‘the best outcome’. It was then he said not a surprise that borrowers look to their mortgage brokers for advice and help in getting the best loan.¹²⁴

*But the first, and in my view essential, step to take is to bring the law into line with what consumers expect. They expect brokers to act in their best interests. Brokers should be obliged to do so.*¹²⁵

This expectation is not the same when borrowers go directly to their bank or other lender. They may well ask for advice from the loans officer, but they do not expect they will get independent advice and they do not expect the loans officer to identify the best loan available in the market. The loans officer is paid by the lender and it is clear the loans officer acts for the lender. Borrowers do not expect the loans officer to act in their best interests and consistent with this, Commissioner Hayne did not recommend that a duty to act in the interests of borrowers also apply to loans officers employed by banks and other lenders. This same logic should apply to financial product advice. Under the current regulatory framework it does not.

Financial advisers have skills and expertise and consumers look to them for independent advice. If they seek investment advice from a financial adviser and they pay a fee for that advice, they expect that they will get the ‘best outcome’ – being the best investment products or best life insurance products for their objectives, financial situation and needs. (This is not the same as expecting the best performance measured in hindsight). And so, to paraphrase Commissioner Hayne, the client of a

123 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), Volume 1, page 21.

124 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), Volume 1, page 62.

125 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), Volume 1, page 72.

financial adviser expects and is entitled to expect that their adviser will act in their interests when they provide their advice. This is consistent with the general law which imposes fiduciary obligations on a person who undertakes to act in the interests of another person in circumstances where that other person could be exposed to harm or detriment if the fiduciary acts for another purpose.¹²⁶

Consumers do not expect an employee of a financial institution to whom they do not pay a fee (other than one who holds themselves out as a financial adviser) to provide them with independent advice. And, like the loans officer who is employed by the lender, employees of a financial institution should not have an obligation to act in the best interests of the client when providing financial product advice. This is not only because of the expectations of their customers, but also because it is not in fact possible to have 2 masters – the customer and the financial institution that is paying them. This does not mean they can provide poor advice. Instead, and as discussed above, they must give the advice they are directed or authorised to give by their AFS licensee and the licensee has a duty to ensure that the advice provided to the client is good advice.

Diagram 6.2: Obligations that apply when personal advice is provided by an AFS licensee compared to a financial adviser



6.5 What is required by the new best interests duty?

6.5.1 The best interests duty is a new duty

In *ASIC v WSAL Justice O’Bryan* said:

In my view, textual and contextual considerations compel a conclusion that s 961B is not concerned with the question whether the substance of the advice is in the best interests of the client and, if it was necessary to refer to it, the relevant extrinsic materials confirm that conclusion. Rather, the section is concerned with the actions taken by the provider in the formulation of the advice and the objective purpose of the provider in taking those actions and giving the advice.¹²⁷

126 Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, pages 96–97.
 127 *Australian Securities and Investments Commission* [2019] FCAFC 187, paragraph 405.

In the Proposals Paper, I said that a financial adviser should have a true fiduciary duty to act in the best interests of their client. In my view, that duty is created now by the Code of Ethics which requires financial advisers to act in the best interests of their client (albeit the relevant standards in the Code of Ethics could be better expressed). That duty is not a process-based duty like the best interests duty in the Corporations Act.

Many advisers supported the proposal to remove the overlap between the Code of Ethics and the Corporations Act. However, some stakeholders, particularly consumer associations said that such a fundamental duty should be imposed directly by the Corporations Act.

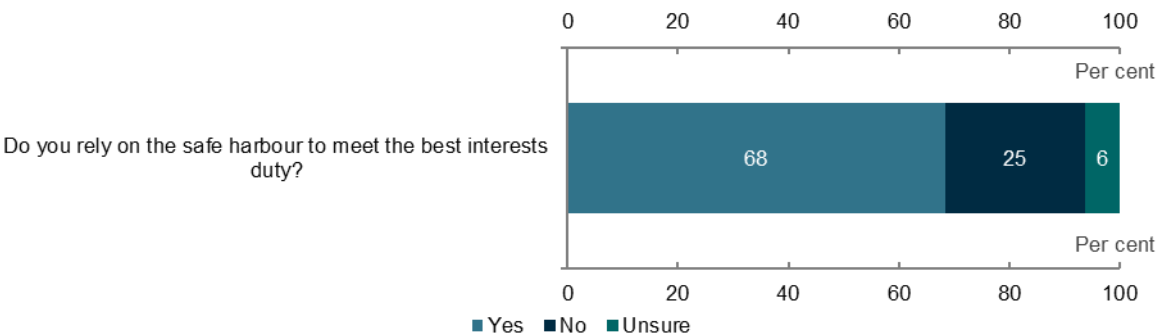
While the Code of Ethics does form part of the law, it can be changed by Ministerial determination, and it is harder to bring proceedings for breaches of the Code of Ethics than breach of the Corporations Act. I am also concerned that some of the provisions of the Code of Ethics are poorly drafted. I am therefore recommending the Corporations Act continue to include a duty for a financial adviser (a relevant provider under the Corporations Act) to act in the best interests of their client when they are providing personal advice. It will be necessary to replace the existing formulation of the best interests duty so that it is able to be interpreted in light of the new regulatory regime and not the existing one.

6.5.2 Safe harbour

Commissioner Hayne said that the safe harbour should be repealed ‘unless there is a clear justification for retaining’ that provision. He said the best interests duty safe harbour steps encouraged a ‘tick a box’ approach to the provision of financial advice.¹²⁸ There is no doubt this is true. When ASIC undertakes file reviews, they do in fact look at whether the safe harbour steps have been followed and where they have not, they ask whether the advice is still in the best interests of the client by considering whether the safe harbour steps have been followed in substance. It would be a brave adviser that does not follow the safe harbour steps. And the feedback we received from advisers was that most are not so brave. That might be appropriate if it ensured that consumers got the advice they wanted or even if it ensured that consumers did not get poor advice. But they do not. And so I am recommending that, together with the existing best interests duty the safe harbour be repealed. They should both be replaced with a new duty for a financial adviser to act in the best interests of the client when the adviser is providing personal advice.

128 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), Volume 1, page 177.

Chart 6.3: Percentage of financial advisers who rely on the safe harbour steps to meet the best interest duty



Values may not add up to 100 per cent due to rounding

6.5.3 Duty of priority

In Chapter 2, I have discussed the difficulties and shortcomings of the duty of priority.

Some people have suggested that even if the best interests duty is removed (as I have recommended for anyone who is not a financial adviser), the duty of priority should be retained. Alternatively, others have suggested a duty to put the client’s interests first.

I do not agree. The existing duty of priority proceeds on the basis that the adviser has a conflict between their duty to the client and their personal interest or their duty to another person. A duty to put the client’s interests first is similar insofar as it implies, at least, that the adviser has a personal interest in the advice. In that case, the duty would require, depending on the formulation, the adviser to give priority to the interests of the client or to put the client’s interests first. Both formulations are flawed.

In the first instance, a true fiduciary duty – to act in the best interests of another person – does not allow a fiduciary to have a conflicting interest without the consent of their beneficiary. And so either formulation would be inconsistent with a best interests duty. The reason for that is the precise reason why a duty of priority (or to put a client’s interests first) would be (and is) ineffective. With the best will in the world, a person with a conflict of interest cannot be trusted to form an objective view about whether they are in fact giving priority to their client’s interests or putting their interests first. As Commissioner Hayne said: ‘interests trumps duty’¹²⁹ and so there is no reason to think that telling an advice provider to put their client’s interests first when they have a competing interest (to their employer for example) would be effective.

I am recommending that a financial adviser have a true fiduciary duty and so the adviser will not be able to have a conflict of interest without the consent of their client and so a duty of priority will have no work to do. There is no clear justification for retaining the duty of priority and I recommend that it be removed, together with the rest of the best interests obligations in Division 2 of Part 7.7A of the Corporations Act. The remaining requirements – the duty to warn and the duty to provide appropriate

¹²⁹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), Volume 1, page 178.

advice have no additional work to do over and above the duty to give good advice and to act in the best interests of the client.

Recommendation 5 – Statutory Best Interests Duty

The existing best interests duty and related obligations (the duty to give appropriate advice assuming the best interests duty is satisfied, the duty to warn the client if the advice is based on inadequate or insufficient information and the duty of priority if there is a conflict) should be replaced with a new statutory best interests duty.

The new best interests duty would be a true fiduciary duty that reflects the general law and will not include a safe harbour.

This duty will apply only to financial advisers (relevant providers).

The objective of this recommendation is to ensure that financial advisers who act on behalf of their clients are motivated solely by the interests of their clients when providing advice.

6.5.4 A fiduciary duty is a stringent duty

This leads me to the question of what is required by a duty to act in the best interests of the client. Well, first it means the financial adviser cannot have a conflicting interest or duty and the adviser cannot make an unauthorised profit. An exception applies where the financial adviser has the informed consent of the client. For example, a financial adviser who intends to accept a commission in connection with the sale of a life insurance product must tell their client that they will receive the commission and ask for the client's consent before doing so.

The duty means that the adviser's sole purpose in providing advice is to provide advice that will further the interests of the client. It is a stringent duty.

In 2016, ASIC entered into an enforceable undertaking with HSBC Bank Australia. In the media release about the enforceable undertaking then Deputy Chairman Peter Kell said:

One of the fundamental obligations of financial advisers is to ensure that financial products are appropriate for the consumers' needs and circumstances.¹³⁰

When a financial adviser (or anyone else) recommends a financial product to their client, the good advice duty will require that. When that recommendation is provided by a financial adviser with a duty to provide advice in the best interests of the client, the adviser will be required to recommend the product the adviser honestly thinks is the best product available to meet the client's needs and objectives at the time the advice is provided.

This does not require the financial adviser to recommend the product with the best performance or the lowest fees and it does not mean that either can be measured in hindsight. It does require advisers to use their skills and expertise to form an honest view of what product, if any, is likely to serve the objectives and needs of their client best. This is a high standard which may not be able to be

130 ASIC (2016), 16-145MR: ASIC accepts enforceable undertaking from HSBC Bank Australia following concerns about deficient advice on retail structured products.

satisfied by a financial adviser who is not able to provide advice on or recommend a wide range of financial products.

6.5.5 Professional standards

As described in Chapter 2, a relevant provider is required by the Corporations Act to comply with the professional standards, which comprise 2 separate components – the education and training standards and the Code of Ethics. The Terms of Reference for this Review do not include the professional standards.

Nevertheless, it is necessary to say something about them. While the education and training standards are currently being reviewed separately from this Review, we have been told by stakeholders that, while they need adjustment to accommodate the variety of professional services that fall under the definition of financial product advice, education, training and ethical standards remain important. In my view, financial advisers must, like other professionals, be held to high education, training and ethical standards. This is consistent with the professionalisation of the industry. My recommendations assume that this will not be diluted by the separate review.

As to the Code of Ethics – it imposes a duty for a financial adviser to act in the best interests of their client, among other obligations. In the Proposals Paper I had proposed that the best interests duty in the Code of Ethics apply in place of the best interests duty in the Corporations Act. For the reasons discussed above, I am recommending that the duty be included in the Corporations Act. There is no reason why a Code of Ethics could not supplement that duty with more specific obligations. Plainly it should not be inconsistent. I suggest that this is considered when the Code of Ethics is subsequently reviewed. I also suggest consideration be given to whether it should continue to be incorporated into the Corporations Act.

Chapter 7 – Superannuation

Chapter Summary

- Superannuation is the second-largest asset for most Australians. Financial advice about their superannuation can contribute to a higher standard of living in retirement.
- Superannuation funds provide a range of financial advice to their members now and should be encouraged to continue to do so.
- Superannuation fund trustees should have a firm legislative foundation upon which to exercise their discretion about the advice they provide to their members and how the cost of that advice should be met.
- Superannuation fund trustees should be able to take into account a member's personal circumstances, including their family situation and social security entitlements, if that is relevant to the provision of the advice.
- Superannuation fund trustees should have an express power in the law to pay an advice fee from a member's superannuation account on the direction of the member.

Objectives

The objectives of the recommendations in this Chapter are to:

- give superannuation fund trustees greater confidence about the scope of advice they can give to their members;
- encourage superannuation fund trustees to decide how to allocate the cost of providing advice between members based on the circumstances of their fund and their members; and
- provide superannuation fund trustees with more certainty about paying advice fees agreed between a member and their financial adviser from the member's superannuation account and ensure that adviser fees are not paid in breach of the SIS Act and are not taxable benefits for members.

7.1 The importance of superannuation and advice

7.1.1 The current state

Around 16 million Australians have superannuation.¹³¹ Together we hold (as at 30 June 2022) close to \$3.3 trillion in superannuation assets (or around 144 per cent of Gross Domestic Product (GDP)).¹³² The 2021 Intergenerational Report (IGR), projected assets under management in superannuation to grow to around 244 per cent of GDP by 30 June 2061.¹³³ For individuals, superannuation is our second-largest asset (18 per cent of total household assets) after our homes.¹³⁴

Early in the Review I was asked whether our superannuation system made it more important that people have financial advice. My somewhat hasty response was ‘no’, because of the defaults in the system – the superannuation guarantee means most employees have superannuation and the MySuper rules set high minimum standards for default superannuation. On reflection and with the benefit of the Review, my opinion has changed.

The Retirement Income Review concluded that Australians approaching retirement would benefit from financial advice.¹³⁵ IGR projections suggest the median superannuation balance at retirement will increase from around \$125,000 in 2020–21 to around \$460,000 in 2060–61 (as measured in 2020–21 dollars) and with it one might think the importance of financial advice.¹³⁶ Contribution and tax rules are complex; superannuation fund, investment and insurance choices matter; and, decisions about retirement products are difficult and important. Decisions about all of these matters have long-term implications for our standard of living in retirement, our entitlement to social security and even decisions about aged care.

7.1.2 The recommendations apply to superannuation funds too

The recommendations in this Report apply to superannuation funds just as much as they do to other financial institutions. And so they will mean that more financial product advice given by superannuation funds to their members will be personal advice. In turn they will require the personal advice superannuation funds give to their members to be good advice. If the advice is given by a financial adviser, the adviser will have to comply with the good advice duty and the best interests duty. This will improve the quality of advice.

Again, as for other financial institutions, the recommendations will also make it easier for superannuation funds to give personal advice to their members. There will be no safe harbour steps to follow and they will not have to give the member a statement of advice. That will improve the accessibility and affordability of financial advice.

131 The references in this Chapter to superannuation funds refer to superannuation funds that are regulated superannuation funds under the SIS Act and which are not self-managed superannuation funds. References to trustees in this chapter are to the trustees of these superannuation funds.

132 APRA (2022a), *APRA Releases Superannuation Statistics for June 2022*.

133 Commonwealth of Australia (2021a), *2021 Intergenerational Report*, page 113.

134 Australian Bureau of Statistics (2022), *Household Income and Wealth*, Australia, table 9.2.

135 Australian Government the Treasury (2020), *Retirement Income Review Final Report*, page 449.

136 Commonwealth of Australia (2021a), page 114.

7.1.3 Superannuation funds are different to other financial institutions

Having spent the last few paragraphs explaining the ways in which the recommendations apply to superannuation funds in the same way as they do to other financial institutions, it is also true that there are some ways in which superannuation funds are different and require different treatment.

They are discussed in this Chapter. The recommendations I have made that are specific to superannuation funds do not fundamentally change the advice superannuation funds can provide nor the way that advice is paid for today. Rather, they are intended to:

- make it clearer what advice can be provided by superannuation funds;
- make it simpler for superannuation funds to provide good advice to their members; and
- provide superannuation fund trustees with discretion in how they provide advice and how that advice is paid for.

Before coming to these matters, it is important to say that the recommendations do not require a superannuation fund (or anyone else) to provide personal advice. There are risks for all providers of advice and where the provider is the trustee of a superannuation fund the trustee needs to consider whether those risks will ultimately be assumed by members. And so, while the recommendations are intended to encourage providers to provide quality financial advice and while superannuation fund trustees have a duty to promote the financial interests of their members, these recommendations do not require trustees to personally provide personal advice to their members and they do not dictate how they might choose to do so. They might, for example, appoint another provider – a related entity or a third party – to provide personal advice to their members.

7.2 The current regulatory framework

7.2.1 Superannuation is a financial product

An interest in a superannuation fund is a financial product (a ‘superannuation product’) under the Corporations Act and, since 2021 operating a superannuation fund has been a financial service. Trustees of superannuation funds are therefore AFS licensees authorised to deal in superannuation products and operate superannuation funds. In many cases they are also authorised to provide financial product advice, sometimes that is limited to general advice and sometimes it extends to personal advice. (There is no special authorisation for intra-fund advice.) This means that when acting as the trustee of a superannuation fund, issuing interests in the fund and providing advice about the fund, the trustee must comply with the obligations of an AFS licensee. They must provide their authorised financial services efficiently, honestly and fairly. If they provide personal advice to a member, they must give advice that is in the best interests of the member and give priority to the member’s interests. They must give the member a statement of advice. If the advice is given by an individual, the individual must be a relevant provider. These obligations apply just as much to intra-fund advice as to other personal advice.

7.2.2 Superannuation law – the SIS Act

Trustees of superannuation funds are also RSE licensees with obligations under the SIS Act. The SIS Act includes the ‘sole purpose test’. It says that a superannuation fund trustee must ensure a fund is maintained solely for one or more of the prescribed purposes: providing retirement benefits to members, disability benefits to members and benefits to the dependants of deceased members (you

might observe that there is in fact more than one purpose). The sole purpose test sets out the boundaries within which the superannuation fund trustee must conduct the business of the fund. It determines how the trustee invests the assets of the fund and the expenses which can properly be deducted from the assets of the fund.

There are only 3 ways in which the trustee of a superannuation fund can pay money from the fund:

- to pay benefits to members (which it may do by rolling over their benefit to another fund or cashing their benefit as a lump sum or pension when the member satisfies a condition of release);
- to pay expenses it incurs in connection with the fund; and
- to take its own fees from the fund, if permitted by the governing rules.

Trustees of 'for profit' or 'retail' superannuation funds typically charge a fee for their services. The fee is deducted from members' accounts and paid to the superannuation fund trustee's personal account. The superannuation fund trustee may (although it is not obliged to) then use its personal assets to pay some or all of the expenses incurred in connection with operating the fund. Trustees of 'profit to members' or 'industry' superannuation funds will typically not charge a fee for their services. The superannuation fund trustee will also deduct 'fees' from members' accounts but it will then allocate those amounts to one or more reserve accounts in the fund from which it pays the expenses incurred in connection with the operation of the fund. The distinction is important because a trustee is free to apply its trustee fees as it thinks fit. They are the superannuation fund trustee's personal assets and therefore they are not subject to the sole purpose test or any other provisions of the SIS Act. Assets in a fund reserve are fund assets and they may only be applied in accordance with the sole purpose test and the trustee's other obligations under the SIS Act.

A superannuation fund trustee's obligations under the SIS Act include its duties to exercise its powers in the best financial interests of members, to promote the financial interests of members and to give priority to the interests of members in the event of a conflict. A trustee cannot have any competing fiduciary obligation, except insofar as the trustee gives personal advice to a member. This is the only obligation which constrains what a trustee may do in its personal capacity. If the trustee does give advice to members, the trustee has a duty to act in the best financial interests of members and to give their interests priority and a duty to act in the best interests of the individual member and to give their interests priority. The law does not say how the 2 duties of priority are to be reconciled and one hopes the interests of the members and the interest of the individual member are on all fours. The same issue does not arise if a superannuation fund engages another person, which might be a related entity, to provide financial advice to its members.

All of this is relevant to whether, how and on what topics a trustee of a superannuation fund gives financial advice to its members.

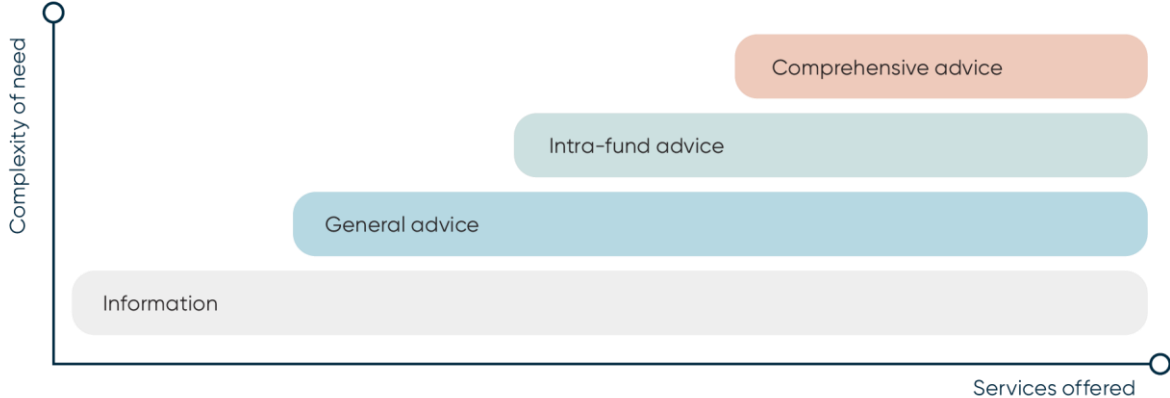
7.2.3 Advice provided by superannuation funds

Information and advice

Superannuation funds do provide information and financial product advice now to their members about their superannuation and research tells us that members trust the advice their superannuation funds provide to them and are likely to seek more advice from their superannuation funds in the

future.¹³⁷ That advice is general advice and limited (or intra-fund) personal advice. Sometimes they make comprehensive advice available to their members.

Diagram 7.1: Layering of advice provided by superannuation funds



Some superannuation funds particularly highlighted the importance of general advice, noting it was a type of advice which was accessed by the largest proportion of their fund members. For example, one superannuation fund told us that 85 per cent of their advice team’s interactions with members take place through their general advice service. Where those interactions are one to one, there is a risk that the general advice is in reality personal advice under the existing law, noting that there is an objective limb to the personal advice test which says that, if a reasonable person might think the provider had taken into account one or more of their objectives, financial situation or needs in providing advice, the advice is personal advice.

Many superannuation funds make calculators and other interactive tools available on their websites. These allow members to see what happens to their superannuation balance if they make additional contributions or to forecast how long their superannuation will last if they draw down a pension. In many cases, calculators provide information and not advice. If they provide financial product advice it is likely to be personal advice because they use information about the member’s financial situation and sometimes also their objectives.

Acknowledging as much, ASIC has issued limited relief from some of the personal advice obligations for generic calculators and retirement income forecasts. However, the relief has not been widely used – the conditions are difficult to comply with and the relief is limited (it is still necessary to provide advice that complies with the best interests duty in the Corporations Act and to provide a statement of advice). It has also led to the unhelpful but widespread belief that all interactive calculators provide financial product advice. This is unfortunate because these kinds of online tools provide valuable information and, sometimes, advice to members. They should be encouraged. The recommendations will make it much easier for them to be provided to members without ASIC relief (noting that, if they do provide personal advice, an AFS licence authorising the provision of personal advice will be required without ASIC relief).

The effect of the recommendations on trustees

The recommendations in this Report will not convert information into financial product advice and so, if an online calculator provides information only today, it will continue to do so if the recommendations are adopted. If an online calculator gives personal advice today, it will continue to

137 Investment Trends (2022).

be personal advice under the recommendations. If a call centre operator provides a recommendation to a member today or if the trustee provides a personalised recommendation to a member by email today, they will very likely also provide personal advice today and they will continue to provide personal advice under the recommendations.

While I do recommend that the definition of personal advice be broadened, these examples demonstrate that it is in fact difficult today for a superannuation fund to provide financial product advice to a member in a one to one interaction which is general advice, as was demonstrated in *ASIC v WSAL*.

But this is not the end of general advice.

General advice

During consultation, some superannuation fund trustees queried whether they could continue to provide general advice to their members. The short answer is 'yes'. The recommendations do not mean that superannuation funds cannot continue to give general advice to their members. They can continue to provide general advice in seminars, newsletters and on their websites. Accepting that superannuation funds will often have information about their members' financial situation and sometimes their objectives and even their needs, the question will be whether any financial product advice is personalised for the individual member. Generally that will not be the case in a seminar, newsletter or website. Generally it will be the case in a personal interaction with the member – whether online or in person. But it will always turn on what the trustee does and says.

Personal advice

If a trustee sends a letter, email or message on an app to a member about whom it has information about their financial situation and it looks and feels like it is a personal letter, email or message (because it is addressed to the individual member for example) and if it contains a recommendation to make a decision about the member's superannuation, it will be personal advice. This is even if the trustee has chosen the member on nothing more than their age and even if the trustee has not as a matter of fact taken into account any of the information they have about the individual member. Because the trustee will have information about the member's financial situation, when they provide the recommendation this will be personal advice.

The reason for this recommendation is that treating financial product advice as personal advice where the fund has information about the member's financial situation, or about one of more of their objectives or needs is likely to be consistent with the member's reasonable expectation. It will also mean the trustee will have a duty to give good advice to the member in the letter, email or message. That is also in the interests of the member. It does not mean that each member's individual circumstances must then be considered – that will depend on the content of the advice. And so on each occasion that a trustee decides to provide personalised advice to a group of members, the trustee will need to consider what helpful and useful recommendations it can make to the cohort without in fact considering their individual circumstances (or it will have to consider those relevant circumstances).

An example might be a letter addressed personally to members approaching retirement about whom the trustee has information about their financial situation. It might be impractical to consider each member's individual circumstances and so the trustee is unlikely to be able to recommend that each member commence an account-based pension consistently with the good advice duty. However, the trustee will be able to recommend that each member *consider* whether they should commence an account-based pension. That is financial product advice. It is also personal advice because the trustee has relevant information about the member and it will be good advice.

Intra-fund advice

Many funds also offer personal advice on limited topics to their members over the telephone and sometimes in meetings. This is referred to as 'intra-fund advice'. The term is a term of art used by the industry to refer to financial product advice (strictly, only personal advice) given by or on behalf of a superannuation fund trustee to a member of the fund about their interest in the fund in circumstances where the member is not charged a specific advice fee. Instead, the cost of the advice is met from the trustee's personal resources or the fund's reserve (which in turn is funded by the administration fee deducted from members' accounts).

Intra-fund advice is not a term defined in the Corporations Act. It is not a special category of financial product advice and no special rules or relief apply to intra-fund advice. Its genesis is in section 99F of the SIS Act. That section is entitled: 'Cost of financial product advice – collectively charged fees'. The title describes the content of the section which is about *charging* for advice. It prohibits a trustee passing the cost of providing personal advice to a member on to any other member if any of the prescribed circumstances apply. The prescribed circumstances (in which advice cannot be given on a collectively charged basis) include providing advice:

- to someone who is not yet a member about becoming a member;
- about another financial product that is not an interest in the fund; and
- about the consolidation of the member's superannuation accounts.

The circumstances in which advice cannot be given on a collectively charged basis also include where the member reasonably expects the trustee will provide further advice.

I wrote about my concerns with intra-fund advice in the Proposals Paper. I worried then, and I continue to worry, that trustees interpret section 99F as giving them permission to provide certain kinds of advice to their members and to use the administration fee charged to all members to meet the cost of doing so. As I wrote in the Proposals Paper, it does not do either of these things.

The first question for any trustee when considering whether to apply the resources of the fund (people and money) to provide financial advice to members is to ask whether it is consistent with the sole purpose test. Most trustees have formed the view that providing advice about members' interests in the fund is consistent with the sole purpose test. I do not disagree. However, I do note the question has never been considered by a court and so the precise scope of what is a proper use of fund resources and what is not has not been tested and is uncertain.

Nevertheless, section 99F proceeds on the basis that a trustee is authorised to provide personal advice to members on some topics at least. The new retirement income covenant in section 52(8A) of the SIS Act will be difficult to satisfy without trustees providing advice to their members (trustees are required to adopt a strategy which will 'assist' retired and retiring members to achieve and balance the prescribed objectives).

As to the topics about which a trustee may apply fund resources to provide advice to its members (whether the cost is attributed to a member's account or to a reserve account), neither section 99F nor any other provision of the SIS Act says anything. And as to how the cost of any advice is met, again, section 99F says nothing more than what cannot be done. Therefore, personal advice topics and to a large extent the allocation of the cost for that advice are both matters the SIS Act leaves for trustees to determine. They must do so having regard to the best financial interests duty, the duty to promote the financial interests of members, their duties to treat different classes of members fairly and the duty in regulation 5.02 of the Superannuation Industry (Supervision) Regulations 1994 (**SIS Regulations**) to allocate costs between members on a fair and reasonable basis.

7.3 Changes and recommendations

7.3.1 Expanding intra-fund advice

Most (although not all) superannuation funds have told us they would like to be able to provide more intra-fund advice to their members, by which I think they mean that they want to provide that advice on a collectively charged basis. They want to be able to provide advice to their members leading up to their retirement and in doing so they want to be able to take into account the member's assets, social security benefits and, where the member has a partner, the partner's financial position. They say that in order to do so the intra-fund advice regime should be broadened (this could be done by narrowing the charging restrictions in section 99F of the SIS Act). However, funds did not have a consistent position on the topics that should be included in the broader scope. For example, they disagreed over whether advice considering a member's spouse's financial circumstances should be in or out of scope.

I agree that it is desirable for trustees to give advice to their members and I agree that all of these matters are likely to be relevant to the advice a member will need in making decisions about retirement and their superannuation. However, I do not think section 99F of the SIS Act needs to be amended to permit trustees to do so. The section restricts the topics on which the trustee may give financial product advice, it has nothing to say about what the trustee takes into account in providing that advice. Further, financial product advice is only that part of any advice which contains a recommendation or opinion that is intended to influence the member to make a decision about a financial product. It has nothing to say about advice on topics that are not about the financial product (for example social security or aged care), although to the extent fund resources are used to provide that advice the sole purpose test might.

7.3.2 Amendments to the SIS Act are required

Superannuation funds, like other product issuers, are an important source of information and helpful personal advice for their customers (their members here). The retirement income covenant requires trustees to assist their members to meet the objectives set out in the covenant. It will be difficult to provide that assistance without providing advice to their members. Given the retirement income covenant and the significance of superannuation for individuals and its very real complexity, the regulatory regime should encourage trustees to provide (or arrange to provide) useful information and personal advice to their members. Again, I note that a trustee might provide advice to their members personally or by entering into an arrangement with a service provider to do so.

The recommendations in this Report will assist trustees to do so. However, while I do not think section 99F should be expanded (or narrowed), I do think changes are required to the SIS Act to provide trustees with a more certain foundation on which to decide what advice they should give and how members should pay for that advice. I raised my concerns about the basis upon which trustees give advice now in the Proposals Paper, and I repeat them below.

As discussed earlier in this Chapter, superannuation fund trustees may only apply fund resources for purposes that are consistent with the sole purpose test. What is permitted under the sole purpose test has not been tested and so, to some extent, trustees are inferring from other provisions in the legislation (sometimes enacted after the sole purpose test) and relying on industry practice to decide where those boundaries are. Trustees should not be encouraged to use fund assets to provide advice if they are not clearly able to do so.

Section 99F of the SIS Act does not give permission to use fund assets to provide advice and it does not set those boundaries – it does not contain a list of topics on which the trustee is authorised to give

advice. It is also poorly drafted and understood and it imposes an unnecessary compliance burden on trustees (albeit one which does not appear to concern many trustees).

In considering whether to provide personal advice to members, a trustee should ask itself what personal advice it should give to members of the fund consistently with its powers and duties – these start with the sole purpose test. After considering that question, the trustee should consider how the cost of providing advice should be allocated to members. In doing so it must act in the best financial interests of members, treat members fairly, promote members' financial interests, allocate costs between members fairly and reasonably, comply with fees and costs rules and comply with its obligations about fund expenditure in APRA's Prudential Standard SPS 515: Strategic Planning and Member Outcomes.¹³⁸

In my view, section 99F adds nothing to these questions and it should be removed.

7.3.3 Feedback on the changes

I consulted on changes to the SIS Act in the Proposals Paper.

Many superannuation funds and some of their industry associations supported the proposed changes. They liked the greater clarity about the scope of advice and the flexibility to determine how they provide and charge for advice. Some said the increased discretion about charging for advice will allow them to provide more advice to their members.

However, some worried that removing section 99F of the SIS Act may make it more difficult for superannuation funds to justify collectively charging for advice and could mean trustees are less willing to give advice. As expressed above and in the Proposals Paper, this is a mistaken view of the law and section 99F should not be relied on as permission or justification for the way costs and expenses are allocated between members.

Consumer associations and industry fund associations expressed some concerns that broadening the scope for superannuation funds to provide advice for their members could lead to poor consumer outcomes. They said that superannuation funds, like other product issuers, have a conflict in giving advice. In response, it is important to note I have not recommended that superannuation funds give advice on a broader range of topics than they do today. Nevertheless, it is true that superannuation funds will and do have a personal interest which might conflict with the interests of an individual member to whom the trustee provides advice (although that might be less acute than in other cases given they will only be giving advice to their existing members). Despite this, for all of the reasons I have written about, it is in my view in the interests of superannuation fund members to be able to get good personal advice from their fund. Superannuation funds will need to satisfy the good advice duty where they provide personal advice to members, and if they employ a financial adviser to give this advice, the financial adviser will have a duty to act in the best interests of the member (their client) as well.

Others told us they were concerned that by giving superannuation funds greater discretion in deciding how to charge for advice, there was a risk of cross-subsidisation – in particular, members as a whole might be assuming the cost of expensive retirement advice for a few. They raised the spectre of the 'fee for no advice' case studies in the Royal Commission. I strongly disagree with this characterisation.

Superannuation funds are collective investment vehicles. Expenses are routinely shared. Administration fees commonly include a percentage-based fee and so members with higher balances will make a greater contribution to fixed expenses than members with lower balances. It is the job of

138 APRA (2019), Prudential Standard SPS 515: *Strategic Planning and Member Outcomes*.

the trustee to determine how those expenses should be recovered and shared between members. The trustee's duties to exercise its powers in the best financial interests of members, to promote their interests, to treat members of different classes fairly are all relevant. And of course, regulation 5.02 of the SIS Regulations is intended for precisely this purpose – it requires a trustee to allocate expenses between members on a fair and reasonable basis. There is no reason to think that a special rule is required for the treatment of expenses incurred in providing advice to members and I am confident that what were proposals should be recommendations.

7.3.4 Recommendations

I recommend that the SIS Act be amended to:

- expressly provide trustees with permission to apply fund resources for the purpose of providing personal advice to members about their superannuation; and
- remove section 99F.

This would not mean the trustee or another adviser could not and should not consider all matters which are relevant to that advice and nor should it mean the advice could not include recommendations which are incidental to the advice about the member's interest in the fund (noting that in this case I am not meaning to separate a superannuation interest from a pension interest). These matters are likely to include the member's financial situation, family situation, social security and health. In many cases the trustee (or adviser) would be required to do so in order to meet the good advice duty. If there is any doubt, this should be clear in the law.

Recommendation 6 – Superannuation advice

Superannuation fund trustees should be able to provide personal advice to their members about their interests in the fund, including when they are transitioning to retirement. In doing so, trustees will be required to take into account the member's personal circumstances, including their family situation and social security entitlements if that is relevant to the advice.

Superannuation fund trustees should have the power to decide how to charge members for personal advice they provide to members and the restrictions on collective charging of fees should be removed.

The objective of this recommendation is to give superannuation funds greater confidence about the scope of advice they can give to their members and to encourage superannuation fund trustees to decide how to allocate the cost of providing advice between members based on the circumstances of their fund and their members.

7.4 Adviser service fees

7.4.1 Existing legal basis

Many members seek advice from independent financial advisers about their superannuation. The Review's survey indicated that 88 per cent of financial advisers provided retirement or pre-retirement

advice and for 65 per cent of advisers, the majority of their business is retirement focussed advice.¹³⁹ These advisers are entitled to charge a fee for advice. When the advice is ongoing, they may charge an ongoing fee. Where the advice provided is about the member's superannuation interest, trustees may agree to pay the fee from the member's superannuation account to the adviser. This reflects the arrangement in practice. The contractual arrangements are more complex.

The SIS Act prohibits the payment of money from a fund other than to pay a superannuation benefit, to pay an expense that is incurred by the trustee in connection with the operation of the fund or as a trustee fee. A fee for advice is not a superannuation benefit. Therefore, the only legal basis on which it can be paid is if it is an expense incurred by the trustee in connection with the operation of the fund (unless it is a trustee fee). If the trustee engages an adviser to provide advice to a member about the member's interest in the fund (and doing so is consistent with the sole purpose test), the cost of providing the advice is incurred by the trustee and can be deducted from the fund. This is the legal basis on which adviser fees can be paid from members' superannuation accounts. However, I am not confident it accurately reflects the actual arrangements under which advice is provided to superannuation members by independent advisers.

The consequences for the trustee and a member of paying money out of the fund to pay an advice fee to the member's adviser if the fee is not an expense properly incurred by the trustee are significant. The trustee will breach the SIS Act and the payment will be treated as a benefit paid to the member under the *Income Tax Assessment Act 1997*. If the member has not satisfied a condition of release, it will be taxable in the hands of the member. These are the real and serious consequences of getting an advice fee arrangement wrong.

7.4.2 Arrangement between member and adviser

Section 99FA of the SIS Act has exacerbated the risks of paying adviser service fees from superannuation funds. It was introduced into the SIS Act with effect from 1 July 2021 following the Royal Commission recommendations. It is intended to prevent advice fees being deducted from a member's superannuation account without their consent and it requires an advice fee paid from a member's superannuation account to be paid in accordance with the terms of the arrangement entered into by the member and the adviser. The member must provide their consent to the trustee for the deduction of the fee the member has agreed with the adviser.

ASIC and APRA have written to trustees to remind them of their obligations to take steps to satisfy themselves that:

- any advice paid for from the fund with the consent of the member under section 99FA is confined to advice about the member's interest in the fund; and
- the cost of the advice is reasonable. In many cases they said trustees impose caps on advice fees that can be paid from the fund.

These steps do not convert the arrangement between the adviser and member into an arrangement between the adviser and trustee or the adviser, member and trustee, and it is very difficult to reconcile the arrangement required by the section with an expense that is incurred by the trustee. In my view section 99FA is flawed and should be replaced. Given the potentially serious consequences for trustees and members of getting the arrangements wrong, this should be done urgently.

¹³⁹ See Appendix 3, Quality of Advice Review Financial Adviser Survey, Question 8.

7.4.3 What adviser fees should be paid from superannuation funds?

Some people have told us that advice fees, particularly ongoing advice fees, should not be paid from superannuation at all. Other people have suggested that superannuation might be an appropriate place to fund financial advice generally. For approximately 60 per cent of advisers, the majority of the fees they charge are deducted from a financial product, and more often than not from a superannuation fund account.¹⁴⁰ The SIS Act prohibits ongoing advice fees being paid from a MySuper product. It does so on the basis that a person who is in a default product does not need regular personal advice. I agree that ongoing advice fees should not be paid from MySuper products. The advice needs of members holding a MySuper product should be able to be met from the advice provided by (or under an arrangement with) the trustee.

For members invested in choice products we have been told that superannuation balances should be preserved for retirement and ongoing advice fees deplete retirement incomes. Good financial advice can add to a person's retirement income and it is appropriate that people should be able to apply some of their superannuation to the cost of receiving financial advice about their superannuation, including their retirement income. However, I am not persuaded that superannuation should be available to pay for broader financial advice.

I am aware that the consequences of my views are that trustees will continue to be responsible for taking steps to ensure that advice fees are paid only for the provision of advice to a member about their interests, if they choose to allow advice fees to be paid from the fund. None of the recommendations require them to do so. But a contrary view would make superannuation available for purposes that are not related to retirement incomes. The SIS Act requires trustees to determine whether insurance premiums would unreasonably erode members' retirement incomes, paying for financial advice from superannuation raises the same question. Where there is a direct connection with the member's interest in the fund, the potential to do so would seem to be much less than should the member's balance be available to pay for financial advice at large.

This does lead to the question about how much should be able to be paid from a member's superannuation account for financial advice about their superannuation interest (or another interest in the fund). In my view, the cost should fairly reflect the value of the advice and it should not unreasonably erode a member's retirement income and so I think there may be merit in limits being imposed on how much and how frequently advice fees can be deducted from a member's account. However, I think these are questions which trustees can answer having regard to the characteristics of their members. I do not think these are matters which should be prescribed by the law.

7.4.4 Proposal to amend the SIS Act to permit the deduction of adviser fees

Given these concerns, I recommend that section 99FA of the SIS Act be repealed and replaced with a provision giving trustees permission to pay, on the direction of a member, a fee for advice provided to the member from a financial adviser about the member's superannuation in the fund. I emphasise that trustees would be given permission to pay an advice fee if they choose to provide the facility to their members, the recommendation would not require trustees to do so.

And so, rather than having to put in place an arrangement by which the advice fee is an expense incurred by the trustee and rather than requiring the consent of the member to the deduction of an advice fee from their account, the SIS Act would authorise the trustee to pay an advice fee, including an ongoing advice fee, on the direction of the member.

140 See Appendix 3, Quality of Advice Review Financial Adviser Survey, question 19.

The direction would operate in the same way that investment directions and binding death benefit nominations work. In neither case is the trustee bound to offer investment choice or binding death benefit nominations, but if they choose to invite members to provide an investment direction or a binding nomination, the trustee is authorised by the SIS Act to act on that direction or nomination. An advice fee paid in accordance with the direction would be treated as an expense of the fund despite the fact that the trustee will not be a party to the arrangement with the adviser and despite the fact that the expense will not have been incurred personally by the trustee.

The trustee will still need to be confident the advice related to the member's interest in the fund and so it would need some ability to confirm that. This might mean that trustees will only permit financial advice fees to be paid at the direction of members to advisers with whom they have an agreement that enables a trustee to review advice provided to members from time to time or to require an audit of that advice to be undertaken. This proposal is not intended to change fundamentally what trustees do now, but it will place it on a firmer foundation and make it easier.

When I consulted on this change in the Proposals Paper, superannuation funds supported this recommendation.

Recommendation 7 – Deduction of adviser fees from superannuation

Superannuation trustees should be able to pay a fee from a member's superannuation account to an adviser for personal advice provided to the member about the member's interest in the fund on the direction of the member.

The objective of this recommendation is to provide superannuation fund trustees with more certainty about paying advice fees agreed between a member and their financial adviser from the member's superannuation account and ensure that adviser fees are not paid in breach of the SIS Act and are not taxable benefits for members.

Chapter 8 – Charging Arrangements, Disclosure Documents and Reporting Requirements

Chapter Summary

- The disclosure obligations in the Corporations Act are intended to arm consumers with the information they need to decide whether to follow the advice provided by their financial adviser. The evidence is that they do not do this.
- The requirements applying to ongoing fee arrangements and statements of advice are complicated and add to the cost of providing personal advice. They also result in documents consumers do not want and are not able to easily understand.
- Annual consent for ongoing fees continues to be important but the disclosure requirements for them should be simplified by authorising financial advisers and product issuers to rely on a single prescribed fee consent form.
- The requirement to give retail clients a statement of advice would be replaced with a requirement for advice providers to maintain complete records of the advice and to provide written advice on request from clients. This should allow advice providers to provide advice in the way that suits the needs and preferences of their client.
- Producing FSGs also contributes to the time, cost and volume of disclosure documents advisers are required to prepare and provide to their clients, often offering little value to clients. Personal advice providers should have the option to make information regarding remuneration or other benefits, and dispute resolution procedures available on their website, or continue to provide the FSG as they do now.
- The consent requirements for being classified as a wholesale client because of the assets and income threshold should be the same as those required for a sophisticated investor. This will make it more likely that consumers will be aware of the protections they are losing.
- The DDO regime for financial advisers should not impose unnecessary burdens on financial advisers who may recommend financial products to clients who are outside a product's TMD. The DDO reporting requirements should only require financial advisers to report the number and nature of complaints to product issuers.

Objectives

The objectives of recommendations in this Chapter are to:

- streamline regulatory requirements to reduce costs for financial advice providers while maintaining appropriate levels of consumer protection;
- allow financial advice and related disclosures to be provided in a form that meets consumers' needs; and
- provide consumers with access to written advice if they want it.

8.1 Terms of Reference

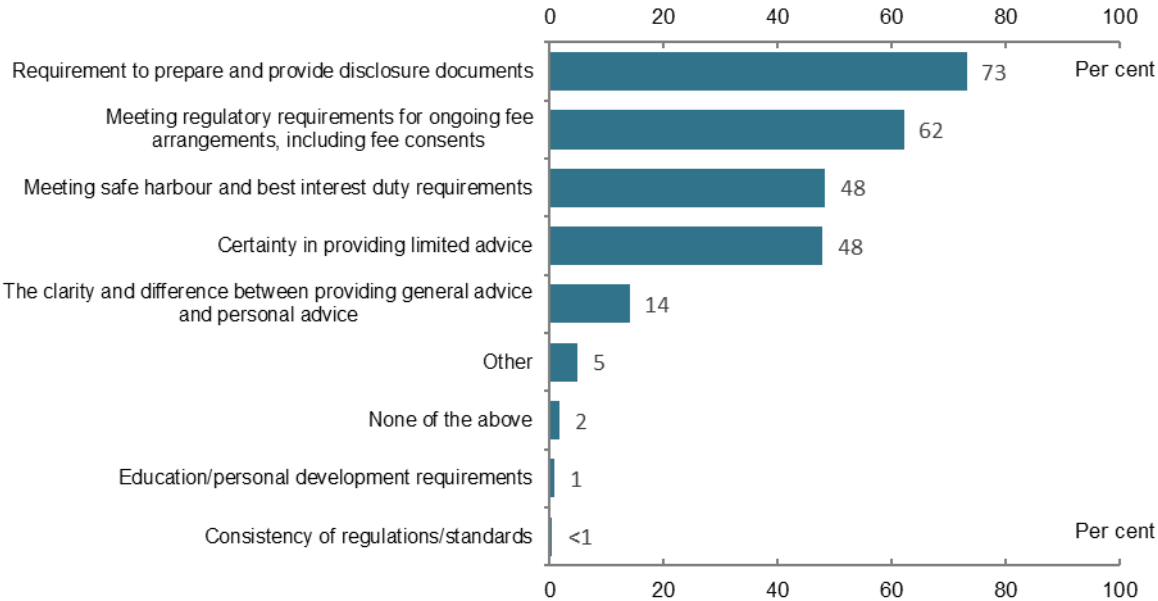
In reviewing the regulatory framework for the provision of financial advice, the Review was required to examine:

- fee disclosure and consent requirements, including the reforms to introduce annual renewal of ongoing fee arrangements following implementation of the Royal Commission recommendations;
- financial advice documentation and disclosure requirements, including statements of advice; and
- the effectiveness of the consent arrangements for sophisticated investors and wholesale clients for the purposes of financial advice.

Financial advisers complained loudly about the obligation to prepare fee disclosure statements, consent agreements, statements of advice and financial services guides. They said the time spent and cost incurred in preparing these documents is the single most urgent area for reform.

I consider each of these documents in this Chapter. I then consider the consent provisions for sophisticated investors and how they relate to the definition of wholesale client and the reporting and distribution obligations under the DDO regime.

Chart 8.1: Areas for reform identified by financial advisers to reduce the burden of regulation



8.2 Ongoing fee arrangements

8.2.1 A brief outline of what ongoing fees and ongoing fee arrangements are

FOFA introduced the concepts of ‘ongoing fees’ and ‘ongoing fee arrangement’ into the Corporations Act and then set out a regime for their regulation. The purpose was to ensure that clients not only agreed to pay ongoing fees for advice, but knew that advice fees were being deducted from their

investments. The expectation was that a client would only agree to pay ongoing fees if they were provided with a service that was commensurate with the fees they were paying.

An ongoing fee is a fee that is payable under an ongoing fee arrangement. There is taken to be an ongoing fee arrangement for the purposes of the Corporations Act if certain conditions are satisfied. They are that:

- an AFS licensee or a financial adviser gives personal advice to a retail client;
- the client enters into an arrangement with the AFS licensee or financial adviser; and
- under the terms of the arrangement, a fee is to be paid during a period of more than 12 months.¹⁴¹

In short, there will be an ongoing fee arrangement between a financial adviser and their client if the adviser provides personal advice to the client and the client agrees to pay a regular fee for a period of more than 12 months. It is commonplace for ongoing advice fees to be calculated as a percentage of the client's relevant investments (asset-based fees).

Ongoing fees are sometimes paid personally by the client (by deducting fees from the client's credit card or bank account), but more commonly ongoing fees are deducted from the client's investment products. In many cases this will be from a superannuation product. The SIS Act prohibits the deduction of an ongoing fee from a member's MySuper product, but not from a choice product (although for the reasons discussed in Chapter 7 on Superannuation and Chapter 9 on Conflicted Remuneration, doing so is not straightforward).

8.2.2 Stakeholder views

Some consumer associations and industry associations said that asset-based fees are not in the interests of consumers. They said they can be invisible to consumers, obscure the true nature of the service provided by the financial adviser and be unrelated to the volume or quality of the work done. They argued that fixed fees are more transparent and are more likely to be commensurate with value of the advice provided. In my view there is merit in these points and I note that in a different context, the Super System Review, suggested that superannuation funds should not pay asset-based fees to investment managers. A contrary view is that asset-based fees – for financial advisers or investment managers – align the interests of the client and service provider.

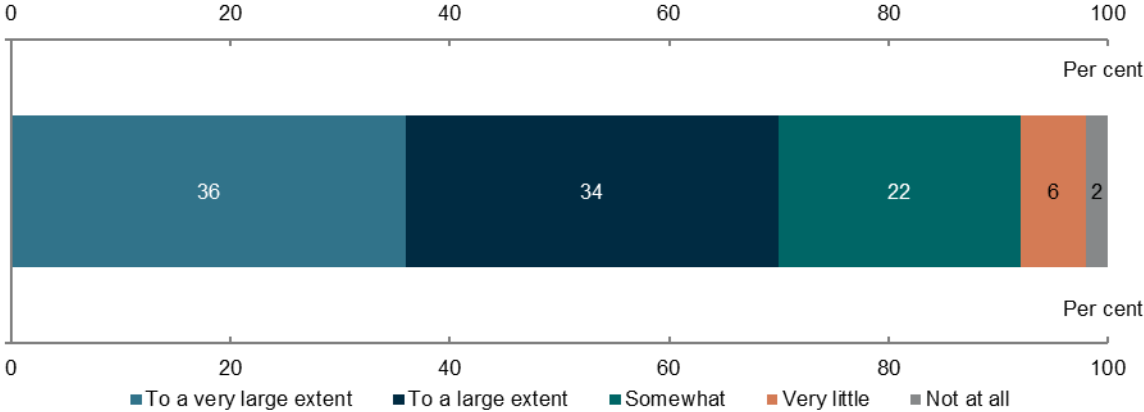
Some industry associations also said that ongoing advice fees should not be able to be paid from superannuation funds at all. They do not think members benefit from regular financial advice about superannuation. Unsurprisingly, financial advisers and advice licensees have told us that an ongoing advice relationship can have significant benefits for their clients including by increasing their retirement incomes.

Financial advisers are nevertheless unhappy about the rules that apply to ongoing fee arrangements. They say the compliance burden is too great and, they also say, it is exacerbated by the requirements of product issuers and advice licensees.

We have also been told they add significantly to the time spent on administrative matters and to the cost of providing advice. And financial advisers questioned the value of these particular requirements for their clients and have noted that signing forms can take up a not insignificant amount of time in meetings with their clients.

¹⁴¹ Corporations Act, s 962A.

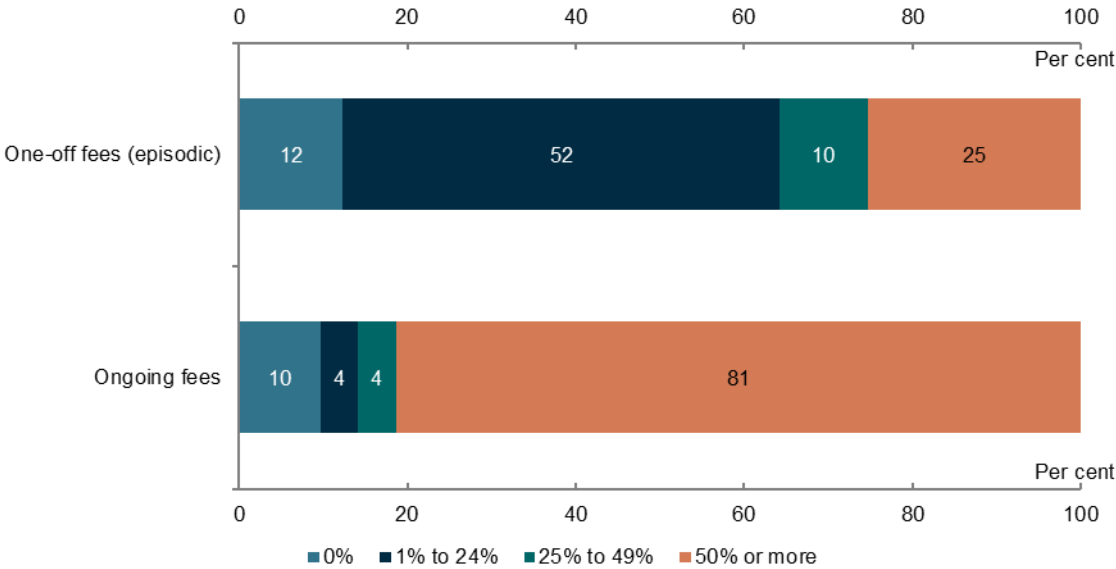
Chart 8.2: Extent to which product issuers impose obligations on advisers which are in addition to those imposed by the ongoing fee arrangements requirements in the Corporations Act



We have also been told that some advisers avoid entering into ongoing fee arrangements because the obligations are too onerous. (Where they are replaced by agreements with rolling terms stopping short of 12 months, it does raise a possible avoidance risk).

However, the Review’s survey of financial advisers shows that ongoing fee arrangements remain commonplace.

Chart 8.3: Proportion of clients who paid one-off or ongoing fees



8.2.3 Requirements for ongoing fee arrangements

The disclosure and consent requirements for ongoing fee arrangements were first introduced with the FOFA reforms. They required providers of financial advice to obtain their client’s agreement to

ongoing advice fees every 2 years.¹⁴² Since then, in response to recommendation 2.1 of the Royal Commission, a client's consent is required to be given annually.¹⁴³ If it is not, the arrangement terminates.

The requirements for ongoing fee arrangements are:

- An advice provider, or a 'fee recipient', is required to give their client a fee disclosure statement annually within 60 days of the anniversary day of entering into an ongoing fee arrangement.¹⁴⁴ The 'anniversary day' for an ongoing fee arrangement is the anniversary of the day on which the arrangement was first entered into.¹⁴⁵ The fee disclosure statement must include the services provided by the adviser and the fees paid by the client in the previous year, as well as the services that will be provided and the fees that will be paid for the following year.¹⁴⁶
- Next, if the arrangement is to continue for a further year, the adviser must obtain the client's agreement to renew the arrangement within 120 days of the anniversary day.¹⁴⁷ If the client fails to renew the agreement within this timeframe, the ongoing fee arrangement automatically terminates 30 days after the day the renewal was due.¹⁴⁸
- Finally, if the advice fees are to be paid from a financial product, the client must also sign a consent form agreeing to the advice fees being deducted from one or more of their financial products within 150 days of the anniversary day each year.¹⁴⁹ An adviser must then provide a copy of the client's consent form to the product issuer.¹⁵⁰ If the advice fee is to be paid from a member's superannuation account, the member must also consent to their superannuation trustee paying a fee to their adviser whether or not the fee is ongoing.¹⁵¹

8.2.4 Proposals Paper and concerns raised by stakeholders

In my view, it is important and necessary for clients to regularly turn their minds to whether an ongoing fee arrangement should continue. The annual consent requirement means that they do and so I did not propose any changes to this requirement in the Proposals Paper. Some advisers argued that the obligation is unnecessary and too onerous. They said it should be sufficient for a client's consent to be provided once only (at the commencement of the arrangement) or, perhaps, every

142 Revised Explanatory Memorandum to the Corporations Amendment (Future of Financial Advice) Bill 2012, page 3.

143 Recommendation 2.1 of the Royal Commission recommended that: the law should be amended to provide that ongoing fee arrangements (whenever made) must be renewed annually by the client; must record in writing each year the services that the client will be entitled to receive and the total of the fees that are to be charged; and may neither permit nor require payment of fees from any account held for or on behalf of the client except on the client's express written authority to the entity that conducts that account given at, or immediately after, the latest renewal of the ongoing fee arrangement.

144 Corporations Act, s 962G(1).

145 Corporations Act, s 962G(3).

146 Corporations Act, s 962H.

147 Corporations Act, s 962L.

148 Corporations Act, s 962N.

149 Corporations Act, ss 962R(2), 962S(3) and 962V(1).

150 Corporations Act, s 962S(3).

151 SIS Act, s 99FA.

2 years. But I agree with those stakeholders who told us ongoing fees can be invisible and therefore can be forgotten.

I also agree with the stakeholders who said this is a complicated regime. It is unnecessarily so. Financial advisers told us there are too many forms and there is too much duplication. This not only creates work and cost for advisers, but they said it is of limited value for their clients. We have been told that clients can be puzzled and sometimes annoyed by the number of forms, and that they may not in fact understand what fees they are paying based on the prescribed disclosure. They also said the requirements for forms and consents to be provided on specific dates referenced by an anniversary day were inflexible and too difficult.

In the Proposals Paper I proposed that renewal agreements (for advisers) and consent forms (for product issuers) be combined into a single prescribed form and that the obligation to provide a fee disclosure statement be removed.

8.2.5 Recommendation for ongoing fee arrangements

I continue to hold the view that a client should be asked to consent to pay an ongoing fee from their financial product each year. This is an important consumer protection measure in the existing law. Moreover, if the complexity of multiple forms is removed, as I recommend, it should not be an onerous obligation. A financial adviser who is being paid an ongoing fee for their advice should be speaking to their client regularly. Having said what I do not think should change, I turn now to the changes I am recommending.

As proposed in the Proposals Paper, I am recommending that the obligation for advisers to provide a fee disclosure statement to their clients be removed. I am recommending the client's annual written consent to renew an ongoing fee arrangement be combined into a single document along with the authorisation to their product provider to deduct advice fees from their financial products. Multiple forms would only be required where fees are to be deducted from financial products issued by more than one product issuer. This form should explain to the client the services the adviser will provide the client and the fee the adviser proposes to charge over the following 12 months.

In addition to this, I am also recommending that there should be a single prescribed form that can be relied on by all product issuers, including superannuation trustees, as evidence of the client's (their investor's or member's) consent to the ongoing fee arrangement and the fee that is agreed to be paid under that arrangement. This is slightly different from the proposal in the Proposals Paper. While I am recommending that the Corporations Act be amended to say that a product issuer is entitled to rely on the prescribed form, I am not recommending that the law require a product issuer to accept the form. This is because it is possible and should continue to be possible that different product issuers might apply different rules to the payment of ongoing fees. Some might apply caps on ongoing fees or permit ongoing fees to be provided in relation to some advice only (superannuation fund trustees are an obvious example here). While it is desirable to have a single consent form, it is not desirable to dictate whether and in what circumstances a product issuer must allow a client to pay advice fees from their financial product.

I am also recommending that consideration be given to whether there can be greater flexibility for advisers about when they obtain their client's consent. The important point is that it must be done on an annual basis.

Recommendation 8 – Ongoing fee arrangements and consent requirements

The current provisions which require a provider of advice to give a fee disclosure statement to the client, to obtain the client's agreement to renew an ongoing fee arrangement and the client's consent to deduct advice fees should be replaced. Providers should still be required to obtain their client's consent on an annual basis to renew an ongoing fee arrangement, but they should be able to do so using a single 'consent form'. The consent form should explain the services that will be provided and the fee the adviser proposes to charge over the following 12 months. The consent form should also authorise the deduction of advice fees from the client's financial product and should be able to be relied on by the product issuer. The form should be prescribed.

The objective of this recommendation is to streamline the requirements for ongoing fee arrangement and fee consents, while ensuring that consumers see and agree the fees they are paying their financial adviser.

Diagram 8.1: Ongoing fee arrangement disclosure and consent requirements



8.2.6 Costs v benefit

These proposals will provide a material benefit to advisers. They will also provide a benefit to their clients.

There is no reason to think fee disclosure statements add anything of value to an adviser's clients. If an advice fee is deducted from a client's financial product in accordance with an ongoing fee arrangement, it will be set out in the periodic statement the client receives from their product issuer. A client does not benefit from being told the same thing twice. To the contrary, they may rightly be confused.

The recommendation to consolidate the renewal and consent requirements into a single document is not new. It is currently permitted but not required by an ASIC legislative instrument (ASIC

Corporations (Consent to Deductions—Ongoing Fee Arrangements) Instrument 2021/124). This recommendation will therefore put into practice what is already allowed. It will reduce the multiplicity of forms and documents financial advisers (and we understand their clients) complain about.

The requirement for the combined renewal and consent form to explain the services that will be provided to the client and the fee to be charged for these services over the course of the following 12 months will mean that clients will still be given the information they need to decide whether to agree to enter into or continue an ongoing fee arrangement. As now, where fees are calculated as a percentage of funds under management, this could be done by explaining how the fee will be calculated together with an example. Where fixed fees are payable, the fee should be stated, again as it must be now.

While I am not recommending banning or restricting the use of asset-based fees or percentage-based fees, I am not convinced they are a fair way for consumers to be paying an adviser for their advice. This is because there is no real connection between a percentage-based fee and the work done by the adviser and because asset-based fees provide an incentive for advisers to prefer wealthier clients. Nevertheless, I am told, and I accept that some clients like asset-based fees because they think it aligns their interests with the adviser's – as their investments go up and down in value so too does the adviser's remuneration.

As for the concerns that consumers may not be aware of the fees they are paying or the services they are entitled to, again I say that my recommendations leave in place the requirement for the client's annual consent and that consent must be provided on a form which sets out the services that will be provided. I understand that it is usual for this consent to be provided in a meeting between the adviser and their client and so there will be an opportunity to discuss those services. Clients will also get statements from their product issuers showing the 'advice fees' (and described as such) that have been deducted. In all of these circumstances, it will be difficult for advisers to receive ongoing fees without providing regular advice.

I have been told and I accept that advice licensees are doing more to satisfy themselves that the financial advisers authorised to provide advice under their AFS licences are able to point to evidence of the services they provide their clients. But if this is not the case, the consumer will be armed with the agreement setting out the promised services, and if need be, can initiate dispute resolution proceedings.

This recommendation will provide a real benefit for consumers who want an ongoing relationship with an adviser. It will reduce the forms that get in the way of that relationship without, for the reasons discussed above, removing the requirements for consent and helpful and important disclosure.

8.3 Statement of advice

8.3.1 What does the law require?

A statement of advice is required to be given, with some exceptions, each time a retail client is given personal advice.¹⁵² The SOA must be the means by which the advice is given or a record of the advice given. In most cases the SOA is not the means by which the advice is given and therefore it should be a record of the advice. A SOA must be given when the advice is provided or as soon as practicable after

¹⁵² Corporations Act, s 946A.

the giving of advice (and in any case before the adviser provides any further services arising out of or in connection with that advice).¹⁵³

Broadly a SOA must include:

- the advice and the basis upon which the advice is provided;
- name and contact details of the providing entity;
- information on remuneration, other benefits or any other interests that may reasonably be expected to be capable of influencing the advice provider; and
- any warnings required to be given about the advice.¹⁵⁴

The SOA needs to contain the information that a retail client would reasonably require to make a decision about whether to follow the advice and the information must be presented in a clear, concise and effective manner.¹⁵⁵ The SOA must also contain additional information when a replacement product is recommended.¹⁵⁶ This is a somewhat roundabout way of imposing a more substantive obligation on the adviser to consider additional matters when recommending that the client replace an existing financial product with another.

The Revised Explanatory Memorandum to the Financial Services Reform Bill 2001 explains that:

*The content requirements [of a SOA] are intended to ensure that consumers receive information necessary to make informed decisions about whether to act on the advice, while at the same time allowing industry some flexibility in determining the level of information that should be included.*¹⁵⁷

Based on what we have been told and have read, it is fair to say that a SOA is frequently not a good record of the advice that was provided and frequently does not give the consumer the information they need to make informed decisions about whether to act on the advice. While the requirements do provide advisers with flexibility in determining the level of information that is provided, the flexibility is most often used to provide more information than the client needs or wants.

8.3.2 What is the problem with SOAs?

In all of our discussions with financial advisers, SOAs have been universally criticised for being too complex and adding significantly to the cost and regulatory burden of providing personal advice.¹⁵⁸ More important than this, consumers find SOAs to be too long. SOAs do not, in the main, provide advice in a form that consumers are readily able to understand.

And so, while SOAs are intended to be consumer focused documents (providing the information the client needs to decide whether to act on the advice) and while the content requirements are intended to be flexible in order to permit providers of advice to tailor the individual SOA to the needs of the client, they are often prepared by financial advisers with an eye on defending a complaint or claim.

153 Corporations Act, s 946C(1).

154 Corporations Act, s 947B(2).

155 Corporations Act, ss 947B(3) and 947B(6).

156 Corporations Act, s 947D.

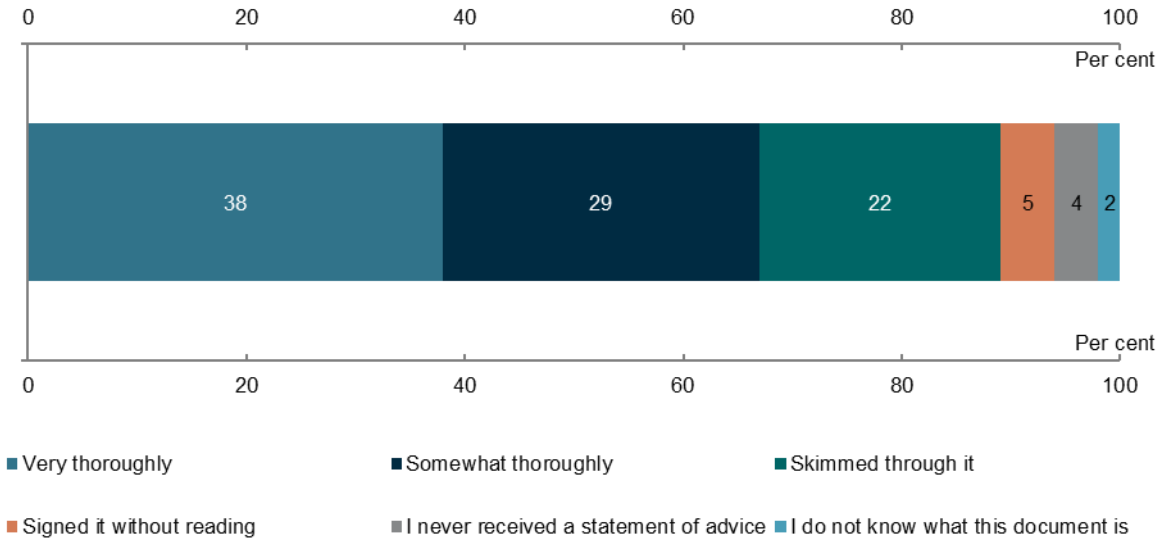
157 Revised Explanatory Memorandum to the Financial Services Reform Bill 2001, paragraph 12.51.

158 The Review's Financial Adviser Survey found that 73 per cent of respondents indicated that changes to the SOA would most effectively reduce regulatory burden, while 90 per cent of respondents stated that the requirements for SOAs should be decreased (see Appendix 3).

This reflects a widespread fear among advisers and their authorising AFS licensees of the consequences of even minor omissions of information they suspect ASIC or AFCA expects to be included in a SOA. This fear has resulted in many advice licensees requiring their advisers to follow the steps in lengthy compliance manuals and completing long, templated documents, which often include extensive fact finds and product comparisons. In some cases, SOAs do not reflect the actual advice conversation between the adviser and their client. This is not only a breach of the law (which requires the SOA to record the advice given), but also means the SOA is not a reliable record of the advice provided, and when an advice licensee or adviser seeks to rely on it when a complaint or claim is made, the client is on the back foot trying to persuade a decision maker the advice was not the advice recorded in the SOA.

In many cases, consumers do not read or do not carefully read a SOA. Consumers rely on what they are told by their adviser. Industry research shows that approximately 33 per cent of consumers who had received advice from a financial adviser did not read the SOA thoroughly (either skimming it, signing it without reading it or not even recalling that they received it).¹⁵⁹ Similar feedback was provided by financial advisers in the Review’s survey.

Chart 8.4: Care taken by clients in reading statement of advice



Further, 79 per cent of financial advisers who responded to the Review’s survey indicated that they thought their clients did not value the SOA, while 63 per cent thought their clients did not understand the SOA.¹⁶⁰

AFCA’s submission to the Issues Paper provided a scathing review of SOAs:

It is AFCA’s experience that SOAs are of limited value in addressing information asymmetry. Many retail clients do not read or comprehend SOAs in full (as they are lengthy, use financial / legal jargon and contain information that does not assist their decision making).

¹⁵⁹ Investment Trends (2022).

¹⁶⁰ See the Review’s Financial Adviser Survey in Appendix 3 (Question 35: Perceptions of why SOA requirements should be decreased).

AFCA's experience is that SOAs also are primarily drafted with an eye to legal requirements...and the needs of the advisory firm's compliance department, rather than a consumer-centric document drafted to assist a client to decide whether to take up particular advice.

Many SOAs seen by AFCA in financial advice complaints still exceed 50 or more pages, are difficult to navigate, contain irrelevant information and do not use plain English to explain the advice, or its benefits and risks. In most instances, there appears to be no focus by the person preparing the SOA toward securing their client's informed decision to accept or reject the advice. The focus generally seems to be on meeting legal and compliance standards.¹⁶¹

8.3.3 The cost of providing advice

A number of stakeholders provided us with estimates of the cost of providing advice, a large part of which is directly attributed to preparing SOAs. These estimates are set out in Chapter 3. They show that the cost of providing advice is continuing to rise with a flow on effect to advice fees. One estimate indicates that between 2018 and 2021, median advice fees increased by 40 per cent.¹⁶²

The time required to prepare a SOA

We have also been provided with or directed to modelling and research on the time that is required to prepare advice, and the accompanying SOA, which showed that on average it can take anywhere between 6.6 hours¹⁶³ and 14.6 hours to produce a SOA.¹⁶⁴ Many advice providers noted that a simplification of the SOA requirements would result in a significant reduction in the time required to prepare advice, which would in turn they said significantly reduce the cost of providing advice. They also said they would have more time to provide advice to more clients.

8.3.4 The length of SOAs

The length of SOAs is a real problem, for advisers and their clients. The Review's survey of financial advisers found that the typical length of a SOA provided to clients is 41 pages or longer. Despite this, 83 per cent of respondents said they thought a SOA for a typical client should be 20 pages or less. AFCA suggested that advice documents should be no longer than 10–12 pages. A number of stakeholders suggested that SOAs would be shorter if the content requirements were reduced.

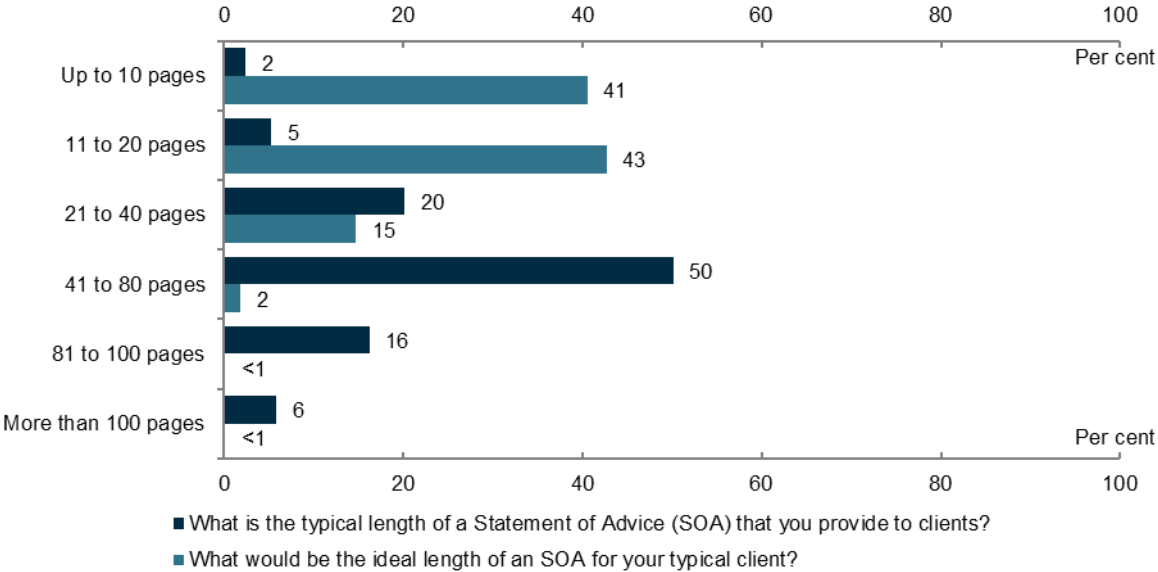
¹⁶¹ AFCA (2022), *Submission to the Quality of Advice Review Issues Paper*, pages 5–6.

¹⁶² Adviser Ratings (2022), page 39.

¹⁶³ Investment Trends (2022).

¹⁶⁴ Iress (2021), *Advice Efficiency Survey Final Report*, page 13.

Chart 8.5: Typical and desired lengths of Statements of Advice for financial advisers



8.3.5 Proposals Paper and stakeholder feedback

In the Proposals Paper, I proposed replacing the current requirement to give retail clients a SOA (or a ROA) with the requirement for providers of personal advice to maintain complete records of the advice they provide to retail clients and a requirement to provide advice in writing to a client only on request.

This proposal was not intended to apply to providers who are currently exempt from the SOA or ROA requirements, such as anyone providing personal advice about general insurance products.

During consultation, there was strong support for the proposal from financial advisers and advice licensees, digital advice providers, banks and superannuation trustees, on the basis that the proposal would give advisers greater discretion to provide advice in a form that suits the needs and preferences of their clients and allow more scope for innovation. They said it would allow them to adjust the documents they provide to their clients to the complexity and risk of the advice and it would reduce the time and cost involved in providing advice.

Having said this some people told us that consumers should be provided with written advice unless the consumer elects not to receive written advice. This was based on the view that, consistent with the original intention of the SOA, written advice is important in assisting consumers understand advice and make a decision about whether to act on the advice. It can also be used as evidence in the event of a dispute.

Stakeholders wanted more information about the proposed requirement to maintain complete records of the personal advice and some queried the timing of when clients could request written advice. They worried that requests made after the advice had been provided could add to their workload. Some said it might defeat the purpose of the recommendation because providers would simply continue to provide written advice for all clients because it would be easier to do so.

My response to the feedback

I do not think there is merit in the suggestion that the obligation to provide a SOA and ROA be retained, but with reduced content requirements. This is for 2 reasons:

- consumers should not be required to accept a document if they do not want it (especially when they have to pay for the preparation of the document); and
- the content requirements in the current law are not the reason for lengthy SOAs.

It is possible to prepare a clear and concise SOA under the existing law. Despite this, SOAs are very often unclear and very long. They often include templated text cut and pasted from other documents. In large part this is because advisers and AFS licensees use the SOA to demonstrate that they have complied with their best interests duty and the safe harbour steps. It might also be because advisers may not be confident or skilful in reducing their advice to writing and because doing so, from scratch, on each occasion a SOA is required is time consuming and costly. Reducing the content requirements for SOAs will not change any of this. By removing the requirement altogether, there is a real opportunity for advisers and AFS licensees to ask themselves and their clients how they would like to receive advice. It is entirely possible that in many cases advisers might use their current SOA templates as their starting point, and there may be nothing wrong with that. But, again, I would encourage them to think about whether that is in fact the best starting point for their clients.

I have not recommended, as some suggested, that written advice be provided to all consumers unless the consumer opts out. In my view, this would defeat the purpose of the recommendation to require advisers to provide advice in a way that suits their client's needs. A requirement in the law that defaults to a requirement to give clients written advice, is very likely to stifle innovation and shift the focus away from the needs of the consumer. This is what the law does now. It is not serving the needs or interests of consumers.

8.3.6 Recommendation

I am recommending that the law be amended to remove the requirements for a SOA or ROA, as I had proposed. I am also recommending that the provider of advice:

- maintain a contemporaneous record of that advice; and
- give the client a written record of the advice if the client requests written advice before or at the time the advice is provided.

This means that providers will need to tell clients they are entitled to a written record of the advice and ask whether they would like written advice before or when they provide that advice.

I do not think the way in which they ask needs to be prescribed. I say this in an attempt to avoid repeating the mistakes of the past, which have led to a regulatory framework that is complex and prescriptive, and which contributes to financial advice being expensive and difficult to access.

I also do not think that what is required to be maintained to meet the record keeping obligation needs to be prescribed. The obligation is to maintain a record of the personal advice – that is the recommendation or opinion about a financial product or class of financial product. It will be a matter for the provider of the advice and the AFS licensee to determine what additional information is kept to evidence why the advice was good advice and, where the advice is provided by a financial adviser, why it was in the best interests of the client. I anticipate the records that are kept, and the form in which they are kept, will be determined by the relevant circumstances. For example, for simple advice (such as advice provided by call centre staff at a bank, superannuation fund or insurer) it may be sufficient

to retain the audio recording of the phone call as a record of the advice provided. On the other hand, comprehensive advice provided by a professional financial adviser would likely require more comprehensive file notes, which document the client's financial situation, objectives and needs, the advice provided, research on financial products compared and so on. A one-size fits all approach to record-keeping will not work.

It is my hope that this recommendation will encourage anyone who provides personal advice to a retail client to provide advice in the way that suits their customers and clients. Freed of the obligation to provide SOAs and ROAs, stockbrokers may provide simple advice to their clients over the telephone, while banks may be able to provide nudges (recommendations) to their customers via an app. Financial advisers will be able to tailor documents to the complexity and nature of the advice being provided, the client's financial literacy and other aspects of their circumstances.

Regardless of the way the advice is provided, the advice must be good advice and it must be provided efficiently, honestly and fairly.

Recommendation 9 – Statement of advice

The requirement to provide a statement of advice (or record of advice) should be replaced with the requirement for providers of personal advice to retail clients to maintain complete records of the advice provided and to provide written advice on request by the client. Clients should be asked whether they would like written advice before or at the time the advice is provided and a request for written advice is required to be made before, or at the time the advice is provided.

This requirement will not apply to a person who is currently exempt from the requirement to provide statements of advice (e.g. a person who provides personal advice about general insurance products).

ASIC should provide guidance on how advice providers may comply with their record-keeping obligations.

The objective of this recommendation is to allow financial advisers and AFS licensees to have more flexibility to provide advice in a form that best suits their customers and clients and to reduce unnecessary compliance costs.

8.4 Financial Services Guides

8.4.1 What the law requires

A person who provides a financial service to a retail client must give the client a FSG.¹⁶⁵ The FSG must be given as soon as it is apparent that a financial service will be provided, or is likely to be provided,¹⁶⁶ and if information in the FSG changes, an up-to-date or supplementary FSG must be given before further financial services are provided.¹⁶⁷

¹⁶⁵ Corporations Act, s 941A.

¹⁶⁶ Corporations Act, s 941D(1).

¹⁶⁷ Corporations Act, s 941F.

A FSG must include all of the following information:

- the details of the providing entity (i.e. name, contact details of the entity and who the entity acts for);
- any special instructions on how the client may provide instructions to the entity;
- the kinds of financial products and financial services the entity is authorised to provide;
- any remuneration (including commission) or other benefits that may be received in connection with the provision of the financial service;
- associations or relationships between the advice provider and the issuers of any financial products that might reasonably be expected to be capable of influencing the financial services provided; and
- the dispute resolution system that covers consumer complaints and how to access that system.¹⁶⁸

8.4.2 Purpose of FSGs

The purpose of a FSG is to provide retail clients with key information about the services being offered by a financial services provider and to put them on notice of any conflicts the provider might have through the remuneration and other benefits it may receive and its associations.¹⁶⁹ Where the financial service is personal advice, the FSG and SOA, together are intended to arm consumers with the information they need to make informed decisions in their own interests. However, the PJC in the Ripoll Inquiry concluded that disclosure is not an effective way to protect consumers from harmful or conflicted advice.¹⁷⁰ As I said in Chapter 2 there is no reason to think it is more effective now.

8.4.3 Proposals Paper and stakeholder feedback

While financial advisers did not say FSGs were a major burden, they did say FSGs contributed to the time, cost and volume of documents they are required to prepare and provide to their clients, again whether their clients want them or not. Financial advisers told us that, in their experience, consumers do not read FSGs. This is not difficult to believe.

Consistent with the feedback on SOAs, one industry association observed that FSGs primarily serve to discharge an adviser's disclosure obligations, rather than fulfilling their intended purpose of aiding a consumer to make informed decisions about the financial service (in this case, advice) they are receiving. Another industry association noted that there is unnecessary overlap between the contents of the FSG and the contents of other prescribed documents.

Some people suggested the content requirements for FSGs be reduced, while others suggested the obligation to provide a FSG be removed altogether. Given FSGs are required to be provided by AFS licensees and their authorised representatives whenever they provide a financial service, and not merely when they provide financial product advice, a comprehensive review of the FSG requirements is beyond the scope of the Terms of Reference. Nevertheless, I do think there is merit in undertaking such a review in the future.

As to removing the obligation to provide a FSG when giving financial advice, while I am not persuaded that FSGs are useful in protecting consumers from poor or conflicted advice, they do provide some

¹⁶⁸ Corporations Act, s 942B(2).

¹⁶⁹ Revised Explanatory Memorandum to the Financial Services Reform Bill 2001, paragraph 12.6.

¹⁷⁰ Parliamentary Joint Committee on Corporations and Financial Services (2009), pages 81–82.

important information to consumers, including how to contact the AFS licensee or adviser and how to make a complaint if they receive poor or harmful advice. This information is more likely to be helpful after the advice is provided (for example when the client thinks there is a problem) than before.

I proposed that providers of personal advice could have a choice to either:

- continue to give their clients a FSG in accordance with the existing requirements in the law; or
- make information available on the advice provider's website, at the time the advice is provided, about the remuneration and any other benefits (if any) the provider receives in connection with the financial services they provide and internal and external dispute resolution procedures (and how to access them).

There was widespread support for this proposal, including from advisers and advice licensees. They noted that this flexibility will enable important information to be readily accessible by consumers when they need it, rather than being lost among all of the other information customers and clients are required to be given.

8.4.4 Recommendation

In many ways, FSGs are less difficult to provide than SOAs, because their content does not change based on the content of the advice, and therefore they do not need to be tailored for each client. Notwithstanding this, FSGs do impose a compliance burden insofar as providers need to consider whether clients have an up to date version each time they provide them with a financial service (including financial product advice) and, if they do not, they must provide them with a new or supplementary FSG before providing the service or advice. Giving consumers a document they do not want at a time they do not want it is not in my view useful or helpful.

Given this, and the widespread support for the proposal, I am recommending that providers of personal advice should have the flexibility to decide how they disclose information that is otherwise required to be in a FSG to their clients. This means that advice providers can continue, if they choose to do so, to give their clients a FSG in accordance with the current requirements in the law. Alternatively, advice providers can choose to include information about the remuneration and any other benefits they receive in connection with the financial services they provide and their dispute resolution procedures (and how to access them) on their website.

This means that where advice providers choose to give a FSG to their client, they would continue to be subject to all of the existing requirements for FSGs in the Corporations Act. This recommendation is not intended to allow advice providers to pick and choose the elements of the FSG requirements they comply with. It also recognises that FSGs are required for the provision of all financial services to retail clients and it is not desirable for separate content requirements to apply to providers of advice and providers of other financial services.

Where a provider of personal advice chooses to make the specified information available on their website, this information must be available at the time the advice is provided. This information should be publicly available and readily accessible. As for the FSG requirements, information included on a website should be updated regularly and should be up to date at the time advice is provided to a client. It is not sufficient that information has been included on a website and is subsequently forgotten.

Recommendation 10 – Financial Services Guide

Providers of personal advice should either continue to give their clients a financial services guide or make information publicly available on their website about the remuneration and any other benefits the provider receives (if any) in connection with the financial services they provide and their internal and external dispute resolution procedures (and how to access them).

The objective of this recommendation is to increase the flexibility and efficiency of the regulatory framework, while ensuring that consumers retain access to important information relevant to the financial services they receive.

8.4.5 Costs v benefits

The recommendation is modest, but it will provide advice providers with more flexibility. I am aware that consumers do not generally read FSGs. However, they do contain important information and the recommendation will maintain an obligation for providers to make important information available to their customers and clients. Where the information is on the provider's website it must be continually updated. This too will provide an advantage to a consumer who may well have been given a FSG, but who will not receive an updated FSG unless they receive a further financial service from the same provider.

My intention is for the regulatory framework to be flexible. In this case that means the flexibility for the provider of advice to decide, as part of the services they provide, how they provide information to their customers and clients. This is consistent with the recommendation for SOAs, which again gives providers greater flexibility in how they give advice to their clients. Prescribing these requirements in the law results in templated, compliance-focussed documents, which do not provide consumers with the advice or information they need.

While some stakeholders suggested that consumers should be directed to the website where this information is available, I do not think the law needs to say as much.

8.5 Consent requirements for wholesale clients

8.5.1 Background and current law

I have been asked to consider whether consent arrangements for sophisticated investors and wholesale clients are working effectively for the purposes of financial advice. However, the definitions of retail client and wholesale client and the associated income and asset thresholds are outside the Terms of Reference.

8.5.2 Retail clients and wholesale clients

The Corporations Act defines the recipients of financial product advice and other financial services as retail clients or wholesale clients. The definitions of retail client and wholesale client are particularly relevant for the regulatory framework for financial advice. These definitions are not fixed and someone's status will depend on the financial product to which the financial service they are receiving relates. This means a client might be a wholesale client for the purposes of investment advice but a

retail client for the purposes of advice about general insurance. In any case, the Review, for the most part, is only concerned with the provision of advice to retail clients.

Relevantly, and except when advice relates to superannuation or general insurance, a person is a wholesale client under section 761G of the Corporations Act if any of the following apply:

- the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds \$500,000;
- the financial product, or financial service, is provided for use in connection with a business that is not a ‘small business’;
- the financial product or service is not provided for use in connection with a business and the person acquiring the financial product or service provides a certificate from a qualified accountant, obtained within the prior 2 years, that they have:
 - net assets of at least \$2.5 million; or
 - a gross income for each of the past 2 financial years of at least \$250,000; or
- the investor is a ‘professional investor’.¹⁷¹

In addition, under section 761GA of the Corporations Act a financial product or a financial service in relation to a financial product (for example, financial product advice) is not provided to a person as a retail client (referred to in the heading to the section as a ‘sophisticated investor’) if:

- the product or service is provided by an AFS licensee;
- the product or service is not provided to the client for use in connection with a business;
- the AFS licensee providing the service is satisfied on reasonable grounds that the client has previous experience in using financial services and investing in financial products that allows the client to assess the merits of the product or service, the value of the product or service, the risks associated with holding the product, the client’s own information needs and the adequacy of the information given by the licensee and the product issuers;
- the licensee gives the client a statement about why they are satisfied about these things; and
- the client signs a written acknowledgement before or at the time the product or service is provided that the licensee:
 - has not given the client a product disclosure statement;
 - has not given the client any other document that would have been required to have been given to a retail client; and
 - does not have any other obligations to the client that they would have had if the product or service had been provided to a retail client.¹⁷²

The Corporations Act says that a financial product or financial service is provided to, or acquired by a person as a wholesale client if it is not provided to or acquired by a person as a retail client.¹⁷³

Accordingly, a client is a wholesale client if, among other things, they satisfy any one of the limbs in

171 Corporations Act, s 761G(7).

172 Corporations Act, s 761GA(f).

173 Corporations Act, s 761G(4).

the definition of wholesale client in section 761G or if they are a sophisticated investor under section 761GA of the Corporations Act.

A person who gives personal advice to a retail client must be a relevant provider (that is, meet the professional standards requirements), comply with the best interests duty, and provide the client with a statement of advice and a product disclosure statement for each financial product they recommend. If a retail client is unhappy with the advice they receive, they have access to the AFS licensee's internal dispute resolution arrangements and to AFCA. None of these requirements apply to a person who gives personal advice to a wholesale client and so there is an incentive for financial advisers to deal with wholesale clients. Some advisers only do so. This affects the accessibility of financial advice for clients who do not meet the wholesale client conditions.

If the recommendations in this Report are accepted, the differences between the obligations applying to retail clients and wholesale clients will not be as stark, with important exceptions for whether the adviser must be a relevant provider and whether the client can make a complaint to AFCA about the adviser's advice.

8.5.3 Concerns with the wholesale client classification

Stakeholders had very little to say about the sophisticated investor requirements. This might be because, in the main, those who provide advice to wholesale clients do so on the basis of the assets and income threshold and accountant's certification limb of the definition of wholesale client.

Many stakeholders did tell us the assets and income threshold for the wholesale client test were too low. This is outside the Terms of Reference and so I merely note the threshold amounts have not been reviewed (or even indexed) since they were first introduced in 2001 and so there does appear to be a need to consider whether they are appropriate.

The accounting industry associations also told us that advisers frequently refer clients to their members for the purposes of certifying that they meet the assets and income threshold. They say they worry that in many cases the clients do not understand what protections they will lose as a result of the certification.

Consent arrangements

I am concerned here with the consent arrangements and in particular whether they are working effectively for the purposes of the regulation of financial advice. The short answer to that is 'no'. This is because there is no requirement for a wholesale client under the assets and income threshold limb of the definition to have any of the qualities which make another person eligible to be a sophisticated investor and because they are not required to be told about or to agree to the consequences of being treated as a wholesale client.

Consent for wholesale client status

There is a very important difference between a client who is a wholesale client under the assets and income threshold and a client who is a sophisticated investor. A client is a wholesale client under the assets and income threshold almost by default. While an accountant must certify the client has the assets or income to meet the threshold, the certification turns on a simple question of fact and does not turn on any requirement for the client to understand the consequences of being treated as a wholesale client. A sophisticated investor on the other hand must in the first instance be someone the licensee is satisfied on reasonable grounds is in fact 'sophisticated' and who must agree to be treated as a wholesale client and in so doing they must acknowledge what they are giving up. This difference is undesirable and unwarranted.

8.5.4 Consistent regime and consumer protection

Currently, the risks associated with the classification of clients as wholesale clients under the assets and income test are 2-fold. First, it is not the case that someone who meets the assets and income threshold is in a better position to consider the merits of any financial advice and to weigh the risks than a person who does not. Second, there is nothing in the test which requires the client to be told about the consequences of being treated as a wholesale client or to agree to those consequences.

I am not able to comment on the threshold amounts themselves, but I do think that the Corporations Act should be amended to require both disclosure and consent for wholesale clients under the assets and income limb of the test, in the same way as it does for sophisticated investors.

In doing so, I understand that disclosure and consent are not a perfect solution. There is much research which indicates that disclosure is not an effective means of conveying risks to consumers. Despite this, it remains better than the alternative. It would also remove the discrepancy between the treatment of one group of wholesale clients who are not sophisticated investors and the other group of wholesale clients who are. I appreciate that there are other limbs to the definition of wholesale client. However, in each of those cases the additional consumer protections which are accorded to retail clients are much less likely to be important or relevant.

8.5.5 Recommendation

I am recommending that the Corporations Act be amended so that a client must consent to being treated as a wholesale client under the assets and income threshold. An accountant's certificate would still be required. In order to give their consent the adviser should be required to explain the consequences of being a wholesale client to the client and the client should be required to sign a written acknowledgement before the financial service (including financial product advice) is provided.

I have decided not to recommend an additional requirement that the adviser be satisfied about the client's level of understanding and 'sophistication' because I am not convinced that an adviser could form that view objectively, particularly if for example the adviser is only authorised to provide advice to wholesale clients.

The written consent should explain the important consequences of being treated as a wholesale client, namely:

- the advice provider is not required to be a relevant provider and accordingly will not have to comply with the professional standards;
- the advice provider will not have a duty to give good advice or to act in the best interests of the client under the Corporations Act. However, an adviser will still have duties under the general law – including a duty of care and in the ordinary course a best interests duty;
- the advice provider is not required to give the client a product disclosure statement or financial services guide; and
- the client will not be entitled to complain about the advice under the AFS licensee's internal dispute resolution procedures or to AFCA.

This should also replace the existing content requirements for the acknowledgement provided by sophisticated investors, which currently omits some of the more important consequences.

Recommendation 11 – Consent requirements for wholesale clients

The Corporations Act should be amended to require a client who meets the assets and income threshold and who has an accountant's certificate to provide a written consent to being treated as a wholesale client.

The written consent should contain an acknowledgment that is given before they are provided with a financial product or service that:

- the advice provider is not required to be a relevant provider and accordingly they will not have to comply with the professional standards;
- the advice provider will not have a duty to give good advice or to act in the best interests of the client under the Corporations Act;
- the advice provider is not required to give the client a product disclosure statement or financial services guide; and
- the client will not be entitled to complain about the advice under the AFS licensee's internal dispute resolution procedures or to AFCA.

The existing consent requirements for sophisticated investors should be amended to require a written acknowledgement in the same terms.

The objectives of this reform are to ensure that wholesale clients who meet the assets and income threshold and sophisticated investors are aware of and agree to the protections they lose by not being a retail client.

8.6 Design and Distribution Obligations

I have referred to the DDO regime many times throughout this Report. It represents a fundamental shift in the focus of the regulation of financial services from advice and disclosure to suitable financial products. This is reflected in the new object of Chapter 7 of the Corporations Act which requires 'the provision of suitable financial products to consumers of financial products'.¹⁷⁴

The Terms of Reference ask the Review to consider the design and distribution obligations only insofar as they apply to providers of personal advice. In doing so, I emphasise that, together with the obligation for an AFS licensee to provide financial services efficiently, honestly and fairly, the design and distribution obligations provide an important underpinning to the recommendations in this Report. The early enforcement action ASIC has taken in relation to the design and distribution obligations highlights what a critically important role they will play in protecting the interests of consumers.

8.6.1 Design obligations

The design and distribution obligations in Part 7.8A of the Corporations Act require product issuers to make a TMD for each financial product that can be issued to a retail client. The TMD must describe the

¹⁷⁴ Corporations Act, s 760A(aa).

class of retail clients that comprise the target market for the product. These are the class of retail clients for whom the product is likely to be suitable on the basis of their likely objectives, financial situation and needs. The product issuer is not required to consider the objectives, financial situation or needs of an individual customer. If an appropriate target market cannot be identified for a specific product, the product issuer cannot offer the product for distribution or sale. The product issuer is required to include these details, along with distribution conditions (if any) and information relating to review and monitoring in the TMD.¹⁷⁵

The issuer is also required to monitor and review the outcomes of the design and distribution of its financial products and consider whether changes are required to be made to a product, the way it is being sold or the target market to whom it is being sold. Product issuers must consider the performance of the product and whether it has resulted in poor outcomes for consumers in the target market. In this way, consumers are protected from poor performing or unsuitable products. This is an important requirement.

8.6.2 Distribution obligations

Both product issuers and distributors must take reasonable steps to ensure that the retail distribution of financial products is consistent with the TMD for the products.¹⁷⁶ However, this obligation does not apply to a person who provides personal advice about the financial product.¹⁷⁷ This allows the provider of personal advice to recommend a financial product to a client who is not in the specified target market. The exception acknowledges the gap between what a product issuer might assume about the class of person for whom the product will be suitable and what the adviser knows about their individual client.

8.6.3 Reporting requirements

An issuer of a financial product is also required to include in the TMD the information distributors of the financial product must provide to the product issuer. A distributor includes a financial adviser. This information can include anything determined by the issuer.¹⁷⁸ Distributors are also required to provide a report to the issuer for each reporting period which specifies:

- any significant dealings outside the target market; and
- whether there have been any and, if so, how many complaints they have received about the financial product.¹⁷⁹

ASIC has provided temporary relief from the requirement for a distributor to notify a product issuer that they have not received any complaints during a reporting period.¹⁸⁰ This relief is available until October 2023.

175 Corporations Act, s 994B(5).

176 Corporations Act, s 994E.

177 Corporations Act, s 994A(1).

178 Corporations Act, s 994B(5)(h).

179 Corporations Act, ss 994F(4) and 994F(6).

180 *ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784* amends the operation of the record-keeping and notification obligations in sections 994F(4) and (5) of the Corporations Act (Record keeping and notification obligations).

8.6.4 Proposals Paper feedback

Financial advisers have told us that the design and distribution obligation reporting requirements are onerous and add an additional compliance burden and expense to the conduct of their practices. In the Proposals Paper I suggested that some of the reporting requirements could be removed without compromising the DDO regime and relevantly the information available to product issuers so they continue to be able to monitor the performance of their products. These were the requirements to notify the product issuer of matters specified by the product issuer in the TMD, of significant dealings outside the target market, and 'no' complaints.

The first obligation allows product issuers to impose obligations (which then become legal obligations) on financial advisers (and other distributors) at will. The third creates a compliance burden with no apparent benefit (as is acknowledged by ASIC's relief). The second is somewhat inconsistent with the regime itself and appears to provide limited value to the product issuer (and in turn consumers). The DDO regime specifically acknowledges and permits a financial adviser to recommend a financial product to a client who is outside the target market for the product. This is an acknowledgement of the gap between the adviser's obligation to provide advice that takes into account their client's objectives, financial situation and needs and the product issuer's obligation to design a product for a class of person for whom it is likely to be suitable. There is then no reason to think that because an adviser recommends a financial product to a client outside the target market, the target market or the financial product needs to be reconsidered.

These proposals were welcomed by financial advisers and I have been given no reason to change them.

8.6.5 Personal advice and DDO

As noted above, the distributor of a financial product has an obligation under the design and distribution obligations to take reasonable steps to ensure the distribution of the financial product is consistent with the TMD. However, it does not apply to a person who provides personal advice to a client about the financial product. Currently, most personal advice must be given by financial advisers with a duty to act in the best interests of the client.

If the recommendations in this Report are adopted, more advice will be personal advice and more of that advice will be given by people who are not financial advisers. This would in turn mean the class of person for whom the exception would apply would be expanded, perhaps significantly. Given the importance of the regime I think this would be undesirable.

And so I am recommending that the existing exception to the requirement to take reasonable steps to distribute financial products in accordance with the TMD be restricted to financial advisers (relevant providers) who will continue to have a duty to act in the best interests of their client when they provide advice. This is largely consistent with the scope of the exception now.

Where personal advice is given by someone who is not a financial adviser, the AFS licensee should be required to ensure that their employees only recommend financial products in accordance with the TMD. This is an important consumer protection provision which will stand behind the good advice duty.

Recommendation 12.1 – Design and Distribution Obligations (Distribution Requirements)

Amend the DDO distribution obligations in the Corporations Act to limit the exception to the requirement to take reasonable steps to ensure the distribution of a financial product is consistent with its target market to personal advice provided by relevant providers.

Where personal advice is provided by someone who is not a relevant provider, the AFS licensee should, like any other distributor, be required to comply with the distribution obligations and take reasonable steps to ensure the financial product is only recommended in accordance with the target market determination.

The objective of this recommendation is to ensure that, where personal advice is provided by a person who is not a financial adviser, financial products are distributed to consumers within the target market for the product.

8.6.6 DDO reporting requirements

I am also recommending that the DDO reporting requirements in the Corporations Act be amended to remove the requirements for a financial adviser to:

- report significant dealings outside the target market;
- comply with the additional reporting obligations specified by the product issuer in the TMD; and
- report to the product issuer where there have not been any complaints during the specified reporting period.

I have not recommended that these exceptions apply to anyone else who provides personal advice (a person who is not a financial adviser) because the exceptions follow and are intended to be an extension of the exception for financial advisers from the distribution obligations referred to above.

Despite these changes, all providers of personal advice (including financial advisers) will continue to be required to report the number of complaints received during a reporting period (but only if there have been any), as well as a description of the nature of these complaints to the product issuer.

Recommendation 12.2 – Design and Distribution Obligations (Reporting Requirements)

Amend the DDO reporting requirements in the Corporations Act to remove the requirement for relevant providers to:

- report significant dealings outside the target market to the product issuer;
- comply with the additional reporting obligations specified by the product issuer in the target market determination; and
- report to the product issuer where there have been no complaints during the specified reporting period.

These exceptions will not apply to someone who is not a relevant provider.

All providers of personal advice (including relevant providers) will need to report the number of complaints received during a reporting period (if there have been any), as well as a description of the nature of these complaints to the product issuer.

The objective of this recommendation is to ensure that the reporting obligations under the DDO regime are appropriate for relevant providers and do not impose an unwarranted compliance burden.

Chapter 9 – Conflicted Remuneration

Chapter Summary

- The Corporations Act prohibits the issuer of a financial product giving conflicted remuneration to an AFS licensee or a representative of a licensee and it prohibits an AFS licensee or a representative of a licensee accepting conflicted remuneration.
- Conflicted remuneration is a benefit (monetary or non-monetary) that could reasonably be expected to influence the choice of financial product recommended, or the financial product advice given, by an AFS licensee or a representative of a licensee to a retail client.
- There are a number of exceptions to the ban on conflicted remuneration.

Exceptions (other than insurance)

- The law should be amended to make it clear that benefits given by a client (or authorised to be given by a client) to an AFS licensee or a representative of a licensee are not conflicted remuneration, which would also allow the existing exceptions for the issue or sale of financial products and dealing services to be removed.
- The exception for benefits given for the issue or sale of a financial product where financial product advice has not been provided in the previous 12 months should be removed.
- The exceptions for benefits given to an agent or employee of an Australian authorised deposit-taking institution should be removed.
- The regulation and distribution of time-sharing schemes should be reviewed (including whether the exception to the ban on conflicted remuneration should be retained).

Life insurance

- The quality of life insurance advice has improved between 2017 and 2021, although there remains significant room for improvement.
- The exception to the ban on conflicted remuneration for life insurance should be retained but subject to a new condition that a person who provides personal advice to a retail client about a life risk insurance product obtain the client's informed consent before accepting a commission.
- The current commissions and clawback rates should be retained.

General insurance

- Intermediaries play an important role in the distribution of general insurance products by arranging for the placement and purchase of insurance.
- The exception to the ban on conflicted remuneration for general insurance products should be retained but subject to a new condition that a person who provides personal advice to a

retail client about a general insurance product obtain the client's informed consent before accepting a commission.

Consumer credit insurance

- In 2019, an ASIC report found that consumer credit insurance represents poor value for consumers. Since then, significant steps have been taken to improve the design and sales practices for consumer credit insurance.
- The exception to the ban on conflicted remuneration for consumer credit insurance should be retained (along with the current cap on commissions), but subject to a new condition that a person who provides personal advice to a retail client about consumer credit insurance obtain the client's informed consent before accepting a commission.

Objectives

The objectives of the recommendations in this Chapter are to:

- improve the clarity and consistency of the conflicted remuneration provisions in the law; and
- balance the tension between consumers accessing personal advice about financial products for which they are unwilling to pay a fee and the conflicts associated with commissions and other benefits.

9.1 Conflicted remuneration and the Terms of Reference

9.1.1 What I have been asked to do

Terms of Reference

The Terms of Reference ask me to examine:

- the remaining exceptions to the ban on conflicted remuneration; and
- the effect of the life insurance remuneration reforms on the levels of life insurance coverage.

In undertaking this examination, I keep coming back to the purpose of the Review, namely, to consider how the regulatory framework could better enable the provision of high quality, accessible and affordable financial advice for retail clients. Some people have said there is necessarily a tension between quality on the one hand and accessibility and affordability on the other. I do not think that is necessarily the case. However, there is one exception to this and that is where an adviser receives benefits (usually a commission) from the product issuer. In that case the tension is real.

9.1.2 What we have done

As part of this Review, we considered data from various sources in relation to general insurance and life insurance. This is described in detail in Appendix 4 of this Report.

9.2 Conflicted remuneration

9.2.1 A brief summary of the regulatory framework

The Corporations Act prohibits the issuer of a financial product giving conflicted remuneration to an AFS licensee or a representative of a licensee.³²⁷ It also prohibits an AFS licensee or a representative of a licensee accepting conflicted remuneration.³²⁸ Conflicted remuneration is defined in the Corporations Act broadly as a benefit (monetary or non-monetary) that could reasonably be expected to influence the choice of financial product recommended, or the financial product advice given, by an AFS licensee or a representative of a licensee to a retail client.³²⁹ Since 2018 the ban on conflicted remuneration has also included a benefit given to an AFS licensee or representative in relation to information given to a person about a life risk insurance product or a dealing in a life risk insurance product.³³⁰ In all other cases, a benefit is not conflicted remuneration unless it influences or is capable of influencing financial product advice. That advice can be general advice or personal advice.

There are a number of monetary and non-monetary benefits that are excluded from the definition of conflicted remuneration. This means there are currently benefits given by product issuers to advisers and other distributors of financial products which do influence the financial product advice given to retail clients. They include:

- benefits provided by a client;
- benefits relating to insurance (life insurance, general insurance and consumer credit insurance);
- brokerage and stamping fees;
- benefits relating to dealing and execution services;
- benefits relating to time-sharing schemes; and
- benefits provided to employees and agents of an Australian ADI relating to basic banking products, general insurance products and consumer credit insurance.

There are also exceptions for non-monetary benefits valued at less than \$300 or which relate to education or training and the provision of information technology software or technology services. The full list of exceptions is included in Appendix 4.

9.2.2 Ripoll Inquiry

Like the best interests duty, the ban on conflicted remuneration has its genesis in the collapses of Storm Financial and Opes Prime and the 2009 Ripoll Inquiry which followed. In each case, retail investors were encouraged to borrow to invest in the share market. When the market collapsed in 2008 during the Global Financial Crisis, many investors were unable to meet margin calls. Many lost the homes that secured their loans.

327 Corporations Act, s 963K.

328 Corporations Act, ss 963E(1), 963G(1) and 963H.

329 Corporations Act, s 963A.

330 Corporations Regulations, regs 7.7A.11C and 7.7A.11D.

The PJC in the Ripoll Inquiry Report asked whether the:

... advice about financial products, or the financial products themselves, are responsible for poor investment outcomes. This question is important because the answer dictates whether the focus of regulation needs to be on improving the quality of financial advice, or identifying and restricting the sale of poor financial products.³³¹

The PJC did recommend that ‘margin lending facilities’ be regulated as a financial product within the AFS licensing regime and Chapter 7 of the Corporations Act. Margin lending facilities continue to be the only credit facility treated as such. However, the PJC formed the view that poor and conflicted financial advice was ultimately responsible for the ‘catastrophic’ (Storm Financial) and ‘devastating’ (Opes Prime) outcomes for investors. It went on to recommend that financial advisers have a fiduciary duty to put their clients’ interests first. The PJC then said that payments from product manufacturers to financial advisers were inconsistent with a financial adviser’s proposed fiduciary duty and recommended that they be banned.

9.2.3 FOFA

Following the recommendations of the Ripoll Inquiry, FOFA banned conflicted remuneration, although as noted above, there were a range of benefits excluded from the definition of conflicted remuneration and which therefore could continue to be provided.

In explaining the reason for the conflicted remuneration provisions, the Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 is tentative in saying:

*Product commissions **may** encourage advisers to sell products rather than give unbiased advice that is focused on serving the interests of the clients. Financial advisers have potentially competing objectives of maximising revenue from product sales and providing professional advice that serves the client’s interests.*

*There is **some** evidence that these conflicts affect the quality of advice. The 2006 Shadow Shopping exercise of the Australian Securities and Investments Commission (ASIC) found that advice that was clearly or probably non-compliant was around six times more common where the adviser had an actual conflict of interest over remuneration. The conflict of interest **may** lead to advice that is not compliant and not in the client’s interests.³³²*

The bolding is mine. Commissioner Hayne was less tentative in expressing his views. He said:

The definition of ‘conflicted remuneration’ in the Corporations Act shows why the practice should be prohibited.³³³

331 Parliamentary Joint Committee on Corporations and Financial Services (2009), paragraph 5.2.

332 Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, paragraphs 2.3 and 2.4.

333 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), Volume 1, page 14.

In other words – a person who is paid to sell a financial product cannot be trusted to give advice that is in the best interests of their client. This is because, in Commissioner Hayne’s words: ‘self-interest will almost always trump duty’.³³⁴ ‘Almost always’ leaves room for exceptions.

9.2.4 My conclusions

A small number of stakeholders have argued that all of the remaining exceptions should be removed, in particular the exceptions that allow commissions to be provided. In the main their arguments are based on a belief that commissions are morally repugnant. However, there are many areas in which commissions are a permitted and common form of remuneration and which are not only tolerated but preferred. Commissions paid to mortgage brokers are a relevant example. They allow smaller lenders to distribute their products and in the main borrowers understand them and for the most part like them.

I too worry about the effect commissions and other forms of conflicted remuneration have on the quality of financial product advice. However, my worry is not a sufficient reason to recommend that all of the remaining exceptions be removed. It is necessary to consider them on a case by case basis. I have done so, and with some reservations, I have concluded that there are better reasons than not to retain insurance commissions and a number of the other exceptions.

In the rest of this Chapter, I discuss my recommendation for the client provided benefit exception and then the exceptions which are not related to financial product advice. The first should be amended, the second should be removed. I then discuss the other exceptions which I recommend be removed before coming to those I recommend be retained. I then set out my comments and recommendations for benefits in relation to time-share schemes. Finally, I return to insurance commissions and discuss life insurance, general insurance and consumer credit insurance separately and in more detail to explain why I have recommended that commissions continue to be able to be paid for these products.

9.3 Benefits provided by a client are not conflicted remuneration

9.3.1 Purpose of the conflicted remuneration provisions

The conflicted remuneration provisions are intended to and do prohibit a product issuer providing a benefit to an AFS licensee or its representative which could reasonably be expected to influence the financial product advice they provide to a retail client.³³⁵

It is plain that the conflicted remuneration provisions were not intended to apply when the benefit is provided by the client. The PJC was concerned about the conflicts created by ‘payments from manufacturers’³³⁶ and the Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 referred to ‘product commissions’.³³⁷

334 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), Volume 1, page 3.

335 Corporations Act, s 963K.

336 Parliamentary Joint Committee on Corporations and Financial Services (2009), page 127.

337 Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, paragraphs 2.3, 2.6 and 2.10.

Consistent with this intention, the operative provisions prohibit a product issuer paying conflicted remuneration. They also prohibit an AFS licensee or an authorised representative accepting conflicted remuneration, but do not expressly go on to say ‘that is given by a product issuer’.

Instead, there is an exception to the ban on conflicted remuneration where the benefit is given to an AFS licensee or its representative by a retail client in relation to the issue or sale of a financial product or financial product advice given by the licensee or a representative to the client.³³⁸

This exception is confusing and not only because the provisions are not intended to apply to benefits provided by a client. The first limb (benefits provided in relation to the issue or sale of a financial product) is difficult to reconcile with the primary conflicted remuneration provision to which it is an exception – which bans benefits that influence financial product advice – not benefits which influence the issue or sale of a financial product. The second limb is widely used by advisers and their clients to authorise the deduction of advice fees from a client’s financial product. This is supported by the Explanatory Memorandum, but not, in my view, the text of the provision.³³⁹ It is also the basis of arrangements by which asset-based fees are paid to AFS licensees and their representatives for services that are only loosely connected with financial product advice, and so might be seen as having an avoidance purpose.

9.3.2 Recommendation

In my view, much of the difficulty and some of the sharp practices could be avoided by amending the operative provisions so that the law is clear that payments (or other benefits) provided by clients to AFS licensees or their representatives are not conflicted remuneration under any circumstances. That would be the case whether the payment is a product fee (for example an administration or investment fee), a transaction fee (for example brokerage) or a fee for financial product advice.

Therefore, my first recommendation is that the Corporations Act be amended to clarify that both monetary and non-monetary benefits given by a client to an AFS licensee or a representative of a licensee, for any reason, are not conflicted remuneration. In my view, this could be achieved in one of two ways, which would involve amending:

- the definition of conflicted remuneration in section 963A of the Corporations Act to explicitly exclude benefits given by a client to an AFS licensee or a representative of a licensee; or
- sections 963E(1), 963G(1) and section 963H of the Corporations Act, which specify that an AFS licensee or a representative must not accept conflicted remuneration to go on to say ‘which is given by the issuer or seller of a financial product’. This will clarify that the benefits banned under these provisions are only those given by a product issuer, and not those given by a client.

³³⁸ Corporations Act, s 963B(1)(d).

³³⁹ Section 52 of the Corporations Act which provides that ‘A reference to doing an act or thing includes a reference to causing or authorising the act or thing to be done’ is said to be the legislative basis for the interpretation, but I doubt that a client causes or authorises the payment from their superannuation of an advice fee when they are not able to direct the trustee to pay the advice fee under the SIS Act.

Recommendation 13.1 – Benefits given by a client

Amend the conflicted remuneration provisions in the Corporations Act to explicitly provide that both monetary and non-monetary benefits given by a client to an AFS licensee or a representative of a licensee are not conflicted remuneration.

This means that the prohibition on AFS licensees, or their representatives accepting monetary and non-monetary benefits would only apply to benefits given by a product issuer, not to benefits given by a client.

The objective of this recommendation is to clarify the law by giving effect to the intended outcome of the conflicted remuneration provisions (to ban benefits given by a product issuer), which would remove the need for unnecessary exceptions.

9.3.3 Advice fees paid from products

If the amendment permitting benefits given by a client is made, an exception will no longer be required to permit a client to pay an advice fee from their bank account or credit card. An exception would also not be required where the client is able to direct the custodian or trustee of an investment product to pay an amount to the adviser. This would allow the client who has a custody arrangement with a platform provider outside of superannuation to pay the client's adviser. In all of these cases, the fee would be paid to the adviser by the client or at the direction of the client.

This is not the case for advice fees paid from superannuation. A trustee of a superannuation fund is only able to pay an amount from the fund as a superannuation benefit to the member or as an expense. This is true whether or not the member has satisfied a condition of release and whether or not the member is receiving a pension from the fund. And so, any amount paid from a superannuation fund is, absent an exception in the law, an amount (or benefit) provided by the trustee of the fund and not the member. Therefore, an exception to the conflicted remuneration provisions will continue to be required to permit an advice fee paid from superannuation if they are to be allowed. The client provided benefit exception is relied on now to permit the superannuation fund trustee to pay an advice fee. It is clear that the drafters of the FOFA legislation intended to permit fees for financial product advice to be deducted from superannuation funds, despite the fact the provisions do not say as much.

The Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 states that this provision:

*ensures that 'fee for service' arrangements – where the client is the person paying the adviser – are not conflicted remuneration (even where the client pays a volume-based fee). The provision is intended to exclude from the definition of conflicted remuneration any fee for service paid by the retail client, whether the benefit is given directly by the retail client or is given by another party at the direction, or with the clear consent, of the retail client.*³⁴⁰

340 Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, paragraph 2.27.

ASIC Regulatory Guide 246: *Conflicted and other banned remuneration* states that:

The benefit may be given directly by the client or by another party on behalf of the client if the client has authorised the benefit and if the client has used their own funds to give the benefit.

...

a benefit has been authorised by a client if the benefit is given at the client's direction or with their clear consent.³⁴¹

The difficulty with this statement for a fee paid from a superannuation fund is that a trustee is not able to lawfully pay a fee from the fund 'on behalf of' a member and a member is not lawfully able to 'authorise' the payment of an amount from the fund, other than as a superannuation benefit. The SIS Act prohibits a trustee acting on the direction of a member other than in limited circumstances. Those circumstances do not currently extend to paying a fee to the member's financial adviser.

9.3.4 Recommendation for client directed payments from superannuation funds

I have recommended that advice fees continue to be able to be paid from superannuation funds provided the advice relates to the client's superannuation (Recommendation 7). So I also recommend that the exception for benefits given by the client for financial product advice be replaced with a specific exception which permits a superannuation fund trustee to pay an AFS licensee or its representative a fee for personal advice where the client directs the trustee to pay the advice fee from their superannuation account.

It is not appropriate and it was never intended that the exception be able to be used to pay for general advice or other services provided to the member. This should be clear in the terms of the exception.

I do not think the exception is required for any other financial product other than superannuation. However, this is a matter that should be considered further, particularly in respect of trusts which are not custodial arrangements, as part of consultation on any Bill to implement this recommendation.

Recommendation 13.2: Client directed payments from superannuation funds

Remove the exception in section 963B(1)(d)(ii) and 963C(1)(e)(ii) of the Corporations Act and replace it with a specific exception that permits a superannuation fund trustee to pay an AFS licensee or its representative a fee for personal advice where the client directs the trustee to pay the advice fee from their superannuation account.

The objective of this recommendation is to enable clients to authorise the payment of an advice fee from their superannuation account, where it relates to their interest in the fund.

³⁴¹ ASIC (2020b), Regulatory Guide 246: *Conflicted and other banned remuneration*, paragraphs 246.54 and 246.57.

9.3.5 Benefits that do not influence advice are not conflicted remuneration

Before leaving the topic of client provided benefits, the conflicted remuneration provisions are intended to apply to benefits which could influence financial product advice. The exceptions to the definition of conflicted remuneration are then only required if and to the extent they could reasonably be expected to influence financial product advice given to a retail client. Yet, some of the exceptions apply to benefits given by the client in relation to the issue of financial products or for dealings in financial products.

I am recommending the repeal of the exceptions for monetary and non-monetary benefits given in relation to the issue or sale of financial products in sections 963B(1)(d)(i) and 963C(1)(e)(i) of the Corporations Act and again for monetary benefits given by the client in relation to the provider dealing in a financial product on behalf of a client in regulation 7.7A.12E of the Corporations Regulations. They are in my view unnecessary and proceed on the basis of a misunderstanding, or perhaps a nervousness about the reach of the conflicted remuneration provisions. In any case, they can all be removed if the operative provisions or the definition of conflicted remuneration (Recommendation 13.1) are amended to make it clear that they do not prohibit a client giving monetary or non-monetary benefits to an AFS licensee or representative for any service – advice or dealing.

During consultation, there was no disagreement that these exceptions should not be necessary. Concerns were nevertheless raised that removing them might lead to unintended consequences. The examples raised during consultation all involved benefits given by a client (for example, a brokerage fee paid by the client on the purchase of shares). These consequences are therefore answered by the recommendation to permit all benefits given by a client to an AFS licensee or their representative (Recommendation 13.1). If this recommendation is accepted, it is difficult to conceive of any unintended consequences following from removing the current exceptions for benefits relating to the issue of financial products or dealing services.

Recommendation 13.3: Removing exceptions for benefits given by clients for issue, sales or dealings in financial products

If the recommendation that permits benefits (monetary and non-monetary) given by clients to an AFS licensee or a representative is accepted, the following exceptions to the conflicted remuneration provisions are no longer required and should be removed:

- section 963B(1)(d)(i) of the Corporations Act – monetary benefits given by the client for the issue or sale of a financial product;
- section 963C(1)(e)(i) of the Corporations Act – non-monetary benefits given by the client for the issue or sale of a financial product; and
- regulation 7.7A.12E of the Corporations Regulations – monetary benefits given to the provider by a retail client in relation to the provider dealing in a financial product on behalf of the client.

The objective of this recommendation is to remove what are likely now redundant exceptions and which will not be required if the conflicted remuneration provisions in the Corporations Act are amended as recommended to clarify that both monetary and non-monetary benefits given by a client to an AFS licensee or a representative of the licensee are not conflicted remuneration.

9.4 Other exceptions that should be removed

9.4.1 Advice has not been provided in the previous 12 months

This is an exception for a benefit given to an AFS licensee or its representative in relation to the issue or sale of the financial product to a person where the licensee or representative has not provided financial product advice in relation to the product (or that class of product) to the client in the 12 months before the benefit is given.³⁴²

This exception is anomalous and should be removed. It appears to have been included on the basis that it is extremely unlikely that a benefit given more than 12 months after advice has been given could in fact influence the advice provided. That is very likely to be true, and so it is difficult to conceive of circumstances in which this exception has any work to do.

Feedback on this proposal during consultation was limited, and again largely focused on possible unintended consequences of removing this exception, although it was noted that the use of this exception was not likely to be widespread.

Even if this provision does currently have work to do, there is no reason for saying that the ordinary rule should not apply – if it is a benefit which could reasonably influence the financial product advice given to the client, such that it would satisfy the definition of conflicted remuneration (but for the exception), it should be treated as such, regardless of the length of time that passes between when the advice is provided and when the benefit for the issue of the financial product is given. The exception should be removed.

³⁴² Corporations Act, s 963B(1)(c).

Recommendation 13.4: Removing the exception for the issue of financial products where advice has not been provided in the previous 12 months

Remove the exception in paragraph 963B(1)(c) of the Corporations Act, which provides for monetary benefits given for the issue or sale of a financial product where the AFS licensee or representative has not given financial product advice about the product (or class of product) for at least 12 months prior to the date the benefit is given.

The objective of this recommendation is to ensure the consistent operation of the conflicted remuneration provisions by providing that a benefit is conflicted remuneration (and therefore banned) if it could reasonably influence the financial product advice regardless of the length of time that has passed between when the financial product advice is provided and the benefit for the issue of a financial product is given.

9.4.2 Benefits given to agents and employees of ADIs

The conflicted remuneration provisions prohibit employers providing conflicted remuneration to their employees.³⁴³ However, there are exceptions for monetary and non-monetary benefits given to an agent or employee of an Australian ADI if access to the benefit is in whole, or in part, dependent on the agent or employee recommending a basic banking product, a general insurance product or consumer credit insurance.³⁴⁴

The Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 says:

*The Bill provides an exception from the ban on conflicted remuneration for arrangements where employees of an ADI (or of an agent of an ADI) advise on and sell basic banking products. This entitles an employee to receive sales incentives from their ADI employer, even where it is volume based. However, if the employee provides financial product advice on financial products other than basic banking products, either in combination with or in addition to advice provided on basic banking products, the receipt of a benefit will be considered conflicted remuneration. This will encourage customer service specialists, who wish to continue receiving volume or sales bonuses, to focus on providing advice on basic banking products only.*³⁴⁵

And so while the Explanatory Memorandum describes the exception, it provides no real explanation for why the exception is necessary or desirable. The exception was later expanded so it applied also to the sale of general insurance and consumer credit insurance.³⁴⁶

Commissioner Hayne pointed out that inconsistencies in the law are undesirable. In this case, it appears the exception was the result of successful lobbying by stakeholders rather than any necessity

343 Corporations Act, s 963J.

344 See Corporations Act, s 963D and Corporations Regulation, reg 7.7A.12H.

345 Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, paragraph 2.52.

346 See the *Corporations Amendment (Financial Advice Measures) Act 2016*.

or benefit to consumers. In my view it is not desirable to treat employees of banks differently to employees of other financial institutions.

This was a recommendation of the Sedgwick Report in 2017 which stated:

One such remuneration practice is the linking of the size of a variable reward payment directly to the achievement of sales targets or similar measures such as cross sales or referrals. The effect of this practice is that sales success is rewarded irrespective of performance against other measures such as customer oriented measures. The risk is that staff or other observers interpret this as a signal that ‘only sales matter’, or ‘sales matter most’, even when staff must demonstrate certain minimum standards of behaviour towards customers to qualify for any incentive payment at all. This risk is accentuated if the workplace culture is heavily sales oriented, which some banks concede is likely to be the case after many years in which sales performance has been highly valued and rewarded.³⁴⁷

I was told that the Sedgwick Report has not been broadly adopted by all Australian ADIs, as it sought to address bad behaviour among listed banks which used aggressive sales targets and led to poor customer outcomes. Concerns were also raised that the removal of this exception could affect the ability of non-listed ADIs to attract and retain staff.

While I acknowledge these concerns, I remain of the view that these exceptions are anomalous and should be removed. This would merely put Australian ADIs in the same position as all other employers. The removal of these exceptions would not prevent ADIs providing their employees with performance-related benefits and incentives under a balanced scorecard approach that includes a broad range of criteria. Also, Australian ADIs, like other employers, can continue to give benefits for the issue or sale of general insurance products and consumer credit insurance, under the remaining exceptions to ban on the conflicted remuneration, and so in practice, this recommendation would only affect benefits given in relation to basic banking products.

Recommendation 13.5: Exception for agents or employees of Australian authorised deposit-taking institutions

Remove the exceptions in section 963D of the Corporations Act and regulation 7.7A.12H of the Corporations Regulations for benefits given to an agent or employee of an Australian authorised deposit-taking institution for financial product advice about basic banking products, general insurance products or consumer credit insurance.

The objective of this recommendation is to ensure the consistent operation of the conflicted remuneration provisions by placing agents and employees of Australian ADIs in the same position as employees of other financial institutions.

347 Sedgwick, S (2017), *Retail Banking Remuneration Review*, page 13.

9.4.3 Recommendations for exceptions that should be retained

Insurance commissions

I have recommended that the exceptions for commissions paid to AFS licensees or their representatives in connection with the issue or sale of general insurance products, life risk insurance products and consumer credit insurance be retained. My reasons and the additional obligations that will attach to the provision of these commissions are set out in subsequent sections of this Chapter.

The other exceptions which should be retained

There is no evidence of any harm being done by the exceptions for the following non-monetary benefits given to an AFS licensee or a representative of a licensee:

- benefits valued at less than \$300 where identical or similar benefits are not given on a frequent or regular basis;
- benefits which have a genuine education or training purpose; or
- benefits which involve the provision of information technology software or support.³⁴⁸

With the exception of those stakeholders who have called for the removal of all exceptions, most stakeholders have urged me to retain these exceptions. They say these benefits provide real value to financial advisers and point out that none of these benefits provide a direct monetary incentive which are the main source of consumer harm.

We have also been told the education and training exception serves an important function in providing financial advisers with access to professional development relevant to their area of specialisation. Seventy-two per cent of respondents to the Review's survey of financial advisers indicated that they had received at least some education or training from product issuers, while 58 per cent reported having received information technology software and support.³⁴⁹

It is questionable whether any of these benefits meet the definition of conflicted remuneration at all, and even if they do the benefits relating to education and training and information technology software and support are likely to positively contribute to the quality of advice provided to consumers rather than to detract. I do not think there is any strong reason to remove them.

I have also not seen any evidence that leads me to think the exceptions relating to advice and dealings in securities: stamping fees and brokerage – are not, in general terms, an appropriate and fair way to remunerate advisers for their services.

Similarly, the exception for the sale of a financial advice business should remain. It allows an adviser who receives trailing commissions for life risk insurance products and even ongoing advice fees (with the consent of the client) to transfer those assets as part of the sale of the advice business for consideration. In my view, if those payments can lawfully be made (as they can), there is no reason for saying the adviser should not be able to transfer them for a purchase price.

I am therefore recommending that the following exceptions to the ban on conflicted remuneration be retained:

348 Corporations Act, ss 963C(1)(b), (c) and (d).

349 See Appendix 3, the Review's Financial Adviser Survey (Question 38). In response to Question 41, 29 and 33 per cent of respondents, respectively, also stated that removing the exception for genuine education or training and IT software and support would impact their ability to work as an adviser.

- section 963C(1)(b) of the Corporations Act – non-monetary benefits valued at less than \$300 and where identical or similar benefits are not given on a frequent or regular basis;
- section 963C(1)(c) of the Corporations Act – non-monetary benefit has a genuine education or training purpose;
- section 963C(1)(d) of the Corporations Act – non-monetary benefit involves the provision of information technology software or support;
- regulation 7.7A.12B of the Corporations Regulations – monetary benefit given as a stamping fee to facilitate an approved capital raising;
- regulation 7.7A.12D of the Corporations Regulations – monetary benefit consists of a brokerage fee; and
- regulation 7.7A.12EA of the Corporations Regulations – monetary benefits given as part of the sale of all, or part, of an AFS licensee, or their representative’s, financial advice business.

9.4.4 Time-sharing schemes

There is an exception for benefits provided in relation to time-sharing schemes. Interests in a time-sharing scheme are financial products and therefore subject to AFS licensing and Chapter 7 of the Corporations Act. This means that a recommendation to acquire an interest in a time-sharing scheme is financial product advice to which the obligations in the Corporations Act also apply. However, they are unusual financial products because their purpose is to provide holders with holiday accommodation. They are not designed for an investment purpose or to manage risk (see the general definition of financial product).³⁵⁰ Interests in time-sharing schemes are sold by people who are paid commissions, with the attendant problems.

ASIC Report 642 Timeshare: consumers’ experiences found that consumers are poorly served by buying interests in the schemes.³⁵¹ Many of the identified problems are problems with the product itself (or the operator) and so I worry that a recommendation which only addresses its distribution would not adequately address the risks to consumers.

This ASIC Report suggests there is a real risk of consumer harm caused by a number of aspects of the sales process:

*Sales presentation – the environment in which consumers purchase the timeshare membership. Consumers spend large sums of money on a purchase they rarely expect to make and enter into ongoing financial commitments without full understanding and under time pressure. The social norms of the sales environment (e.g. the other couples who are also attending the presentation) influenced participants and, in some cases, caused them to get caught up in the excitement or not question their purchase decision.*³⁵²

This was quoted in a recent decision of the Federal Court, which found that the operator of a time-sharing scheme had breached its obligations to ensure that its representatives complied with the best interests duty and related obligations, by allowing its financial advisers to recommend that

350 The general definition of *financial product* is in section 763A of the Corporations Act.

351 ASIC (2019c), Report 642: *Timeshare: Consumers’ experiences*.

352 ASIC (2019c), paragraph 25.

consumers invest in the time-sharing scheme despite this advice not being in the clients' best interests and not being appropriate to their circumstances.³⁵³

Considering time-sharing schemes more broadly is outside my Terms of Reference and so I recommend the Government undertake a separate review of time-sharing schemes and their distribution to determine whether the regulatory framework for time-sharing schemes under Chapter 7 of the Corporations Act is appropriate. As part of that review, consideration should be given to whether the exception to the ban on conflicted remuneration for time-sharing schemes should be removed.

Recommendation 13.6: Time-sharing schemes

The Government should undertake a separate review of time-sharing schemes and their distribution to determine whether the regulatory framework for time-sharing schemes under Chapter 7 of the Corporations Act is appropriate. As part of this review, consideration should be given to whether the exception to the ban on conflicted remuneration for time-sharing schemes should be removed.

The objective of this recommendation is to ensure that there is a more holistic consideration of time-sharing schemes, their regulation and distribution, in light of concerns raised about consumer harm.

9.5 Life insurance

9.5.1 A bit of background

Life insurance cover is provided under a policy (a contract) issued by the life company to the policyholder for the provision of a benefit (the sum insured) on the death, total and permanent disablement, temporary disablement, or incidence of major illness of the life insured.

Sometimes the policyholder is also the life insured. Sometimes the policyholder is a third person, for example the trustee of a superannuation fund or an employer. Cover can be provided under an individual policy (a single contract per life insured) or a group policy (a single contract with multiple lives insured).

There are a number of different types of life cover that are available. I have specifically considered the 4 main categories of life insurance products, namely:

- life insurance (or death cover) – which provides a lump sum to the insured's beneficiaries in the event of the insured's death;
- total and permanent disability insurance (TPD) – which provides a lump sum to the insured if they become permanently disabled;

353 *Australian Securities and Investments Commission v Ultiqa Lifestyle Promotions Limited (in liq) (No 2)* [2022] FCA 1228, at paragraph 29.

- individual disability income insurance (or income protection) – which provides a regular income to the insured if they are unable to work due to serious sickness or injury; and
- trauma cover – which provides a lump sum to the insured if they are diagnosed with a major illness.

As at 30 June 2022, APRA data on the number of lives insured and the collective premiums for each of the 4 main cover types (across all of the distribution channels – retail, direct and group) were as follows:

Table 9.1: Number of lives insured and the collective premiums³⁵⁴

	Lives insured	Total Premiums paid (\$)
Life (death) cover	13.6 million	\$6 billion
TPD cover	8.9 million	\$3.9 billion
Income protection	5.3 million	\$5.6 billion
Trauma cover	1 million	\$1.6 billion

9.5.2 Distribution

Life insurance is issued through the following distribution channels:

- direct distribution by the life companies;
- group cover provided by superannuation funds and banks; and
- financial advisers.

Unlike some other financial products, life insurance products vary with the distribution channel. They have different terms and conditions and different premiums depending on how they are sold.

Direct life insurance is generally sold with only general advice or factual information provided at the point of sale. As for other financial products, general advice about life insurance products is limited to information about the life insurance product and its features and benefits and does not take into account the customer’s objectives, financial situation or needs. Direct life insurance products can be underwritten or have guaranteed acceptance (where the consumer meets defined eligibility criteria) and can have a range of exclusions and limitations.³⁵⁵

Superannuation funds that offer a default superannuation product (a MySuper product) must offer default death cover and TPD cover to members with a superannuation balance of more than \$6,000 and who are over 25 years of age. This cover is provided under a group policy. Cover will automatically be provided to eligible members without underwriting. Again the terms will be simple with little or no capacity for special conditions and relatively modest sums insured. Superannuation fund trustees can also cancel or change the terms of group policies at any time.

Most superannuation funds also offer additional cover – being higher sums insured and sometimes temporary disablement (or income protection) cover. Some funds will offer this additional cover under group policies, others under individual policies. In practice the divide is between industry superannuation funds (which offer group policies) and retail superannuation funds (which offer

354 APRA (2022b), *Life insurance claims and dispute statistics* June 2022.

355 ASIC (2018), REP 587: *The sale of direct life insurance*.

individual policies). This distinction is important because commissions can be paid on individual policies, but not on group policies.³⁵⁶

Life insurance distributed by financial advisers will usually be underwritten and can include riders (which are provisions that add benefits or amend the coverage or basic terms of a basic insurance product) and terms and conditions that reflect the risks of the individual.

We have heard from life insurers that the intermediated channel (life insurance policies sold through a financial adviser) provides benefits to consumers and insurers that may otherwise not be possible to replicate through other channels.

In short, life insurance sold through different channels tends to serve different consumer needs. This is relevant to the consideration of commissions.

9.5.3 Life insurance reform in Australia

In 2014, ASIC released *Report 413: Review of Retail Life Insurance Advice*, which identified a strong connection between high upfront commissions, policy lapse rates and poor consumer outcomes.³⁵⁷

In response to ASIC's report, the Government asked the industry to review its remuneration practices in retail life insurance. This review, which was led by Mr John Trowbridge, recommended a combination of level commissions along with a fixed initial advice payment paid to the adviser on a per client basis (no more than once every 5 years) to address the issues of poor quality advice, churn and misaligned incentives identified in the ASIC Report.³⁵⁸

The Government also commissioned the Financial System Inquiry (FSI), chaired by Mr David Murray AO, which recommended replacing up front commissions with level commissions to achieve better alignment between consumer and adviser interests, reduce incentives for policy churn and improve the quality of advice on life insurance.³⁵⁹

9.5.4 Life Insurance Framework

In response to these reviews, legislation was enacted which gave ASIC the power to set maximum commission levels ('acceptable benefit ratios') and clawback arrangements ('acceptable repayments').³⁶⁰

The Life Insurance Framework (LIF) reforms narrowed the benefits that could be given in relation to life insurance. They placed caps on the commission that could be paid. Life companies can either pay a level commission for the life of the policy or an initial commission of 60 per cent of the new business premium and an ongoing commission (trail commission) of 20 per cent of the premium. This is subject to an obligation for the adviser to refund any commission if the policy is cancelled within the first

356 Corporations Act, s 963B(1)(b)(ii).

357 ASIC (2014), REP 413: Review of retail life insurance advice.

358 Trowbridge, J (2015), Review of Retail Life Insurance Advice Final Report.

359 Australian Government the Treasury (2014), *Financial System Inquiry Final Report*.

360 *Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017*. The commission and clawback rates are currently prescribed in ASIC Corporations (Life Insurance Commissions) Instrument 2017/510.

2 years after the policy is issued. The reforms also apply to benefits that influence the provision of information or a dealing (arranging for the issue of the product) in a life insurance product.³⁶¹

During consultation on the Issues Paper, we were repeatedly told by life insurers and advice providers that the LIF reforms have been effective in better aligning industry incentives and consumer interests, reducing policy churn and improving the quality of life insurance advice. And many called for the retention of the existing commission and clawback rates. Some called for the upfront commission rates to be increased to 80 per cent.

The assessment of the life insurance advice files indicates that there has been some improvement in the quality of life insurance advice. Compliance with the best interests duty and related obligations has increased from 37 per cent to 58 per cent between 2017 and 2021. There remains significant room for improvement. The incidence of consumer detriment arising from the advice has decreased from 12 per cent in 2017 to 7 per cent in 2021.

On the other hand, consumer associations and superannuation industry associations argued for the removal of all of the remaining exceptions to the ban on conflicted remuneration, in particular life insurance commissions, on the basis that they create an incentive for advisers to sell potentially unsuitable life insurance to consumers, and that the LIF reforms are insufficient to eliminate this conflict.

9.5.5 Commissioner Hayne's views

In the Royal Commission Final Report, Commissioner Hayne said:

I doubt that a complete ban on conflicted remuneration in respect of life insurance products would lead to significant underinsurance. At the time of writing, the overwhelming majority of life insurance policies in Australia are held through superannuation funds. As at August 2017, more than 70% of Australian life insurance policies were held in this way. While it may not follow that every Australian who holds a life insurance policy through a superannuation fund has the same level of cover that he or she would be advised was appropriate on consulting a financial adviser, I am not convinced that a move away from commissions for life insurance products would see large numbers of Australians without an appropriate level of life insurance.

...

any decision that commissions should continue to be paid and received in relation to life insurance products should be based on clear evidence that the harm that would flow from abolishing commissions would outweigh the harm that already flows from allowing this form of conflicted remuneration to continue.³⁶²

³⁶¹ Corporations Act, pt 7.7A, div 4, sub-div 1 applies to benefits in relation to life risk insurance products that are conflicted remuneration.

³⁶² Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019) Volume 1, page 188.

And he went on to make Recommendation 2.5:

When ASIC conducts its review of conflicted remuneration relating to life risk insurance products and the operation of the ASIC Corporations (Life Insurance Commissions) Instrument 2017/510, ASIC should consider further reducing the cap on commissions in respect of life risk insurance products. Unless there is a clear justification for retaining those commissions, the cap should ultimately be reduced to zero.

9.5.6 Relevant changes since the Royal Commission

The Royal Commission concluded its work in February 2019. Since then there have been significant changes to life insurance, particularly for group insurance. The Protecting Your Superannuation legislation prohibits funds providing default cover to members who are under 25 or members with low account balances and requires cover to be cancelled (subject to the member opting out) if contributions are not made to their accounts for more than 16 months or if their account balance is below \$6,000.³⁶³ In addition, superannuation fund trustees must not provide insurance cover that will inappropriately erode superannuation balances. The short-lived Insurance in Superannuation Code of Practice said that a premium which was more than one per cent of a member's income would have that effect.

And so, fewer people have default death and TPD cover in superannuation than they did before the Royal Commission.

Table 9.2: Number of lives insured under group insurance³⁶⁴

	2018	2021	Percentage Difference
Life (death) cover	13,299,000	8,576,000	Decrease by 36%
TPD cover	11,999,000	7,674,000	Decrease by 36%
Income protection	5,033,000	3,865,000	Decrease by 23%

Consumers who have group insurance policies often have modest sums insured (which we have been told are inadequate for many people) when compared to those with life insurance policies purchased through a financial adviser (retail life insurance).

Table 9.3: Difference in the average sum insured between group insurance and retail life insurance (for the year ending 31 December 2021)³⁶⁵

	Retail policy purchased through a financial adviser	Group insurance policy	Percentage Difference
Life (death) cover	\$782,319	\$218,908	72%
TPD cover	\$840,766	\$187,051	78%
Income protection	\$7,752	\$3,600	54%

363 Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019.

364 Data sourced from APRA (2022b).

365 Data sourced from APRA (2022b).

Fewer people also have a retail life insurance product (purchased through a financial adviser) and the average premium for these products has increased between 2018 and 2021.

Table 9.4: Number of lives insured and the average premiums (retail life insurance)

	2018		2021	
	Number of lives insured	Average premium	Number of lives insured	Average premium
Life (death) cover	1,994,000	\$1,578	1,621,000 (19% decrease)	\$1,939 (23% increase)
TPD cover	1,177,000	\$1,073	972,000 (17% decrease)	\$1,488 (39% increase)
Income protection	911,000	\$2,894	805,000 (12% decrease)	\$3,732 (29% increase)
Trauma cover	826,000	\$1,697	752,000 (9% decrease)	\$2,025 (19% increase)

9.5.7 Under insurance

We have been provided with reports commissioned by the industry or their associations which say that Australians are under insured – both by the number who hold life insurance and for those that do, the amount of cover. These same reports refer to the importance of insurance for individuals, their families and the community. They also discuss the effect removing commissions would have on under insurance. For example:

- In 2022, NMG Consulting, commissioned by the Financial Services Council, concluded that there are an estimated one million Australians who are under insured for death and TPD cover, and approximately 3.4 million who are under insured for income protection. NMG also estimated that removing commissions would reduce the sale of advised life risk insurance products by 60 per cent (and increase lapse rates). This would subsequently result in a 32 per cent decline in the overall number of in-force advised life risk policies by 2027, significantly increasing the under insurance gap.³⁶⁶
- In 2017, a joint study conducted by the Financial Planning Association of Australia and Griffith University came to the conclusion that under insurance is not only an issue for individuals, but can also lead to greater pressure on government expenditure. The study found that under insurance can lead to decreased tax revenue and can increase reliance on social welfare where insufficient insurance is held to maintain an income after tax, mortgage repayments and childcare expenses.³⁶⁷

While I am mindful that this research has been commissioned by those with an interest in maintaining life insurance commissions, it is the best information we have and I accept that life insurance is important.

³⁶⁶ NMG Consulting (2022), *Australia’s Life Underinsurance Gap: Research Report*, pages 19 and 27.
³⁶⁷ Driver et al. (2017), *Insurance literacy in Australia: Not knowing the value of personal insurance*, page 58.

9.5.8 Role of financial advisers

We have also been provided information showing that financial advisers continue to play an important role in ensuring consumers are able to access financial product advice about life insurance.

The 2015 Review of Retail Life Insurance Advice found that life insurance is generally poorly understood and complex. Benefits, options, conditions, exclusions and premiums can all be different across different products. This was contrasted with general insurance where it found the products are well understood, have a short duration and sales are essentially demand driven. This review concluded that an intermediary is necessary to assist consumers make decisions about life insurance.³⁶⁸

There is no doubt that advice can be critical for consumers in obtaining a suitable type and amount of cover. I have been told and I accept that the cost of providing advice has increased and the number of life risk advisers has declined. This alone is not a reason to recommend that commissions continue. However, I have been asked to recommend changes that assist consumers access affordable financial advice.

9.5.9 Advice fees

We have been told (just as the PJC was in 2009 and Treasury was in 2012) that consumers will not pay a fee for advice about life insurance, although I note that some consumers do. It also seems likely that more consumers would be willing to do so if commissions were not able to be paid. Of course that has not been tested and we have been told (and I accept) that, given a choice between a commission and an advice fee, many consumers would choose a commission.

9.5.10 Commissions are justified in all of the circumstances for life insurance

On balance therefore, I have formed the view that the exception to the ban on conflicted remuneration for commissions paid in connection with the issue or sale of life risk insurance products continues to be justifiable. The quality of life insurance advice provided by advisers improved between 2017 and 2021 (although there is still much room for further improvement) and there is a real risk that fewer people would get that advice if commissions were banned.

Nothing we have seen suggests that life insurance advice is of a poorer quality than advice on other topics and nothing we have seen suggests that financial advisers are recommending life insurance in circumstances where the client will not benefit from holding life insurance. Although I think both of these things should be tested by sampling of advice across life insurance and investment products from time to time. The LIF reforms also mean all life insurers pay the same rate of commission and so there is less incentive for an adviser to recommend a policy issued by one insurer over another. This is helpful.

Commissions cannot be paid on group cover in superannuation and so there is an incentive for advisers to recommend individual policies (inside or outside super) on which commission can be paid rather than increasing (for example) the sum insured under a group policy. However, as noted above, the benefits that are provided under group policies and individual policies are different and so it is not the case that the former will necessarily be a more suitable option than the latter. We have also been provided with evidence that group cover can be more expensive than individually underwritten cover. There remains a real risk that advisers will recommend policies with higher premiums or that they will recommend higher sums insured than a client needs. This is a risk that is mitigated by the design and

³⁶⁸ Trowbridge, J (2015), page 15.

distribution obligations which require life companies to design their products for customers and not for the advisers who distribute them. Nevertheless, it is a risk which should be monitored by advice licensees and, from time to time, ASIC.

9.5.11 Increasing commissions

We have also been told the cost of providing advice will often exceed the upfront commission. We are then told that trail commission is vital for the viability of adviser practices. At the same time, we have been told that advisers are reluctant to provide advice to younger clients for whom lower premiums would be payable (and consequently a lower commission would be received). And so some stakeholders have argued for the current caps on upfront commissions to be increased and some have argued that a minimum commission be paid, irrespective of the premium.

Either option would make it more financially viable for advisers to provide advice about life insurance and therefore could increase the accessibility of advice about life insurance. However, both options would increase the cost to the life company and so it is difficult to see how either option would not have the effect of increasing premiums. I do not think it would be desirable for commissions to increase. However, while I have not recommended that life insurance commissions be banned, I do think it is preferable for consumers to pay a fee for advice about life insurance, like they must for other financial products.

The recommendations I have made in this Report will make it easier and less costly for advisers to provide advice and I hope encourages greater innovation and creativity in the way advice is provided to customers and clients. It will also help life companies to provide personal advice to their customers about life insurance. In this context, I encourage advisers to think more about how they can encourage their clients to pay a fee for advice about life insurance, just as they do for advice about superannuation and other investments.

9.5.12 Recommendation

Retain LIF commissions

For the reasons set out above and with one condition, I am recommending that the conflicted remuneration provisions in the Corporations Act for benefits provided in respect of life insurance remain as they are. This includes retaining the current LIF levels for commissions and clawbacks.

Condition

The condition to this is that the provider of personal advice to a retail client about a life risk insurance product must explain to their client that they will be paid a commission if the client decides to buy the product recommended by the adviser and they must ask for the client's consent to accept the commission. If the client does not consent then the adviser can agree to provide the advice for a fee paid by the client or they can decline to give the advice and the consumer must find another way to purchase their life insurance, if they decide to do so (for example, by finding an adviser who is willing to provide the advice for a fee or by contacting a life insurer directly).

Special treatment

During consultation some stakeholders suggested the consent requirement should not apply equally to all intermediaries, for example that it should not apply to life underwriting agencies, who act on

behalf of the insurer to issue the life insurance product, rather than on behalf of the consumer. To this I say that informed consent is required in all situations where:

- the provider provides personal advice to a retail client in relation to a life risk insurance product; and
- the provider expects to receive a commission in connection with the issue or sale of the life insurance product.

Considerations about whether the advice provider is an insurer intermediary or a consumer intermediary are not relevant for this purpose. The requirement should apply consistently to all providers of personal advice.

Why consent is in all the circumstances desirable

In most cases, I expect that the provider of personal advice would be a financial adviser (relevant provider). As discussed in previous Chapters, a financial adviser will have a fiduciary obligation to act in the best interests of the client in relation to the advice provided. The prospect of receiving a commission creates a conflict for the adviser and under the general law they must have the client's consent before they can accept the commission.

In *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 Justices McHugh, Gummow, Hayne and Callinan JJ said:

*... the fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is 'a conflict or a real or substantial possibility of a conflict' between personal interests of the fiduciary and those to whom the duty is owed.*³⁶⁹

I think the Corporations Act should reflect the position articulated by the High Court. The law requires the beneficiary of a fiduciary obligation (the client) to provide their consent to the receipt of a personal benefit (the commission) by the fiduciary (the adviser). The client is then in a position to understand how the adviser's personal interest might compromise how they discharge their obligations to the client in providing advice that is in the client's best interests. Of course, the Corporations Act could, as it does now, say that disclosure is sufficient. While I acknowledge that it is possible that consumers might be coerced into providing consent, that they may not understand the consequences of doing so or that it might have the effect of increasing the client's trust in the adviser it is, in my view better than mere disclosure.

What is required for consent

Having said this, consent is not intended to be an onerous obligation. Instead, it is intended to foster an open conversation between the adviser and their client. For that reason, I do not recommend any form of prescription for the consent beyond that it be informed and recorded. I certainly do not require consent to require the creation of a new form, in the manner of consent requirements for ongoing fee arrangements.

To be genuine and provide a real opportunity for the consumer to make an informed decision, the consent must be obtained before the life insurance product is issued. However, on the question of

³⁶⁹ *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, paragraph 78.

whether the consent is sought before or after the life insurance advice is provided, this is up to the adviser. In order for consent to be informed, the adviser must provide the client with a clear explanation that they will be paid (if this is correct), 60 per cent of the first year's premium and 20 per cent of the premium in each following year for the life of the policy.

In that case, they will not need to obtain any further consent when the trail commission is paid. The consent is not required to specify the dollar amount of the commission the adviser will receive.

Consent is also not required if the AFS licensee or a representative transfers the responsibility for managing a client's life insurance product as part of the sale of part or all of the advice business. In this case, the new adviser would need to retain a record of the consent, but is not required to obtain the client's further consent.

There might be a formal written agreement between the adviser and client which would record how the adviser will be paid and the client's agreement. If there is no such agreement, the discussion and consent might be recorded in an email from the adviser to the client confirming the discussion and the consent.

Transition

This requirement should not have any retrospective effect and should only apply to life insurance products issued after the commencement of the law implementing this obligation. This would ensure that advisers are not required to obtain consent from their clients who hold a current life insurance policy.

Advice services

Before I leave the topic of life insurance, I want to discuss one further issue. Many advisers providing advice about life insurance have ongoing relationships with their clients and they will regularly review their life insurance arrangements and, if necessary, assist them if they need to make a claim for no additional fee. They say that this justifies the ongoing commission. If an adviser offers these services, or any other service in relation to the life insurance product, the client should be clearly told.

However, a commission is a fee paid by the life company for the sale of the life insurance. It is not a fee for services provided to the client and therefore they should not be represented as such. This means that if the services are promised but not provided, the client may be able to bring a complaint against the adviser, but the life company will not have any obligation to turn off the commission or claim any part of it back from the adviser.

Recommendation 13.7 — Life insurance

Retain the exception to the ban on conflicted remuneration for benefits given in connection with the issue or sale of a life risk insurance product. Commission and clawback rates should be maintained at the current levels (60 per cent upfront commissions and 20 per cent trailing commissions, with a 2-year clawback).

A person who provides personal advice to retail clients in relation to life risk insurance products, who receives a commission in connection with the issue or sale of the life risk insurance product, must obtain the client's informed consent before accepting a commission. This consent should be recorded in writing and should be obtained prior to the issue or sale of the life risk insurance product.

In order for the client to make an informed decision, the advice provider must disclose:

- the commission the person will receive (upfront commission and trail commission) as a per cent of the premium; and
- the nature of any services the adviser will provide to the client (if any) in relation to the life risk insurance product (such as claims assistance).

Consent will be one-off and apply for the duration of the policy.

This requirement will only apply to life risk insurance products purchased after the commencement of this recommendation.

The objective of this recommendation is to assist consumer to access personal advice about life insurance in order to obtain the type and amount of cover that meets their objectives, needs and circumstances. The intention is that the other recommendations will encourage more providers to offer to provide life insurance advice for a fee paid by the client and that over time commissions will play a lesser role in the distribution of life insurance.

9.6 General insurance

9.6.1 Some background

General insurance offered to retail clients (which includes small businesses) covers a broad range of financial products including motor vehicle insurance; home and contents insurance; residential strata insurance; sickness and accident insurance; travel insurance and pet insurance.

For the purpose of the Review, I have not specifically considered the relevant arrangements for strata insurance (or strata managers), as they are not regulated under Chapter 7 of the Corporations Act. However, I think that further consideration of the remuneration arrangements for strata insurance is warranted.

The general insurance industry is broad and complex. I describe the distribution and remuneration structures below.

9.6.2 Distribution

I have been told by general insurers that intermediaries play an important role in the distribution of general insurance products in Australia by arranging the placement and purchase of insurance.

Intermediaries can be classified as insurer intermediaries and consumer intermediaries. Insurer intermediaries arrange insurance contracts on behalf of the insurer (for example, products sold through white label brands or underwriting agencies). Consumer intermediaries (such as insurance brokers) arrange insurance contracts on behalf of the consumer (or in the case of strata insurance, the owner's corporation). The distribution channel varies according to the nature of the insurance. For example, most motor vehicle and home and contents insurance products are most commonly purchased directly from the insurer. Travel insurance is primarily sold through travel agencies and strata insurance by brokers and strata managers. Some kinds of insurance are sold with the assistance

of underwriting agencies who may in turn engage brokers and advisers. With the exception of insurance sold by brokers, most insurance is sold without personal advice.

Throughout the Review, we have been told that intermediaries, and especially brokers, play an important role in the market. Insurers have told us that intermediated channels deliver customer benefits, and benefits to insurers that may be hard to replicate through other channels. Brokers may have specialist product expertise, they may work in regional and remote areas where insurers are unlikely to have branches (if they have them at all), they are often willing to meet their clients in person when insurers cannot. Intermediaries also increase choice and competition in the market. There are a large number of products for the major retail classes of general insurance. For example, there are around 80 insurers listed as providing home building insurance on the Insurance Council of Australia's 'Find an Insurer' website. Without the assistance of intermediaries, consumers are likely to limit their search to the large direct insurance brands, limiting choice and also competition in the market. Finally, many consumers want to purchase insurance when they need it and so they value being able to purchase insurance through the same financial institution that provided them with their home loan.

9.6.3 Commissions and conflicted remuneration

When the 2009 Ripoll Inquiry recommended the ban on conflicted remuneration following the collapses of Storm Financial and Opes Prime, the PJC was considering investment advice provided by advisers and not advice about general insurance. The Committee recommended that financial advisers have a fiduciary duty to put the interests of their clients' first. It is doubtful that this obligation was intended to apply to insurance brokers or other people selling general insurance. Consistent with that, the Corporations Act limits the steps which must be taken by a person providing advice about general insurance in order to satisfy the safe harbour steps for the best interests duty and has never banned commissions or other benefits provided by insurers in respect of the sale of general insurance products and advice about general insurance products.

Remuneration structures and commission rates differ according to distribution method and product type. The most common type of commission is where a base commission is paid at an agreed percentage of the premium.³⁷⁰ For example, commission rates for home and contents insurance and motor vehicle insurance can vary from 10 to 30 per cent of the premium.³⁷¹ Other types can include profit-sharing and non-monetary incentives.

During consultation we were given a number of reasons for retaining commissions for general insurance products, including that these products are considered to be low risk, are simple and well understood and are short lived (generally 12 months).

The reason for banning commissions would be to free the adviser of any conflict so that they are able to provide advice that is in the best interests of the client and so it is not to the point that the products are widely understood. It is also not clear that is true in the case of some general insurance products, as has been observed in the recent claims arising out of fires and floods.

370 ACCC (2020), *Northern Australia Insurance Inquiry – Final Report*, page 476.

371 Finity Consulting (2019), *General Insurance Distribution and Remuneration Arrangements*, page 45 – Report provided to the Quality of Advice Review.

9.6.4 Reasons for retaining the exception for general insurance

The question for me now is whether the exception for commissions and other benefits provided by general insurers in respect of the sale of general insurance products should continue.

General insurance is important for individuals and the community. It protects consumers from the risk of sometimes significant financial loss in the event of loss or damage. Despite that, consumers may not voluntarily seek out insurance. In many cases, they are obliged to hold the insurance (for example when they borrow money to buy a car or home) and in other cases they are reminded at the point of sale (for example when they pay for a holiday or visit a vet) that it is available. In none of these cases, would the distributor sell or make the insurance available unless they were paid by the insurer to do so. There is no reason to think the payment of commissions is of itself harmful. We have been told that it can be less expensive than direct sales for the insurers and that intermediaries can have a wider reach and therefore it is unlikely that a ban on commissions would significantly reduce the cost of insurance. The design and distribution obligations again provide an important consumer protection because they require insurers to design products that are suitable for the target market.

This leaves insurance brokers. They are in a different position because, like financial advisers, clients look to them for independent advice. Where they provide personal advice to retail clients, they will have an obligation to provide good advice. In a perfect world they would charge a fee for their advice and they would not be paid a product commission. And in some cases they do. This is because commissions do create a conflict – they provide an incentive for the broker to sell a more expensive insurance product or more insurance than might be required by the consumer. However, I have not been able to find any real evidence of widespread misconduct and I am concerned that consumers who rely on brokers may not be willing or able to pay a fee for their advice.

9.6.5 Recommendation

Retain commissions

Therefore, my recommendation is the same as it is for life insurance. Subject to one condition, I recommend that the conflicted remuneration provisions in the Corporations Act for benefits provided in respect of general insurance remain as they are.

Condition

The condition is that a person who provides personal advice to a retail client in relation to a general insurance product must explain to their client that they will be paid a commission if the client decides to buy the recommended insurance product and they must ask for the client's consent. If the client does not consent then the adviser can agree to provide the advice for a fee or they can decline to give the advice. The disclosure must set out the commission that the advice provider expects to receive from the sale of the general insurance product. Noting that premiums vary and commission rates vary across insurers, this does not need to be in dollar terms. It is sufficient that this take the form of a percentage range (for example, 10–20 per cent of the premium).

If the advice provider intends to provide any other services to the client (such as claims assistance), this would also need to be disclosed to the client.

Renewal

I understand that it is common for a broker to renew a client's cover on a yearly basis without necessarily meeting with the client before doing so. In that case, it would be difficult to obtain the client's consent in advance of obtaining the renewal and we have been told there is a real risk the client could be left uninsured if the broker was in fact required to wait for that consent. I accept that this is a risk and so I do not recommend that the broker be required to obtain the client's consent on an annual basis. Instead, it should be sufficient for the broker to explain to the client on the first occasion they arrange for the client to be issued with a general insurance product that they will be paid a commission on each occasion that the insurance is renewed. The client's consent would then apply to the commission paid when the product is first issued and the commission paid on each subsequent renewal. Should the commission arrangements change (for example when a policy is renewed and a higher commission than was previously disclosed and consented to is payable), a further discussion and consent would be required at that time.

Requirements for consent

The key elements of the condition to obtain informed consent are intended to be the same as for life insurance and are as follows:

- The condition to obtain informed consent applies to all providers of personal advice to retail clients in relation to general insurance products who will receive a benefit in connection with the sale of the general insurance product. This applies to all intermediaries regardless of whether they are insurer intermediaries or consumer intermediaries.
- Consent must be obtained prior to the issue or sale of the general insurance product. Consent is not required for a renewal of the same type of cover provided the original consent included the client's consent to the further commissions.
- Consent must be recorded – if consent is obtained in writing, this should be retained. However, if consent is obtained through other means (such as during a telephone call between the provider and the client), consent should be documented in writing (for example via an email) and provided to the client, and retained by the advice provider.
- The form and content of the consent requirements should not be prescribed, and it is not intended that it would require the client to complete a separate form.
- Consent is not required to be provided to, or checked by an insurer. It is the responsibility of the advice provider to obtain consent and to retain a record of the client's consent.
- The recommendation only applies to general insurance products purchased through an intermediary following the commencement of the recommendation.

Recommendation 13.8 — General insurance

Retain the exception to the ban on conflicted remuneration for benefits given in connection with the issue or sale of a general insurance product.

A person who provides personal advice to retail clients in relation to a general insurance product who receive a commission in connection with the issue or sale of the general insurance product, must obtain the client's informed consent before accepting a commission.

This consent should be recorded in writing and should be obtained prior to the issue or sale of the general insurance product. Consent is not required for any renewals of the same type of cover provided the client's original consent applied to the commission payable on any renewed cover.

The advice provider must disclose details of the commission the provider will receive for the issue or sale of the general insurance product (including for subsequent renewals) and any services the provider will provide to the client (if any). The disclosure of the commission amount can be set out in the form of a per cent range of the premium.

The objective of this recommendation is to assist consumers to continue to be able to access personal advice about general insurance products.

9.7 Consumer credit insurance

9.7.1 Some background

Consumer credit insurance (CCI) provides insurance cover to a consumer who has taken out a loan or holds a credit card.

CCI policies generally have 3 components:

- unemployment (involuntary unemployment);
- unable to work because of accident and illness; and
- death cover.³⁷²

If the insured is unemployed or unable to work because of injury or illness, the insurance will meet minimum loan repayments for the agreed period and if the insured dies, the insurance will usually pay out the loan.

CCI is generally offered as an add-on insurance product when the consumer applies for or draws down on a home or personal loan or is issued a credit card. The premiums are often financed by the loan (and repaid over the course of the loan term) or paid by the customer (via direct debit or credit card).³⁷³

CCI is sold through intermediaries: banks, other lenders, mortgage brokers and finance brokers. They are paid a commission which under the NCCP Act is capped at 20 per cent of the premium.³⁷⁴

372 Finity Consulting (2019), page 34.

373 Finity Consulting (2019), page 34.

374 Finity Consulting (2019), page 34.

9.7.2 Commissions and conflicted remuneration

CCI was largely overlooked by both FSR and FOFA. This might be because the sale of CCI was to some extent regulated by the Consumer Credit Code and now the NCCP Act. It might also be because it was bundled with general insurance, even though CCI almost always includes life insurance and is issued by life companies (or jointly by life companies).

Nevertheless, like general insurance products, commissions and other benefits provided in relation to the sale of CCI have always been subject to an exception to the ban on conflicted remuneration and insurers have continued to pay a flat 20 per cent commission for the distribution of the policies.

9.7.3 CCI has a poor reputation

CCI has been the subject of much criticism, due to poor sales practices and product design which have led to poor outcomes for consumers. In 2019, ASIC Report 622 reviewed the sale of CCI by lenders for the period between 2011 and 2018 and found that:

- CCI is poor value for money – for CCI sold with credit cards, consumers were paid only 11 cents in claims for every dollar of premium they paid (and the more cover types in the policy, the lower its claims ratio), while for all CCI sold, this increased to only 19 cents per dollar in claims paid.
- CCI sales practices cause consumer harm – a number of concerns were raised about the way CCI was sold to consumers, including that CCI was sold to consumers who were ineligible to claim, or who were unlikely to benefit or need cover, the use of high pressure and unfair selling practices and consumers were charged incorrectly with some consumers being charged ongoing premiums even after they had paid off their loan.³⁷⁵

Strengthened consumer protections

The findings of the ASIC report are clear and alarming. However, since then the deferred sales model for add-on insurance recommended by the Royal Commission have been introduced into the Corporations Act.³⁷⁶ They require a distributor to give the consumer a period of 4 days between the issue of the loan and the sale of a CCI product. The anti-hawking rule also prohibits the unsolicited sale of CCI to consumers.

The design and distribution obligations are again vitally important. The target market for any financial product, including CCI, must be consumers for whom the product is likely to be suitable based on their likely objectives, financial situation and needs.³⁷⁷ This requirement will make it very hard for insurers to design products which are poor value for money and which have low claims ratios. The distribution obligations will also make it hard for distributors to sell CCI to consumers for whom the product is likely to be unsuitable. These obligations should go a long way to addressing the misconduct identified by ASIC and if the distributor provides personal advice (which they are likely to do), they will have an obligation to comply with the good advice duty.

³⁷⁵ ASIC (2019d), Report 622 – *Consumer credit insurance: Poor value products and harmful sales practices*, pages 2–3.

³⁷⁶ The *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* introduced a deferred sales model for add-on insurance, which requires a 4-day pause between when a customer agrees to acquire a principal product or service and when they are offered or sold an add-on insurance product.

³⁷⁷ Corporations Act, s 994B(8).

9.7.4 Recommendation

The question I have been asked is whether commissions should continue to be able to be paid for the issue of CCI products. CCI is sold almost exclusively through intermediaries (lenders and brokers) who are paid a commission. If they did not they would not sell the product. And so if I recommended that commissions for CCI be banned, I would in effect be stopping the issue of CCI. I do not want to do so. If all of the recent changes to the law referred to above have not been effective to improve CCI products and if mis-selling continues, despite the good advice duty, ASIC has a product intervention power which it can use to stop the sale of particular CCI products or CCI products at large. In either case, this would be a significant step which should be done directly by the regulator and not indirectly by a recommendation to ban commissions, especially where there is a regime for their payment under the NCCP Act which is separate from the conflicted remuneration provisions in the Corporations Act.

I acknowledge that CCI has been and potentially remains a product which often represents poor value for consumers and which can be harmful. However, it does not have to be. To the contrary, well designed CCI products can assist to address the under insurance identified by some stakeholders and discussed earlier in this Chapter and it is reasonable to think recent changes to the law will have had a positive effect.

Having said this, I do not have the evidence to know and I suggest that there is a need for further data to be collected on the effectiveness of these recent reforms.

And so, based on the evidence I have available to me, I am recommending retaining commissions for CCI products, on the condition that where personal advice is provided to a retail client about CCI, the advice provider be required to obtain informed consent from the client. I would expect this requirement to operate in the same way as it does for general insurance.

Recommendation 13.9 – Consumer credit insurance

Retain the exception to the ban on conflicted remuneration for benefits given in relation to consumer credit insurance. The current cap on commissions in relation to consumer credit insurance (of 20 per cent) should continue to apply.

A person who provides personal advice to retail clients in relation to consumer credit insurance who receives a commission in relation to consumer credit insurance must obtain the client's informed consent before accepting a commission.

The objective of this recommendation is to further improve the transparency of how consumer credit insurance is sold to consumers by requiring a person who provides personal advice about consumer credit insurance to obtain their client's informed consent to receive a commission.

Chapter 10 – Digital Financial Advice and Consumer Data

Chapter Summary

- There is a limited supply of scaled and incidental financial advice and the cost of comprehensive financial advice is out of reach for many people. Technology and digital advice tools have the potential to improve access to quality advice across the spectrum of financial advice for those who want and need it.
- The recommendations in this Report, in particular the good advice duty and the more flexible disclosure requirements, will make it easier to provide digital advice. There is no need for regulation specific to digital advice.
- Increased access to consumer data will help high quality financial advice and services to be provided more efficiently.

10.1 Digital advice

10.1.1 A short reminiscence

When FSR commenced I spent many weeks combing through a range of calculators and questionnaires (risk profilers and the like) available on the websites of banks, insurers, superannuation funds and others dividing them into those which contained information, those which contained general advice and those which contained personal advice. I remember this work because it was engaging and fun, and I learnt a lot about my own financial situation and how I could improve it.

But, what happened is that the banks, insurers and superannuation funds took most of them down. They were nervous that the ones which provided information might provide advice. The ones that provided advice invariably provided personal advice because, what made these tools so useful, was that they asked the user for information about their financial situation and sometimes their needs and objectives. They took them down because it was too hard and expensive to provide a statement of advice and when FOFA commenced it became even more difficult (they thought) to comply with the best interests duty. Since then I have regularly been asked to look at various forms of calculators and other digital advice tools – which will tell the user how much life insurance cover they should have or how much they should contribute to superannuation and so on, and overwhelmingly they have been really helpful and overwhelmingly they have not been made available to consumers because of the regulatory regime.

10.1.2 Terms of Reference

The Terms of Reference ask me to consider how technology and digital advice might enable mass market adoption of low cost advice, particularly for young consumers, those with low asset values and consumers who do not currently engage with the financial advice industry.

Given that and the broader focus of the Review on increasing the accessibility and affordability of quality financial advice, I have thought a lot about technology and digital advice tools.

10.1.3 Consultation

I saw 20 years ago how much digital advice tools could do and how useful they could be. During consultation we have been told and we have seen – both in Australia and overseas – how much more digital advice can do. It is possible to get a full financial plan and ongoing advice digitally. Some providers charge a modest advice fee and some charge a subscription fee. We have been told that employers will sometimes make these digital advice services available to their employees as an employment benefit. Where a fee is charged, the cost is within the range that consumers say they are willing to pay for personal advice.

Much of the more limited digital advice that is available now is provided to consumers without any charge (the ASIC MoneySmart website and the calculators that are available on some superannuation funds' websites or member portals are examples). Many providers are building apps and online client portals which provide prompts and nudges – these are forms of digital advice. In many cases they give personal advice now and they will increasingly do so if the definition of personal advice is broadened as I have recommended.

Some digital advice providers combine digital advice with the support of an individual – sometimes a financial adviser. These hybrid models are common in the UK. They can also be used by financial advisers to provide advice to more clients. Technology is also increasingly capable of supporting financial advisers give personal advice more efficiently.

Research shows that consumers are increasingly willing to use digital advice tools. In a recent financial capability survey consumers expressed a strong preference for using digital financial products and services.³⁷⁸ Across all ages, 85 per cent of respondents 'agreed' or 'strongly agreed' that using online financial technology would save them time and 68 per cent indicated that they would prefer to use financial technology over other channels to access financial services.

I am convinced that digital advice tools can make good quality financial advice widely available.

10.1.4 Barriers and impediments

Despite all of this promise, the adoption of digital advice tools in Australia has been slow. There are 2 reasons:

- we have been told people are reluctant to commit the time, capital and resources to set up digital advice systems while the rate of regulatory reform continues to be so high; and
- regulatory complexity – and in this respect the impediments now are the same impediments as they were 20 years ago – providers see the obligations applying to the provision of personal advice as not only difficult but uncertain.

³⁷⁸ Commonwealth of Australia (2021b), *National Financial Capability Survey*.

10.1.5 What needs to be done to help?

This Chapter can be very short, because what is not needed to promote more digital advice tools is separate regulation. The Corporations Act does not treat the provision of digital advice differently from other financial advice and there is no reason for it to do so if the recommendations in this Report are adopted.

What is needed is regulation that does not assume a person (an individual) always provides advice and regulation that does not prescribe what must be done to give advice and how the advice must be provided. The recommendations I have made in this Report do not do any of these things. The recommendations proceed on the basis that advice will very often not be given by an individual.

It can be difficult to determine when advice is given by an individual and when it is given by a body corporate. This distinction was an issue too when FSR commenced. Regulatory Guide RG 146 Licensing: training of financial product providers set out the training requirements for providers of personal advice. It has to a large extent been superseded by the requirement that most personal advice be given by a financial adviser who meets the professional standards. It applied to ‘all natural persons who give financial product advice to retail clients’. It then says:

Persons that do not provide financial product advice are not required to meet the training standards. Examples of conduct that is not treated as financial product advice include conduct done in the course of work of a kind ordinarily done by clerks or cashiers ...³⁷⁹

This is a somewhat odd statement and exception – on the one hand it refers to people (‘persons’) who do not provide financial product advice and on the other it refers to conduct that is not treated as financial product advice. What ASIC is struggling with (fairly) is who is the provider of advice when a person (here the clerk or cashier) is merely doing and saying what they are told to do by their employer. Similarly, ASIC also says in RG 146:

Customer services representatives (i.e. call centre or front desk staff who deal with initial queries from customers) may provide financial product advice to customers in the course of their work. They do not need to meet the training standards where the only financial product advice they provide is either: (a) derived from a script approved by a person who meets the training standards (see RG 146.23); or (b) made under the direct supervision of a person who meets the training standards (see RG 146.24).³⁸⁰

Again, there is a live question as to whether a person who follows a script is in fact the provider of financial advice. It matters a lot under the current regulatory framework because now, a person who provides personal advice must be a financial adviser (unless an exception applies).

If the recommendations in this Report are adopted the person would not have to be a financial adviser unless a fee is charged for the advice, and so less will turn on the question. Under the recommendations the good advice duty will apply to the AFS licensee (the entity) and not to the employee even if the employee is providing that advice. Having said this, as technology continues to improve and digital advice tools become more sophisticated, it is less and less likely that advice will be provided by an individual and more and more likely that advice will be provided by a digital advice tool. This is not only likely to improve access to advice, but it also promises to improve quality as there

379 ASIC (2012), Regulatory Guide 146: *Licensing: Training of financial product advisers*, paragraph RG 146.18.

380 ASIC (2012), paragraph RG 146.22.

will be less room for error and less room for the provider to improvise. And when things do go wrong there will be an accurate record of the advice.

The likelihood that more advice will in fact be given by a digital advice tool, even when an individual is involved in the interaction with the customer, is one of the reasons I have not recommended that the law prescribe minimum training and education standards for representatives of AFS licensees who provide personal advice to customers but who are not financial advisers. What is required will turn on the extent to which that advice is supported by digital advice tools, as well as the nature and content of the advice. As I said in Chapter 6, this is a matter which should be left to the AFS licensee rather than prescribed by the law.

10.1.6 Stakeholder feedback on digital advice

Almost all financial institutions and even many advice licensees and financial advisers do give some forms of digital advice now. There are also specialist digital advice providers who provide technology to financial institutions and financial advisers and some who make their digital advice services available directly to consumers. None of them have said they need a separate regulatory regime for the provision of digital advice, and I agree. It is neither required nor desirable.

In the Proposals Paper, I said that I thought the proposals would help more providers provide more digital advice. Largely, those who we consulted with agreed. They said removing the safe harbour steps and reducing the disclosure obligations would be especially helpful. The recommendations do both.

10.1.7 ASIC's role

All of the specialist digital advice providers said they valued and wanted more engagement with ASIC. I understand that ASIC does engage with the industry and some digital advice providers told us that that engagement was helpful.

It will plainly help the industry and ASIC if there is open discussion about new digital advice tools, how they work and what they can offer to consumers. These discussions will assist ASIC to think about whether changes might be needed to regulatory guides or ASIC instruments and even from time to time the law to assist more digital advice providers to enter the Australian market. It will also assist ASIC to update its regulatory guidance to include case studies and examples which will assist providers of digital advice tools. I do not think ASIC can or should be required to approve business models or certify compliance.

10.1.8 No further changes needed

And so I am satisfied that the recommendations in this Report will assist existing providers – financial institutions and financial advisers – to provide more digital advice tools to their customers and clients. In many cases they will do so at no additional cost. I am also satisfied that they will help existing and new providers of digital advice tools to offer new digital advice services to consumers. To quote the Terms of Reference, they promise to ‘enable mass market adoption of low cost advice’.

10.2 Consumer data

Advice providers (human and digital) have all told us they, and their customers and clients, would benefit from greater access to consumer data held by government and by private entities. They say it can be a slow and difficult process collecting information about a client's financial situation, particularly information from their product issuers. They say it would transform the way they do business and significantly improve the efficiency and quality of the advice they provide to their clients. With the benefit of this data they could quickly understand their clients' financial situation.

And so many stakeholders suggested 2 things to improve access to consumer data:

- First, the expansion of the Consumer Data Right (CDR)³⁸¹ to include Open Finance as soon as it is feasible to do so. In order of usefulness, stakeholders identified data about superannuation and other wealth products and data held by the ATO, births, deaths and marriages registries and Centrelink.
- The second was for financial advisers to be given access to the ATO's tax agent portal and to a client's myGov account.

This is an ambitious wish list, and it would clearly help financial advisers to provide advice to their clients more efficiently if they have direct access to reliable client data.

CDR is both very new and expanding. CDR allows consumers to share and control the use of their data by trusted third parties and is being rolled out on sector-by-sector basis. It commenced with the banking sector in 2019 with product reference data sharing by the four major banks. Changes were made in October 2021 giving a broader range of people access to CDR data including mortgage brokers, accountants, tax agents, financial counsellors and financial advisers. An announcement was made in early 2022 that CDR would be expanded to 'Open Finance'. This should go a long way to responding to what financial advisers say they need to help their clients. Given this, I do not think there are any recommendations I can usefully make on this topic.

381 Commonwealth of Australia (2022), *Consumer Data Right Sectoral Assessment: Explainer*.

Chapter 11 – Transition and Implementation

Chapter Summary

- The recommendations in this Report are designed to complement one another and should be viewed as a package. Some recommendations will require a longer transition period than others.
- The recommendations will make some significant changes to the current regulatory regime. They will require changes to existing ASIC guidance and more guidance on the new regime may be helpful, particularly examples.
- Financial institutions and financial advisers have a responsibility to provide good quality personal advice to their customers and clients. The recommendations will give the industry the opportunity to think about how they can help their customers and clients with personal advice that best meets their needs. They should embrace that opportunity.

11.1 Transition

11.1.1 The recommendations complement and rely on each other

If they are accepted, the recommendations in this Report will, together, improve the accessibility and affordability of quality financial advice. Many of the recommendations complement and rely on other recommendations. To increase the quality of advice I have recommended that more advice should be treated as personal advice (Chapter 4). To increase the availability of that advice I have recommended that people who are not financial advisers should also be able to give personal advice (Chapter 5). To help both (quality and access) I have recommended that the obligations that apply to the providers of advice look first at what consumers want when they ask for advice and then at the relationship between the consumer and provider of the advice and the expectations of the consumer (Chapter 6). I have also recommended that many of the prescribed documents and contents of documents be removed to eliminate some of the impediments to giving financial advice in ways consumers want and value (Chapter 8). This means the recommendations should be viewed as a package when decisions are made on the implementation of the recommendations.

11.1.2 Can some of the recommendations be introduced early

Nevertheless, some of the recommendations in this Report will require less time and effort for the industry to adopt than others and might be safely introduced ahead of others. During consultation on the Proposals Paper, many stakeholders indicated that the recommendations on charging arrangements, disclosure documents and reporting requirements (Chapter 8) could commence with only a relatively short transition period. These recommendations also promise some benefits to consumers in the form of more consumer focused documents, fewer forms and lower advice fees and so I anticipate the early enactment of legislation to make these changes would be welcomed by financial advisers and their clients.

The superannuation specific recommendations in large part are not intended to make significant changes to the law, but the changes they will make are important changes and will protect members and trustees (Chapter 7). The new consent requirements for insurance products are unlikely to be onerous (Chapter 9). I do not anticipate they will require an extended transition period and so they should in my view commence shortly after the relevant legislation is enacted.

In saying this, I expect that the benefits of these recommendations to consumers – in the form of improvement to the accessibility and affordability of financial advice will take longer to realise, as they will turn on how the industry responds to these changes. But shorter transition periods where practical may encourage providers to embrace the opportunities these reforms give them to make changes to the way they provide advice to their customers and clients in ways that better suit their needs. Providing advice in something other than a statement of advice is a good example.

The other recommendations will likely require a longer transition period. These include the expansion of the definition of personal advice (Chapter 4) and the associated expansion of who can provide personal advice (Chapter 5), the introduction of the good advice duty and the new statutory best interests duty (Chapter 6). In some cases, these changes will require the industry to adjust their systems and processes. I understand that rushed commencement of measures that require system changes can significantly and unnecessarily add to cost. They might also lead to errors. Therefore, the industry should be consulted about the time they need to transition to the new regime.

11.2 The role of the regulator

11.2.1 Feedback on ASIC's role

A key theme of the Review is how central ASIC is to the regulatory framework. The industry looks to ASIC for guidance about how to comply with the law. In a perfect world they would like ASIC to be able to provide a safe harbour from prosecution and even consumer complaints (some people want ASIC to have a rulings power). On the other hand the industry worries that ASIC will take enforcement action for what they see as minor breaches of the law. As I have said a number of times in this Report, many of the expectations the industry has of ASIC are too high and many of their criticisms appear to be unfair.

11.2.2 ASIC's role in providing guidance

In some ways the recommendations in this Report will make some big changes to the law applying to the provision of financial product advice. There will be new duties and new terms. There will be more flexibility and greater discretion for providers of advice.

This means that in many cases existing ASIC guidance will need to be replaced. And while my recommendations are intended to result in a clearer articulation of what is expected of advice providers, it is very likely the industry will look to ASIC to tell them what the law means. Again as I have said before, that is primarily the role of the courts. Nevertheless, there is a clear role for ASIC in providing guidance and help to the industry in how to interpret the law. Examples appear to be particularly useful, and I encourage ASIC to continue to publish examples based on actual experiences.

I note that in the past, good intentions on the part of ASIC to respond to requests from industry for greater regulatory certainty through additional guidance have in fact contributed to the overly prescriptive state of the current regulatory environment. If the same outcome is to be avoided under a new regime, industry must be willing to operate with less regulatory guidance from ASIC.

11.2.3 Rulings power

Throughout the course of the Review, some stakeholders have asked me to recommend that ASIC be given a power to issue binding rulings in the same way the Commissioner of Taxation can. I understand this could give the industry greater certainty about how the law applies to them in specific circumstances. However, there is an important distinction between tax law and financial services law. The tax laws set out the personal liabilities of taxpayers to pay tax to the Commonwealth and in the main, a ruling from the Commissioner of Taxation tells the taxpayer about their personal liability (or otherwise) for tax, sometimes it might apply to a group of taxpayers. However, in the main they do not affect the rights of consumers at large (one exception that springs to mind are the superannuation guarantee rulings), but they are rare.

The regulatory framework applying to the provision of financial product advice (and financial services more broadly) directly affects the rights of consumers and so in my view it would not be appropriate for ASIC to have a power to affect (and potentially change) the rights of consumers through a rulings power. Moreover, I query how useful it would be in the financial services industry. A ruling proceeds on the basis of assumed facts. Where those assumed facts deal with a specific transaction or a specific product, they are unlikely to diverge from the actual facts. That is not likely to be true in relation to the provision of financial product advice where the facts might change with each interaction with a customer or client.

In any case, the recommendations will in a number of ways lead to plainer and clearer law for which there should be less need for ASIC's opinion on whether particular conduct complies with the law or not. I keep coming back to Commissioner Hayne's 6 principles and in particular, treating consumers fairly. I encourage providers to do so too. This will provide a good measure of whether any particular conduct complies with the law. It is another way of asking Commissioner Hayne's 'should we' not 'can we' question.

11.3 The role and responsibility of the industry

This brings me to the industry. If you have got this far I congratulate you for your persistence.

The recommendations in this Report do what the Review was set up to do: recommend changes to the regulatory framework that will make quality advice more accessible and affordable for consumers. However, they do not require anyone to give financial advice. And so I encourage you to embrace them and to think about how you can use them to not only provide more advice to your clients, customers and members but to do so in ways that suit their needs best. These recommendations do not tell you how to do that, that is your responsibility, what they will do is give you the flexibility to decide how to exercise that responsibility.

Thank you.

Appendix 1: Terms of Reference of the Review

Purpose and scope of the Review

1. The Government is committed to ensuring that Australians have access to high quality, affordable and accessible financial advice. Consistent with recommendations 2.3, 2.5 and 2.6 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission), the Government is commissioning this Review.
2. The Review will consider how the regulatory framework could better enable the provision of high quality, accessible and affordable financial advice for retail clients. In particular, it will investigate:
 - 2.1. Opportunities to streamline and simplify regulatory compliance obligations to reduce cost and remove duplication, recognising that the costs of compliance by businesses are ultimately borne by consumers and serve as an impediment to consumers' access to quality advice;
 - 2.2. Where principles -based regulation could replace rules -based regulation to allow the law to better address fundamental harms and reduce the cost of compliance;
 - 2.3. How to simplify documentation and disclosure requirements so that consumers are presented with clear and concise information without unnecessary complexity;
 - 2.4. Whether parts of the regulatory framework have in practice created undesirable unintended consequences and how those consequences might be mitigated or reduced.
3. The Review will include examination of:
 - 3.1. The legislative framework for financial advice, specifically:
 - 3.1.1. Key concepts such as 'financial product advice', 'general advice', 'personal advice', as well as how they are used, how they are interpreted by consumers, and whether they could be simplified or more clearly demarcated. The Review should also consider the role and bounds of advice that is scaled, intra-fund or limited in scope;
 - 3.1.2. The safe harbour provision for the best interests duty, in line with Commissioner Hayne's recommendation that 'unless there is a clear justification for retaining (the safe harbour provision), it should be repealed';
 - 3.1.3. Financial advice documentation and disclosure requirements, including statements of advice;
 - 3.1.4. Fee disclosure and consent requirements, including reforms to introduce annual renewal of ongoing fee arrangements (Royal Commission Recommendation 2.1);
 - 3.1.5. The life insurance remuneration reforms, and the impact of the reforms on the levels of insurance coverage;
 - 3.1.6. The remaining exemptions to the ban on conflicted remuneration, including in life and general insurance (Royal Commission Recommendations 2.5 and 2.6);

- 3.1.7. The application of the advice framework to certain activities and professions, including consideration of Recommendation 7.2 of the Review of the Tax Practitioners Board.
 - 3.2. Whether consent arrangements for sophisticated investors and wholesale clients are working effectively for the purposes of financial advice;
 - 3.3. Actions undertaken by ASIC, including regulatory guidance and class orders; and
 - 3.4. The role of financial services entities and professional associations.
4. As relevant, the Review will have regard to:
 - 4.1. Structural changes and professionalisation of the sector;
 - 4.2. Best practice developments internationally;
 - 4.3. The level of demand for advice and the needs and preferences of consumers;
 - 4.4. Enabling innovation and the development of technological solutions, including the use of regulatory technology and digital advice. The Review should pay particular attention to how technology and digital advice might enable mass market adoption of low -cost advice, particularly by young consumers, those with low asset values and consumers who do not currently engage with the advice industry;
 - 4.5. Opportunities to reduce compliance costs on industry, while maintaining adequate consumer safeguards;
 - 4.6. Other key regulatory developments, including the Consumer Data Right, the Retirement Income Covenant and the Design and Distribution Obligations as they apply directly to financial advice.
5. The Review may also have regard to the interim findings of the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation.
6. The Review will not make recommendations on:
 - 6.1. The professional standards for financial advisers;
 - 6.2. The new disciplinary and registration systems for advisers (Royal Commission Recommendation 2.10), the reference checking and information sharing protocol (Royal Commission Recommendation 2.7), the obligation on licensees to report serious compliance concerns (Royal Commission Recommendation 2.8) and to take steps when they detect an adviser has engaged in misconduct (Royal Commission Recommendation 2.9);
 - 6.3. Changes to the definitions of 'retail client', 'wholesale client', and 'sophisticated investor', including the income and asset thresholds;
 - 6.4. Financial services redress arrangements; or
 - 6.5. The application of taxation and privacy laws to financial advice.

Process

The Review will be led by an independent reviewer and supported by a secretariat based in Treasury.

7. The Review will invite submissions from the public and consult with stakeholders, including consumers, industry and regulators. The Review will also be informed by data collected by ASIC and Treasury.
8. The reviewer will provide a report to Government by 16 December 2022.

Relevant recommendations

Financial Services Royal Commission

Recommendation 2.1 – Annual renewal and payment

The law should be amended to provide that ongoing fee arrangements (whenever made):

- must be renewed annually by the client;
- must record in writing each year the services that the client will be entitled to receive and the total of the fees that are to be charged; and
- may neither permit nor require payment of fees from any account held for or on behalf of the client except on the client's express written authority to the entity that conducts that account given at, or immediately after, the latest renewal of the ongoing fee arrangement.

Recommendation 2.3 – Review of measures to improve the quality of advice

In 3 years' time, there should be a review by Government in consultation with ASIC of the effectiveness of measures that have been implemented by the Government, regulators and financial services entities to improve the quality of financial advice. The review should preferably be completed by 30 June 2022, but no later than 31 December 2022. Among other things, that review should consider whether it is necessary to retain the 'safe harbour' provision in section 961B(2) of the Corporations Act. Unless there is a clear justification for retaining that provision, it should be repealed.

Recommendation 2.5 – Life risk insurance commissions

When ASIC conducts its review of conflicted remuneration relating to life risk insurance products and the operation of the ASIC Corporations (Life Insurance Commissions) Instrument 2017/510, ASIC should consider further reducing the cap on commissions in respect of life risk insurance products. Unless there is a clear justification for retaining those commissions, the cap should ultimately be reduced to zero.

Recommendation 2.6 – General insurance and consumer credit insurance commissions

The review referred to in Recommendation 2.3 should also consider whether each remaining exemption to the ban on conflicted remuneration remains justified, including:

- the exemptions for general insurance products and consumer credit insurance products; and
- the exemptions for non-monetary benefits set out in section 963C of the Corporations Act.

Review of the Tax Practitioners Board

Recommendation 7.2

Having recommended the regulatory burden on tax (financial) advisers is to be reduced, the Review believes it is reasonable that a similar level playing field should be considered for accountants. The Review therefore recommends the Government initiate a specific review of what advice accountants can and cannot give in respect of superannuation and which accountants that might apply to. Such a review could perhaps be undertaken by the Productivity Commission.

Appendix 2: Industry Specific Feedback from Consultation

Financial advisers

One of the key pieces of feedback from financial advisers is desire for the regulatory framework to reflect the professionalisation of the advice industry. They have suggested that the current framework is overly prescriptive and does not allow advisers to rely on their professional judgement when providing advice. They also highlighted the overlap between the obligations on advisers in the Corporations Act with those in the Code of Ethics, and how the slightly differing obligations are leading to advisers being required to take additional process steps when providing advice that do not add value to the consumer. Other key areas of concern are the disclosure obligations, especially around ongoing fee arrangements, fee disclosure requirements and statements of advice.

Some advisers also advocated for the separation of financial advice from financial products advice. They consider that it is important to recognise the value of the advice itself, rather than simply the final product recommendations. These advisers feel that the broader definition of financial advice should capture other forms of advice which do not result in a product recommendation, such as budgeting and cash flow management, debt management, and other forms of strategic advice. They consider that this would lead to better outcomes for consumers through more streamlined regulation.

The recently implemented DDO requirements, primarily the reporting requirements, were also of concern to advisers. For DDO, they consider the requirement to report on significant dealings outside of the TMD (and implied obligation to be aware of the TMD for any product they recommend) to be unnecessary and over burdensome when they already have a Best Interest Duty requiring them to produce advice which is in the best interest of their client.

Stockbrokers

The primary feedback from stockbrokers is that the current 'one-size-all' approach to regulation is not well suited to certain specialists, however these issues were primarily with the professional standards, and the education standards.

With regards to the regulatory framework, their concerns mirror much of the advice industry around desire for additional clarity, changes to the safe harbour to allow more limited advice, and changes to fee consent forms. Their main area of difference was that many stockbrokers want general advice to remain, and improved clarity for the boundary between general and personal advice.

AFS licensees

While AFS licensees shared the broad concerns of financial advisers with the regulatory framework, especially around areas of uncertainty, more of their feedback was directed towards issues with the compliance actions of ASIC and AFCA.

Another key area of concern for AFS licensees were aspects outside the scope of the review, specifically costs associated with the ASIC industry funding model and professional indemnity insurance.

Financial institutions and other product issuers

The key concerns of financial institutions were the clarity between general and personal advice, especially following the ASIC v WSAL decision. These concerns revolve around the increase in obligations which apply when giving personal advice compared to general advice.

Superannuation funds

Superannuation trustees for the most part had concerns that some of the existing regulatory barriers were preventing them providing more advice to their members, noting the increasing proportions of their membership bases that are approaching retirement. While they shared similar concerns with other product issuers on the boundaries between personal and general advice and the ensuing obligations, unique to superannuation funds are the interactions with the SIS Act, and specifically the ability to collectively charge for advice.

Superannuation trustees were also concerned about their ability to provide advice on factors related to retirement, but not directly related to the members interest in the fund, such as age pension entitlement, especially following the introduction of the retirement income covenant.

Life insurance providers

Feedback from life insurers was broadly consistent with feedback from other product issuers, primarily on wanting clarity around the difference between general and personal advice, and that the regulatory burden associated with providing personal advice is a barrier preventing life insurers from providing it.

Life insurers also expressed desire to provide more limited or scaled personal advice to their clients, especially for existing policy holders who have questions around their coverage.

General insurance providers and brokers

Feedback from general insurance providers and brokers primarily focussed on the different nature of general insurance products in comparison to life insurance products, and more broadly other financial products. This different product structure is also reflected in the different distribution methods which exist for general insurance products.

Much of the feedback from these stakeholders was around recent changes in the general insurance market, and desire to retain the current settings, such as general insurance products being non-relevant financial products, and the exemption from the ban on conflicted remuneration. Concerns were also raised with the 'one-size-fits-all' approach to regulation, despite the differences across insurance products.

Accountants

Accountants broadly shared the concerns of financial advisers, especially around the complexity and cost of regulation for providing personal advice. They had some additional concerns on factors outside the scope of the Review, such as the education requirements in the professional standards and associated costs with being licensed to provide financial advice.

A joint working group between CAANZ, IPA and the SMSFA have strongly advocated for alternative licensing arrangements for certain sufficiently qualified registered tax agents, which would allow them to provide financial product advice on a limited number of topics. These include making recommendations to establish and wind up self-managed superannuation funds, make superannuation contributions and establish a pension.

These peak bodies consider these topics to primarily be tax advice, or inherent to business structuring advice provided typically provided by tax agents, and the current exemptions for registered tax agents do not facilitate these services.

They consider that since registered tax agents are already licensed and regulated under the Tax Practitioners Board, which includes being subject to their own education standards and code of ethics requirements, then needing to be authorised under an AFSL is a duplicative layer of regulation.

Appendix 3: Quality of Advice Review Financial Adviser Survey

Objectives of the survey and methodology

Background

The purpose of this survey was to obtain a greater understanding of how the current regulatory settings impact financial advisers' ability to provide high quality and affordable financial advice. Feedback from this survey has helped the Review identify opportunities to improve and refine current regulatory settings.

The survey was conducted by ORIMA Research and distributed by ASIC on behalf of the Review.

Sample

The sampling frame for the research was financial advisers registered on the Financial Adviser Register whose email contact details were available as of 5 July 2022. A total of 14,328 advisers were invited to participate in the survey.

A total of 3,326 financial advisers responded to the survey out of 14,328 invited, representing a response rate of 23 per cent.

Questionnaire development

The draft questionnaire was developed and refined in consultation between ORIMA Research and the Review secretariat.

Fieldwork

The online survey was conducted from 5 July 2022 to 22 July 2022 and was hosted by ORIMA Research. The survey was distributed by ASIC on behalf of the Review, using advisers' contact details from the Financial Adviser Register. This distribution approach was intended to maximise the response rate to the survey and to protect the privacy of advisers' contact details. The Review liaised with industry bodies to notify them of the survey and encourage their members' participation.

Analysis of open-ended comments

The survey collected a volume of responses which included open-ended comments. While a random sample of open-ended comments (proportionate to the total number of comments) were coded to capture the main themes that emerged from the full range of comments and to facilitate an analysis of the comments for the Review, this data has not been included in this appendix.

Statistical precision

As the survey was an attempted census of all advisers, the survey results are not subject to sampling error. However, this survey is subject to non-sampling measurement errors, with the main non-sampling error risk being the potential for non-response bias to affect results.

Presentation of results

Reported percentages are based on the total number of valid responses made to the particular question being reported on. This occasionally differs from the total number of completed survey questionnaires because of omissions in the completed questionnaires. The results reflect the responses of people who had a view and for whom the questions were applicable. 'Don't know/unsure' responses have only been presented where this aids in the interpretation of the results.

In cases where the counterfactual and its percentage have not been explicitly stated, the counterfactual's percentage is the remaining, unstated percentage.

Quality and Compliance Statement

This project was conducted in accordance with the international quality standard ISO 20252, the international information security standard ISO 27001, as well as the Australian Privacy Principles contained in the *Privacy Act 1988* (Cth). ORIMA Research also adheres to the Privacy (Market and Social Research) Code 2021 administered by the Australian Data and Insights Association (ADIA).

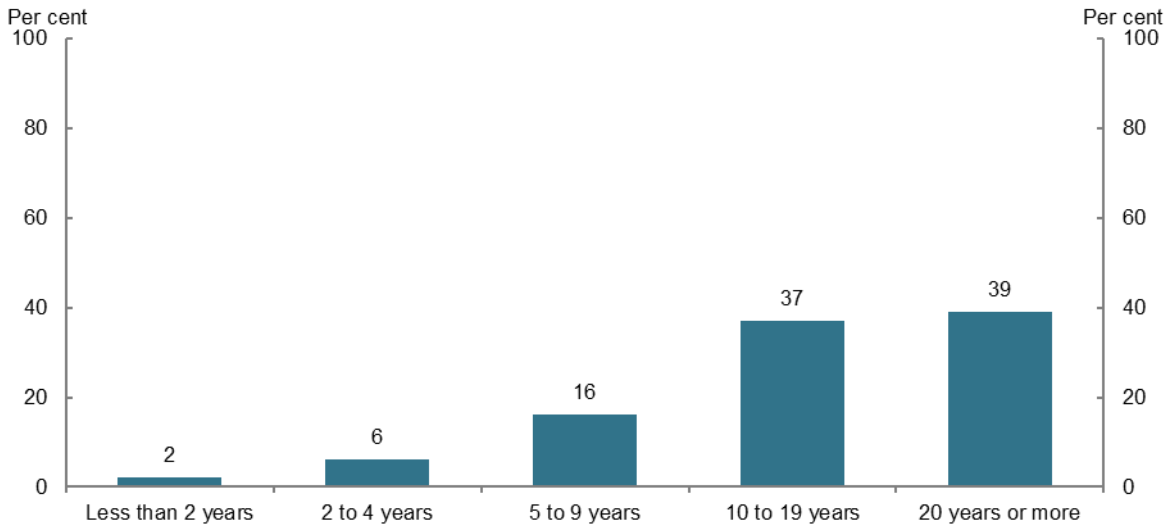
Survey results

Profile of respondents

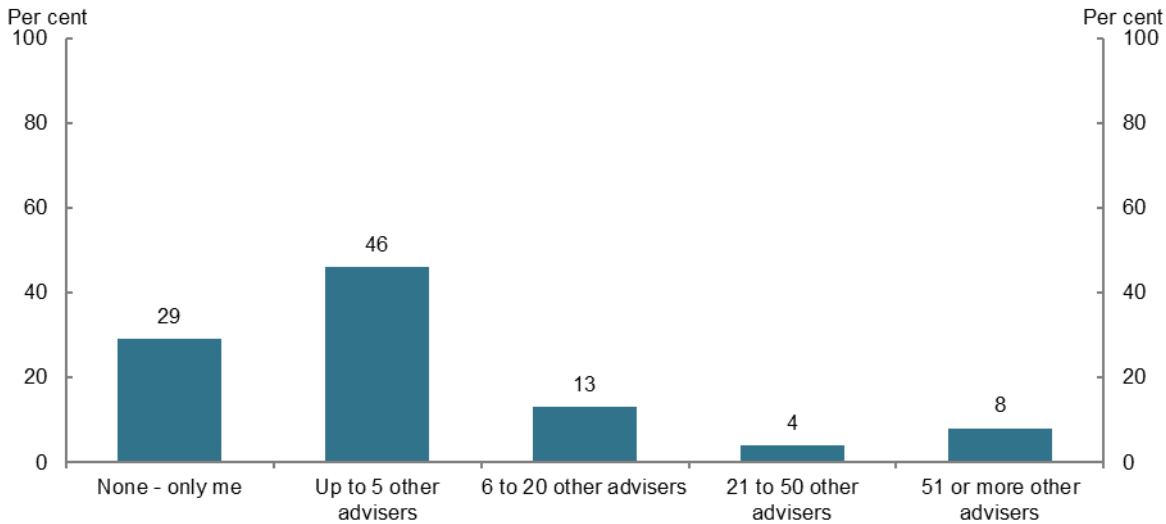
Question 1: Licensing arrangements

80 per cent of respondents were authorised representatives of a licensee.
19 per cent of respondents were self-licensed.
16 per cent of respondents were an employee of a licensee.

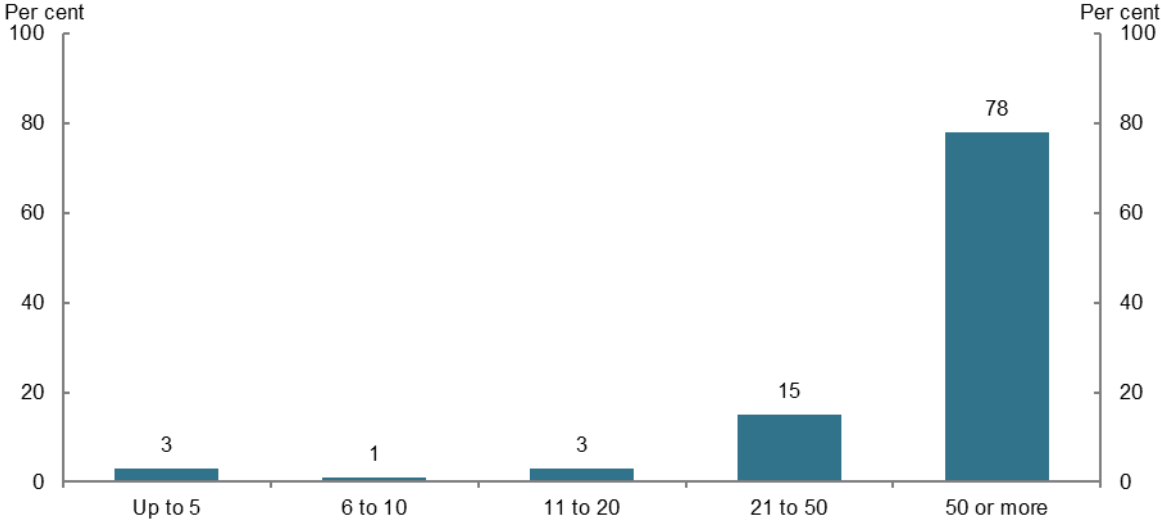
Question 2: Years of experience as an adviser



Question 3: Number of advisers in practice



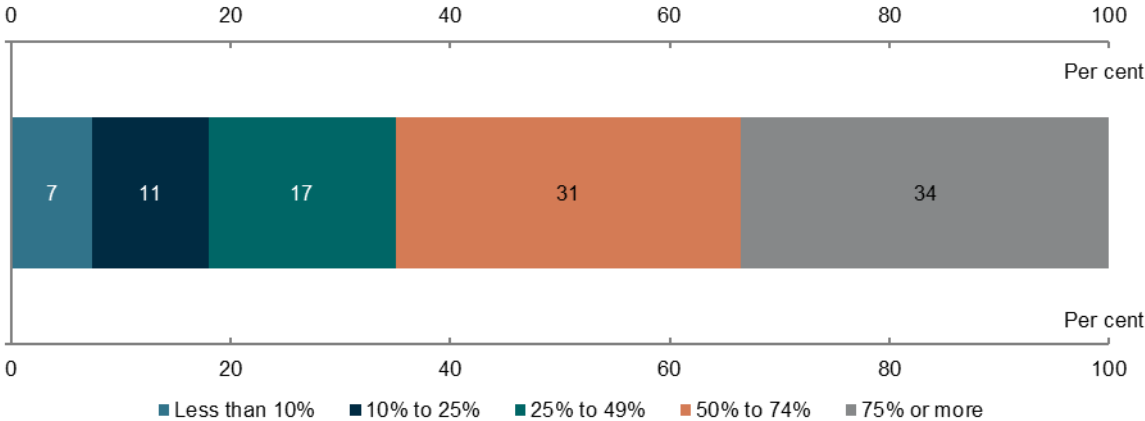
Question 4: Number of clients in past 12 months



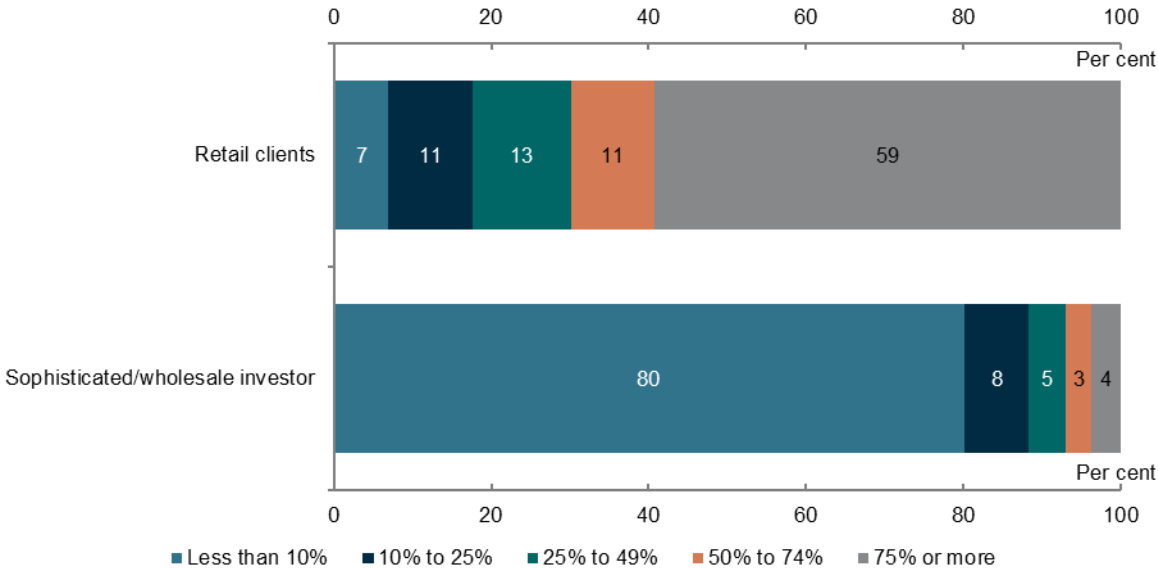
Question 5: Declined taking on new clients in past 12 months

69 per cent of respondents had declined taking on new clients in the past 12 months.

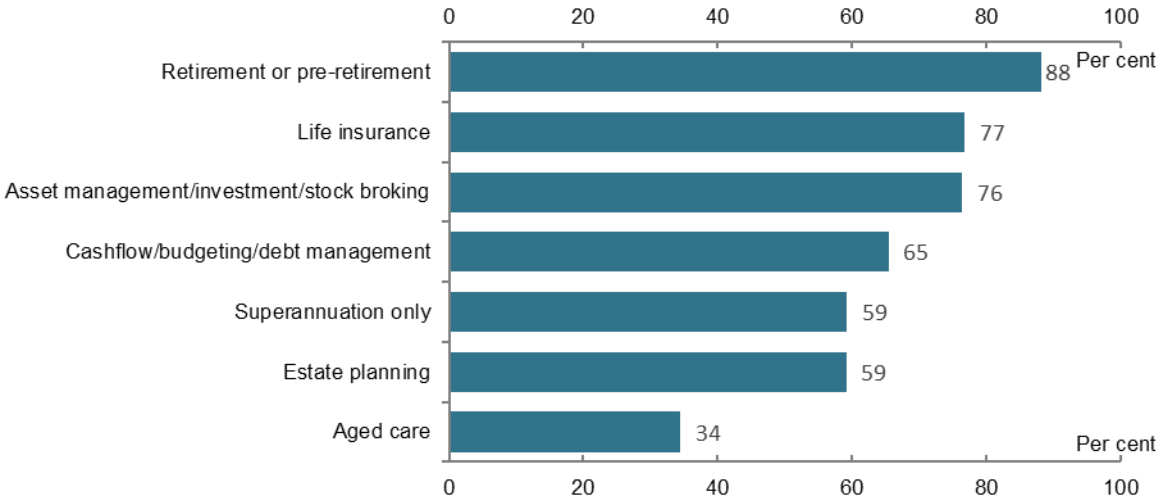
Question 7a: Proportion of clients who were retirees/pre-retirees



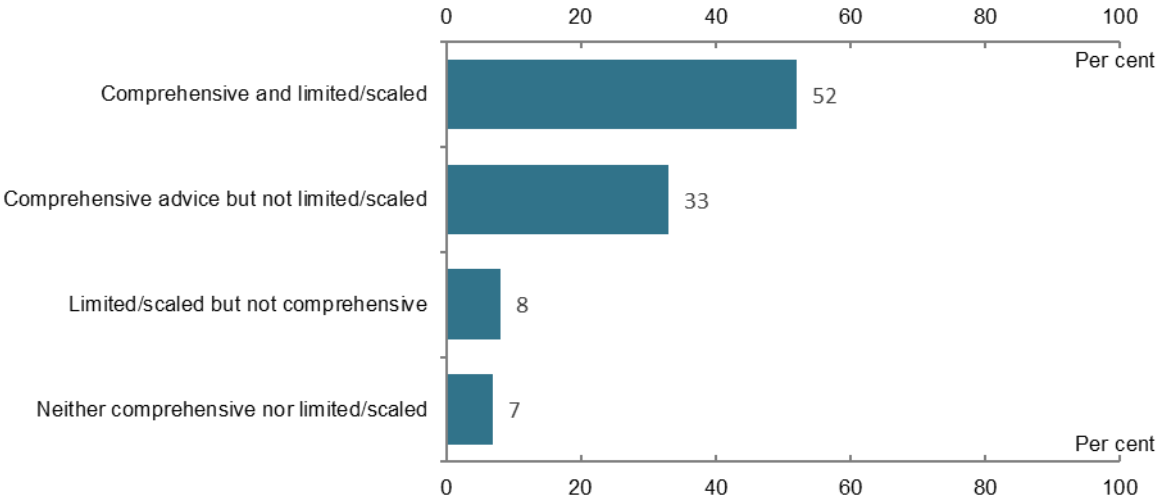
Question 7b and 7c: Proportion of respondents' client base that were retail clients or sophisticated/ wholesale investors



Question 8: Types of advice provided



Question 9: Whether provided comprehensive and/or limited/scaled advice



Question 10a: If they provide a financial advice service to any superannuation fund members

83 per cent of respondents stated that they provide a financial advice service to superannuation fund members.

Question 10b and 10c: Qualified accountant status (member of the CPA, CAANZ or IPA) and the accountant’s exemption

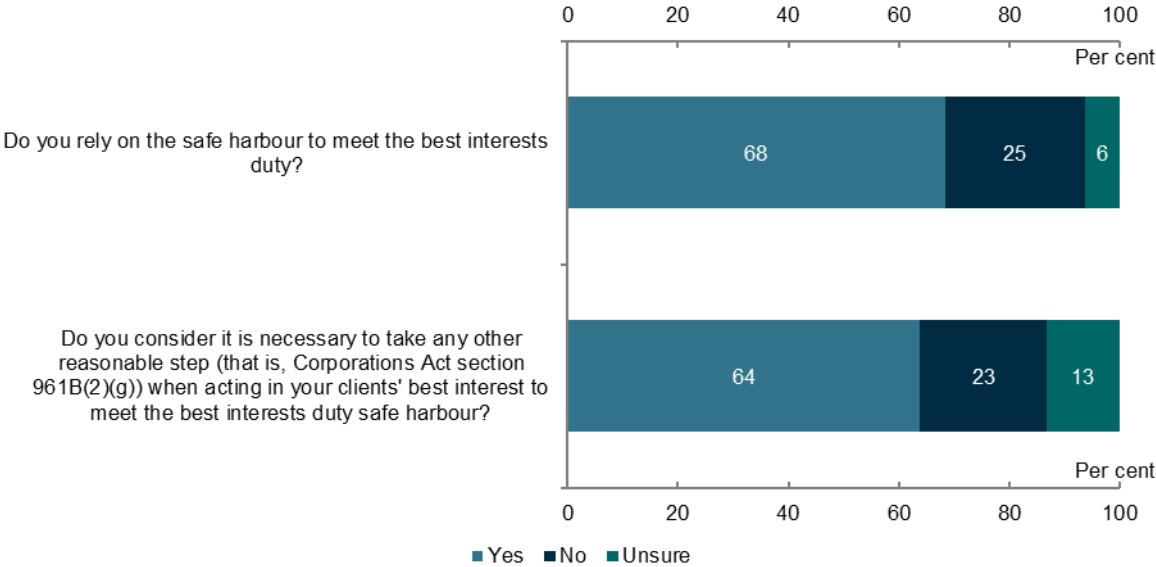
11 per cent of respondents were qualified accountants. Among those who were qualified accountants, 38 per cent were subject to an accountant’s exemption for providing financial advice in Australia prior to 2016.

Question 11: Intention to leave the advice profession within the next 5 years

18 per cent of respondents said that they intend to leave the advice profession within the next 5 years, with 56 per cent of respondents stating that they did not intend to leave within this timeframe, and 25 per cent of respondents unsure.

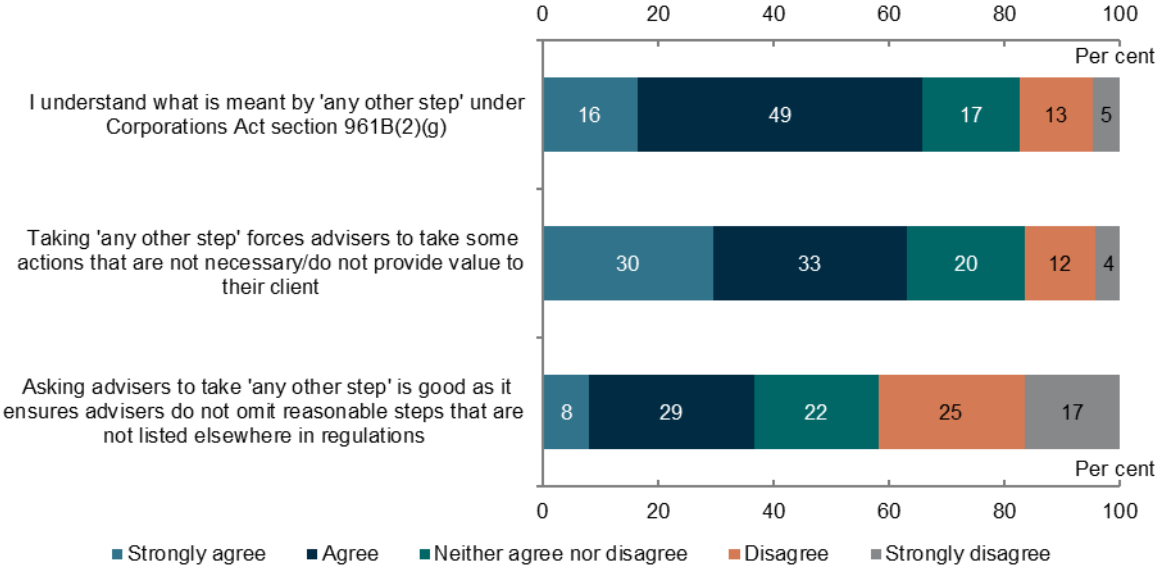
Safe harbour and best interests duty

Question 13 and 14: Reliance and perceptions of safe harbour to meet best interests duty

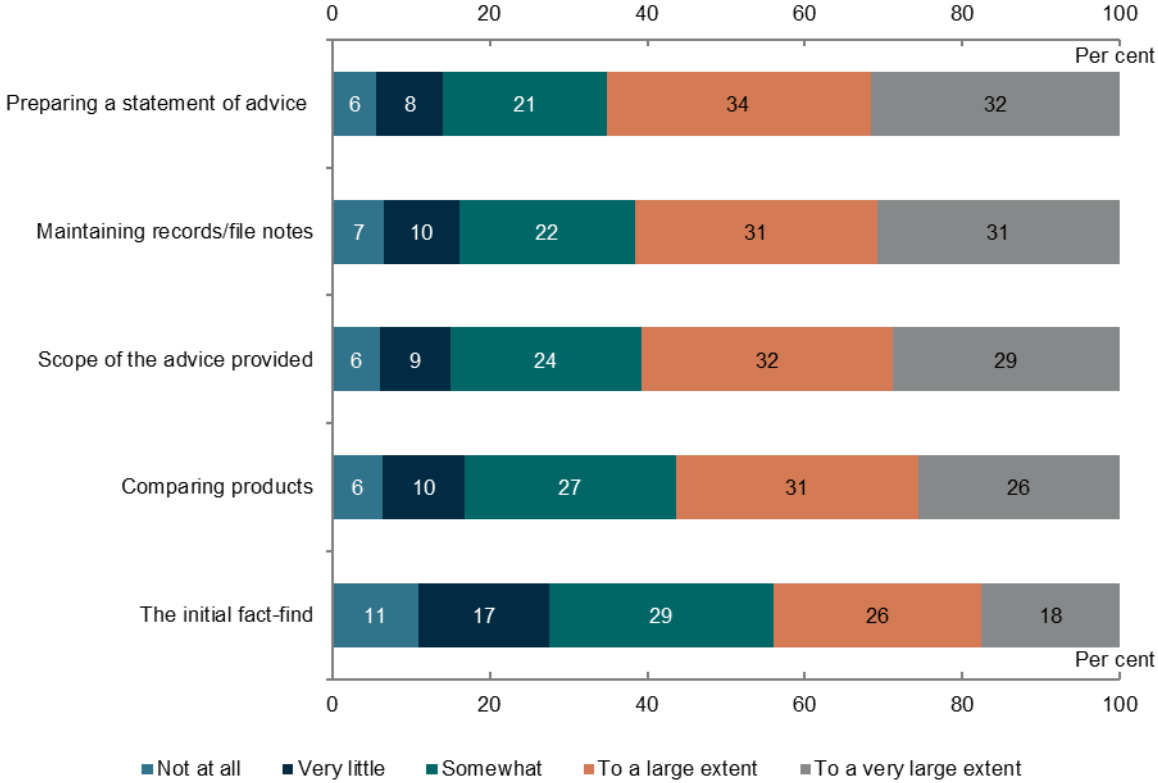


*Values may not add up to 100 per cent due to rounding

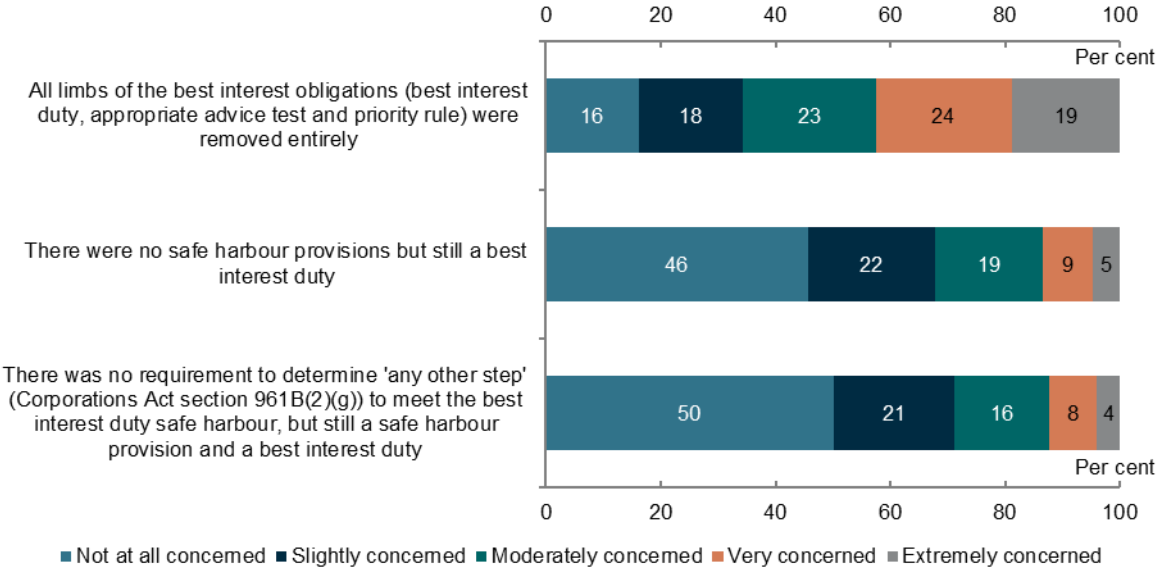
Question 15: Perceptions and understanding of 'any other step'



Question 16: Impact of 'any other step' requirement on work

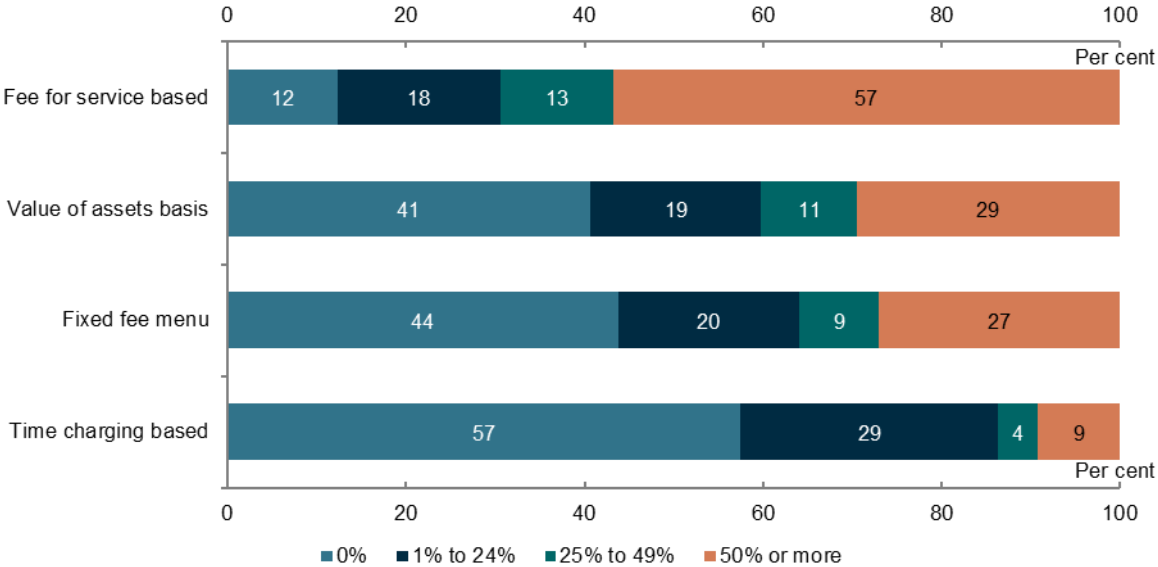


Question 17: Level of concern if best interest obligations were removed

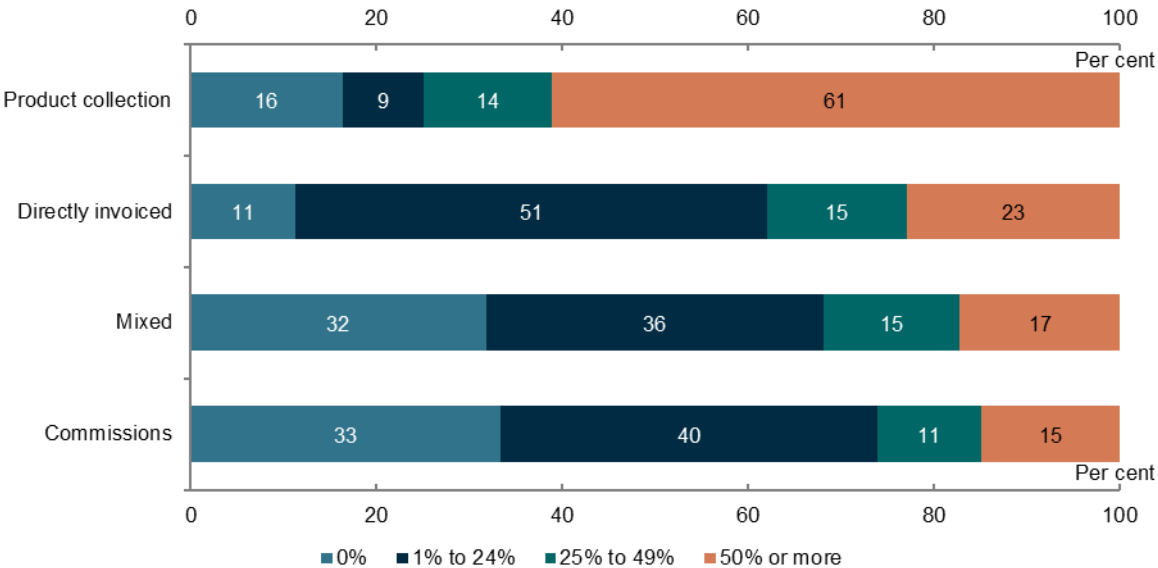


Charging arrangements

Question 18: Proportion of fees charged to clients by calculation method

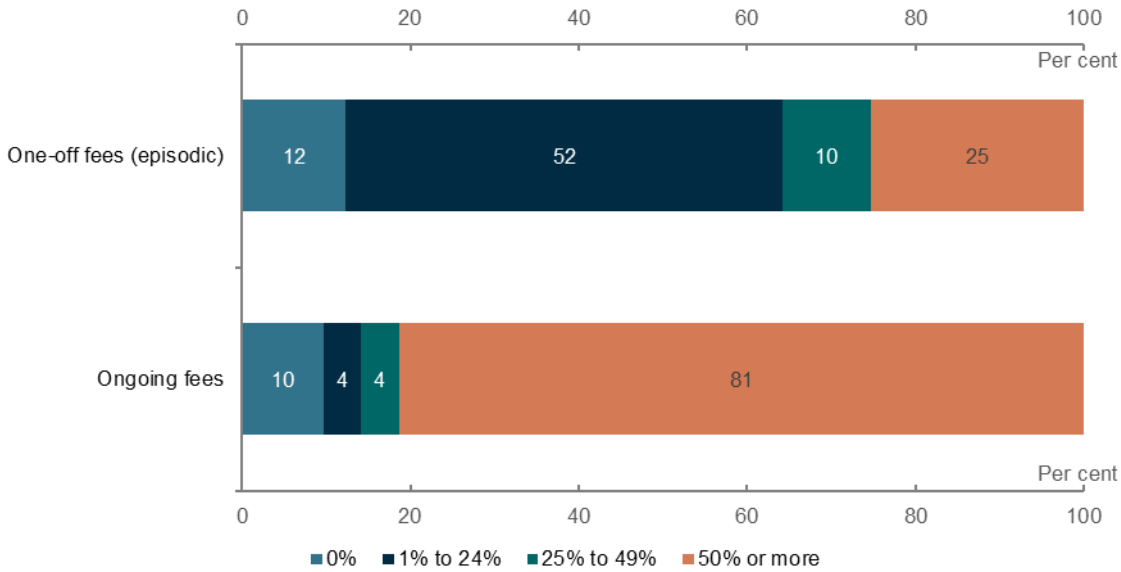


Question 19: Proportion of clients who pay for financial advice fees by charging method

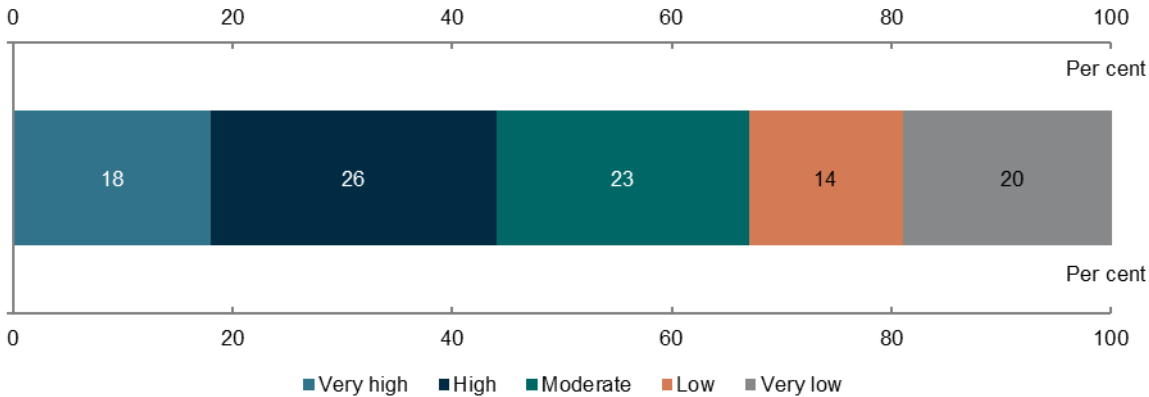


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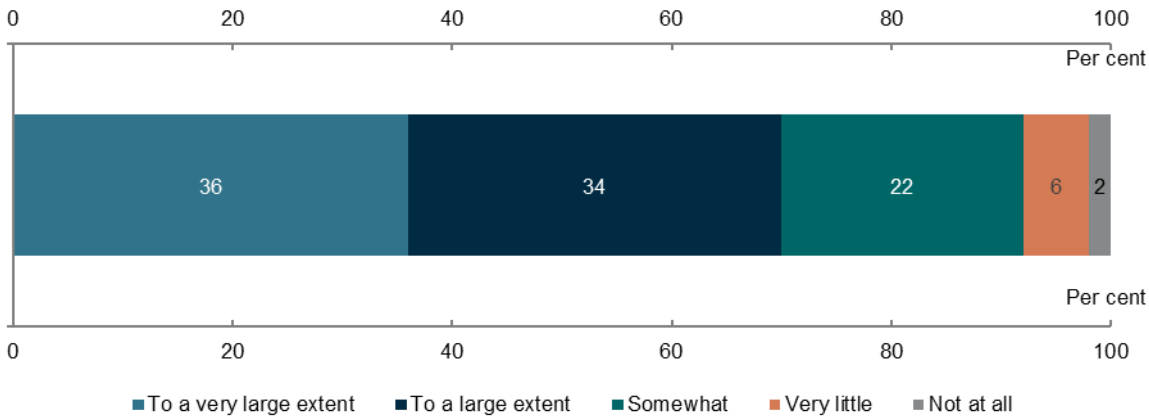
Question 20: Proportion of clients who paid one-off or ongoing fees



Question 21: Clients' understanding of why they need to sign consent forms for each account fees are deducted from

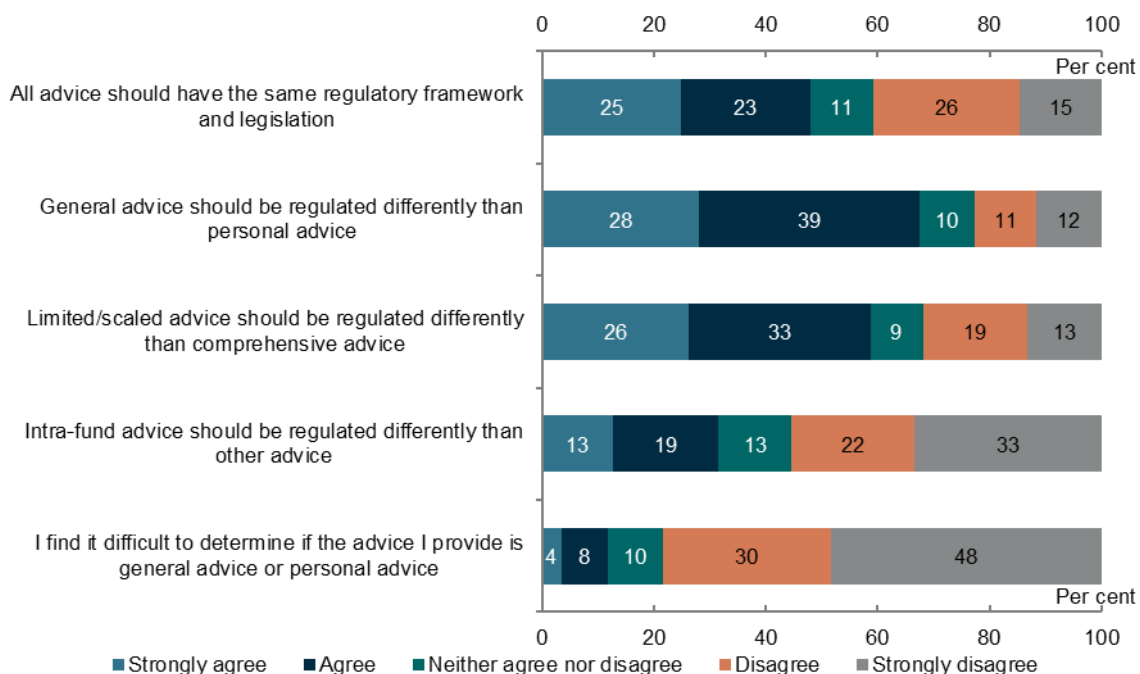


Question 23: Extent to which product issuers impose obligations on advisers in addition to those imposed by the ongoing fee arrangement requirements in the Corporations Act

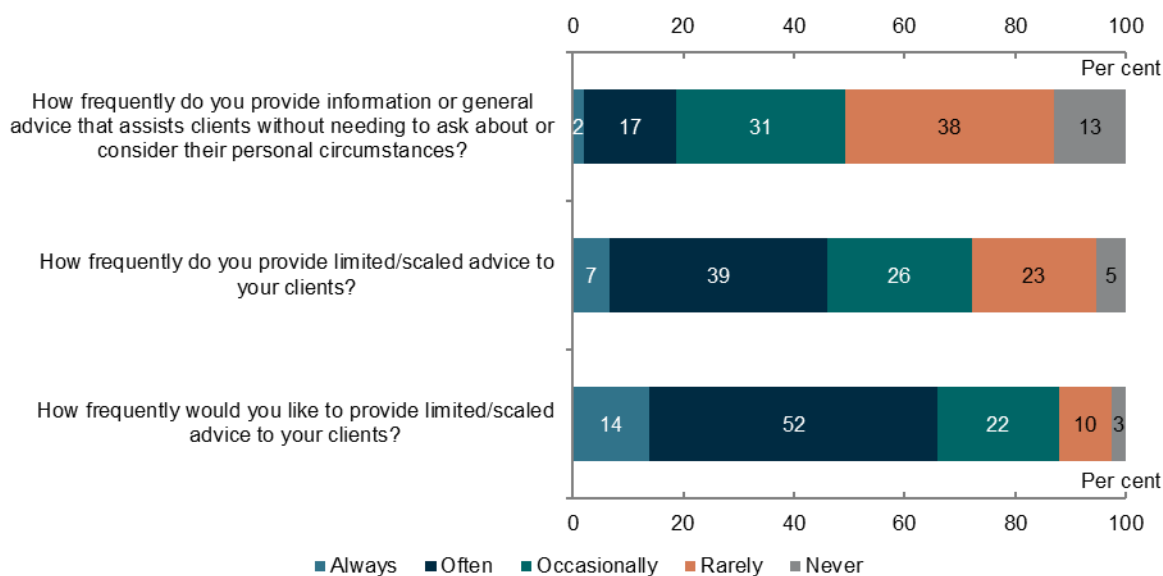


Types of advice/advice boundaries

Question 24: Perceptions of how different types of advice should be regulated

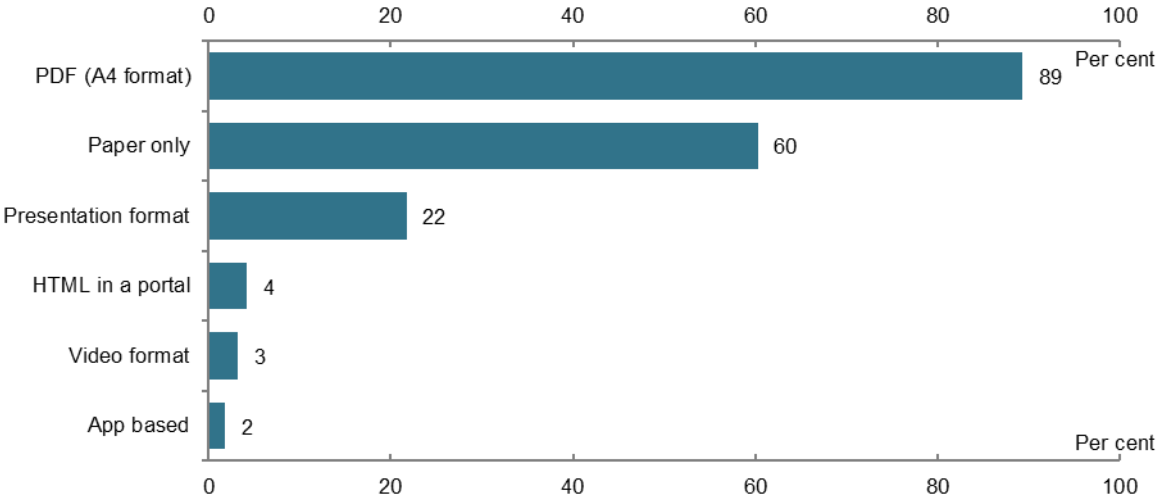


Question 25, 26 and 28: Provision of general and limited/scaled advice

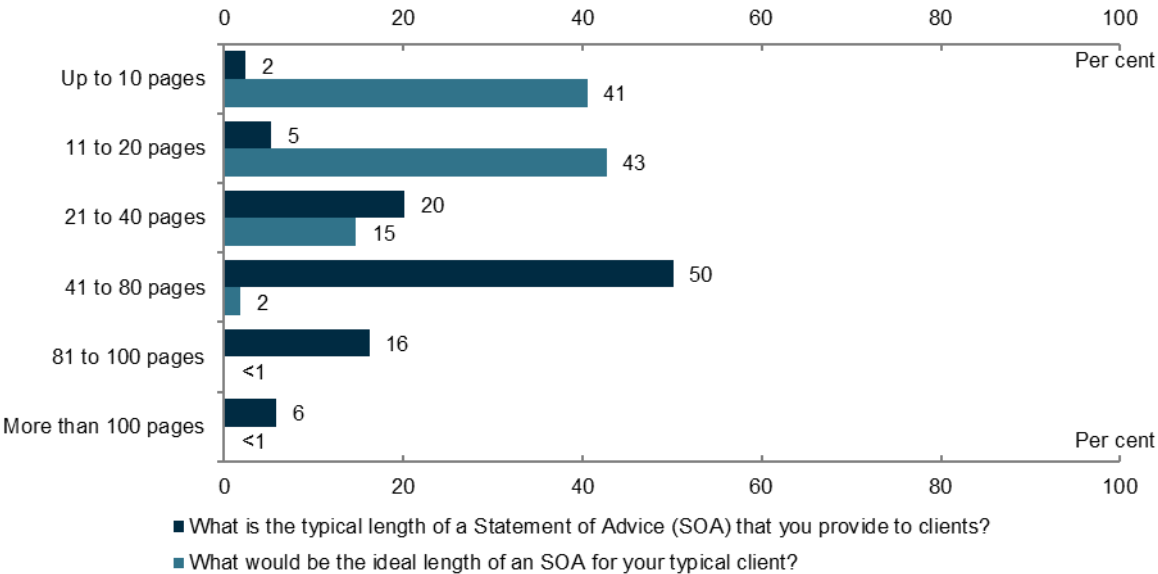


Disclosure documents

Question 29: Format for the provision of Statements of Advice



Question 30 and 31: Typical and desired lengths of Statements of Advice



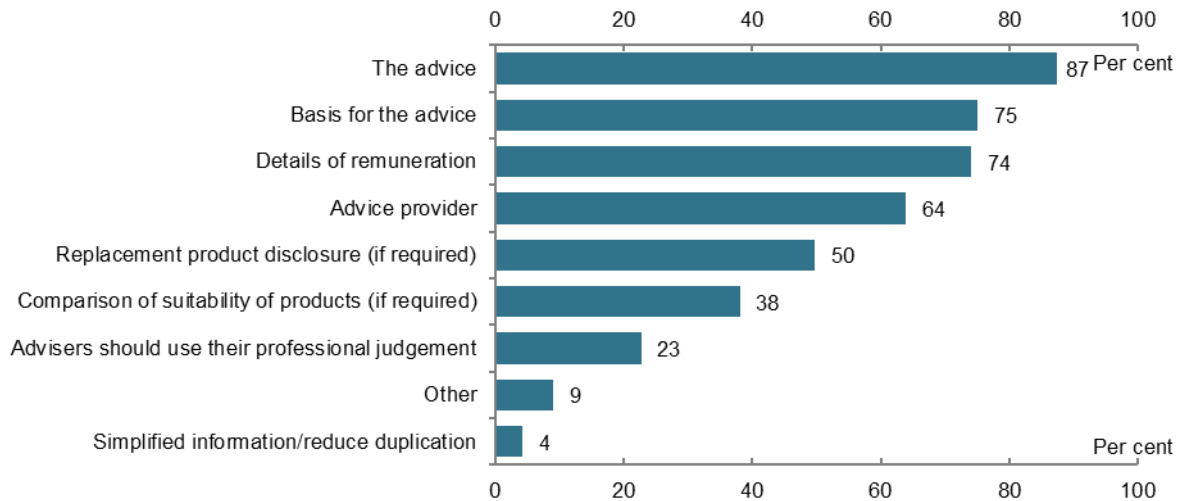
Question 32: Whether their SOA requirements differ to those required in the Corporations Act

25 per cent of respondents reported that their SOA requirements differed from those required in the Corporations Act, with 50 per cent of respondents reporting that their requirements did not differ and 25 per cent unsure whether their requirements differed.

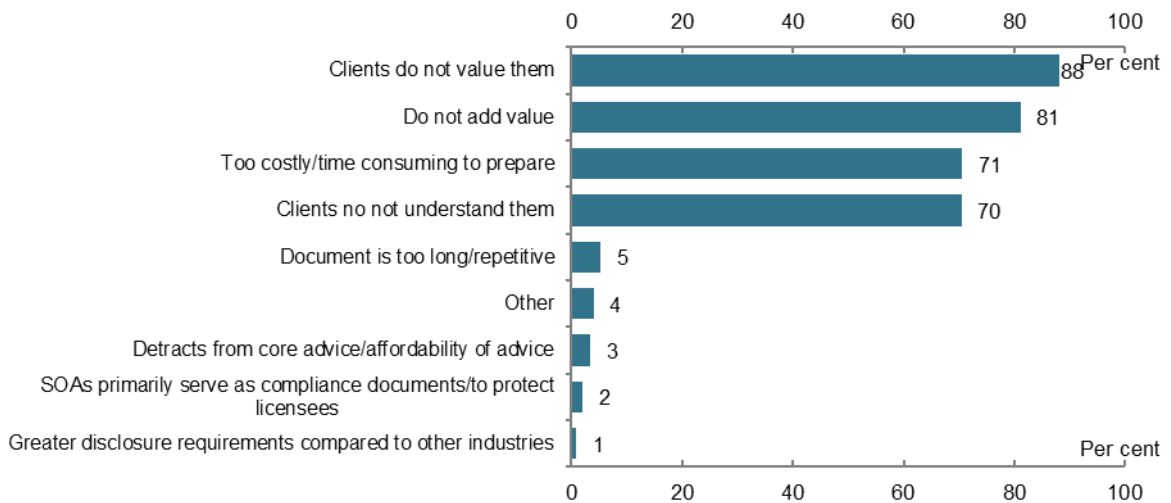
Question 33: Perceptions of whether the requirements regarding the completion and provision of SOA should be changed

90 per cent of respondents considered that the requirements regarding the completion and provision of SOA should be decreased.

Question 34: Perceptions of what should be retained if SOA requirements are decreased (among those who considered that SOA requirements should be decreased)

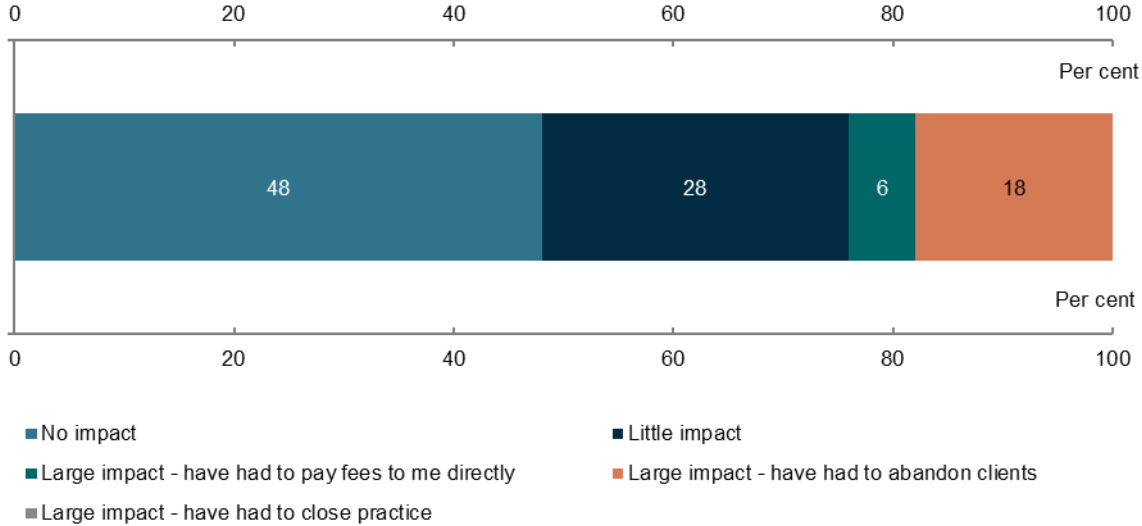


Question 35: Perceptions of why SOA requirements should be decreased (among those who considered that SOA requirements should be decreased)

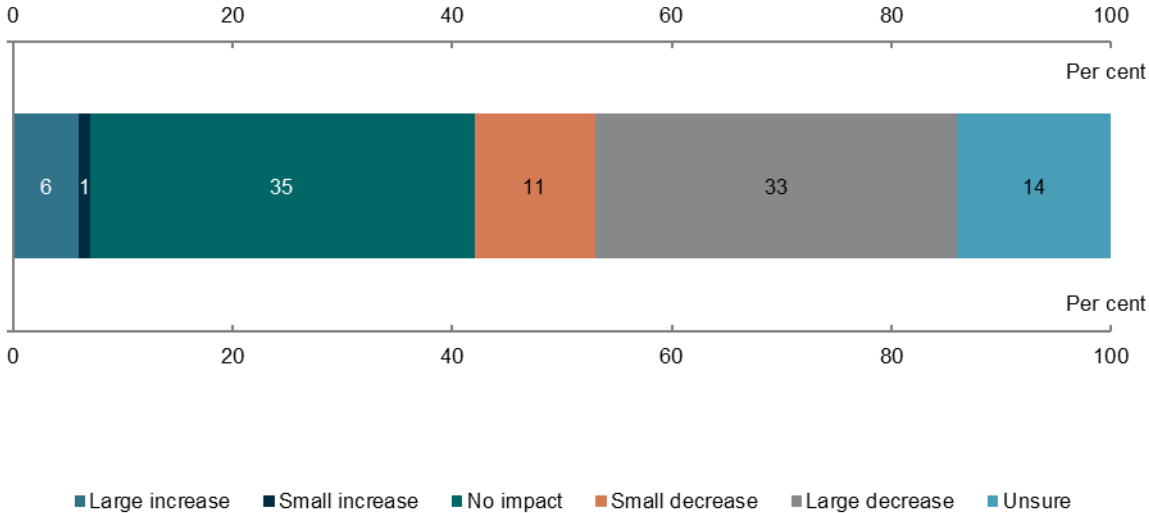


Conflicted remuneration

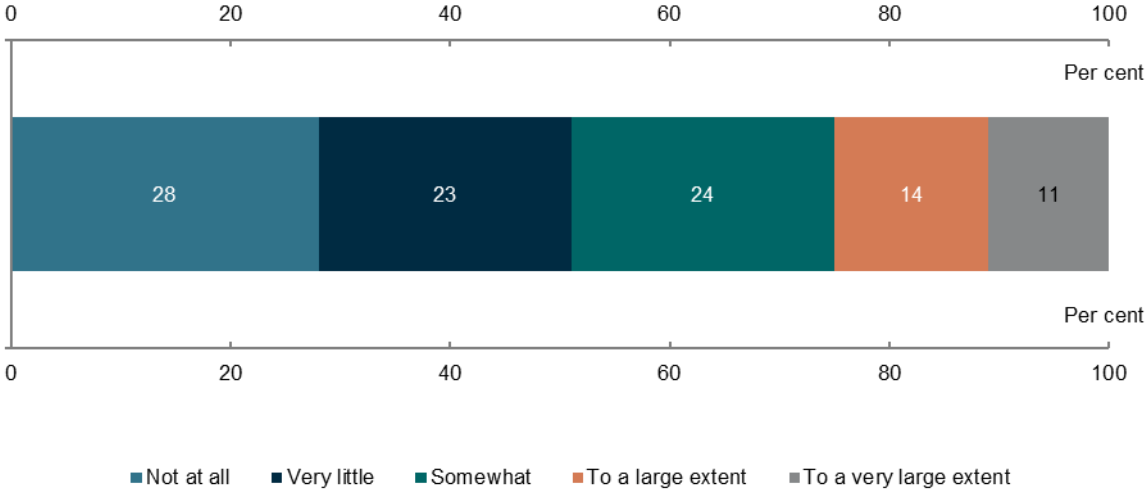
Question 36: Impact of banning conflicted remuneration on clients



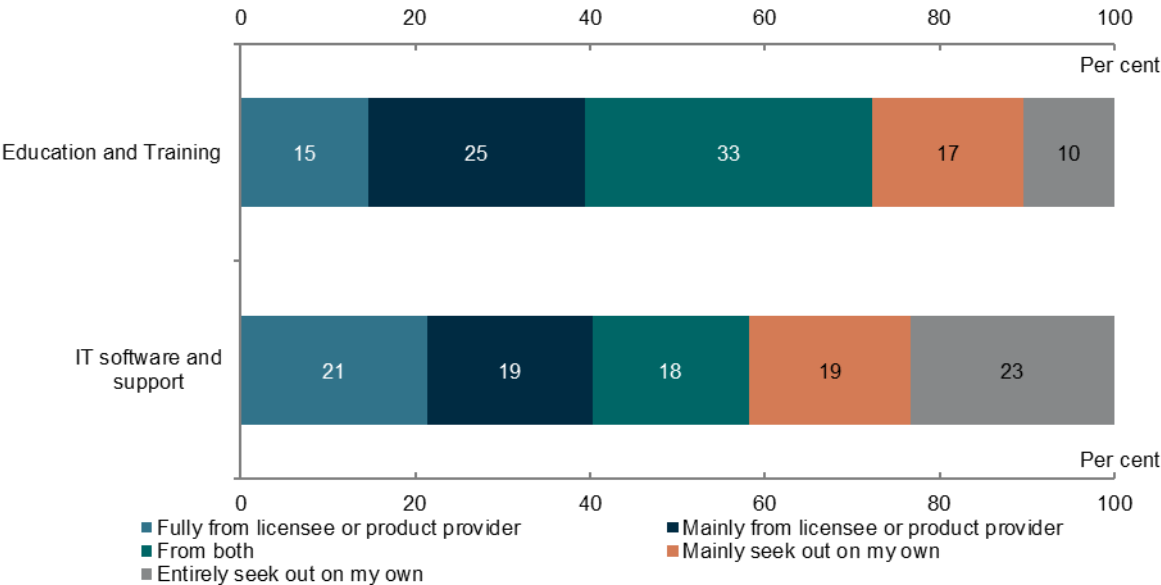
Question 37: Impact of capping life insurance commissions on the number of consumers seeking or receiving life insurance advice



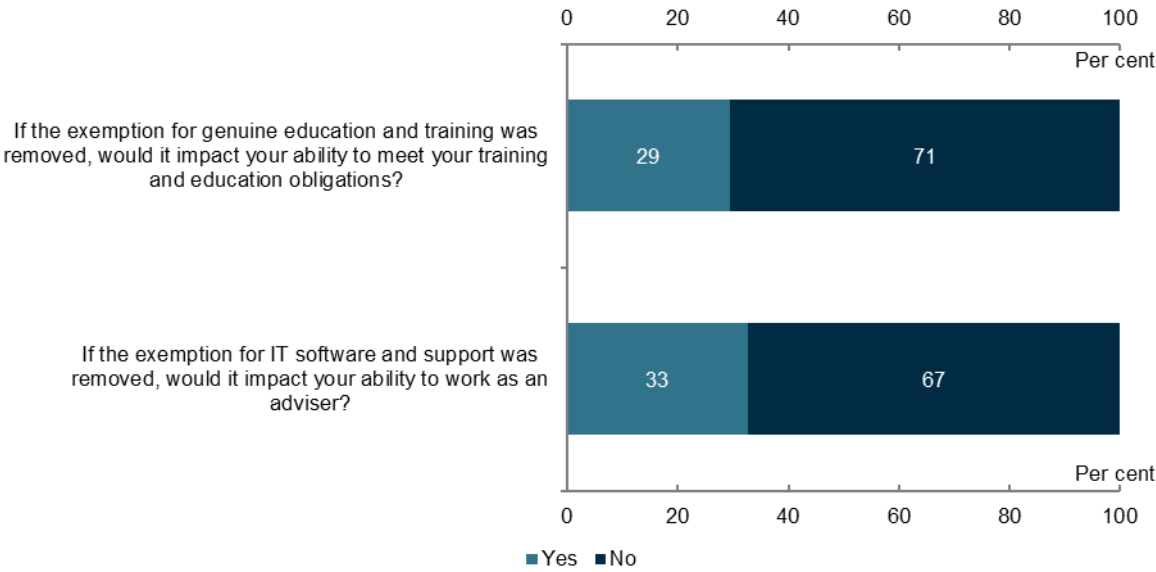
Question 38: Reliance on commissions (up-front and trailing) for revenue



Question 39: Extent to which education and training or IT software and support services are received from product providers or sought out on their own

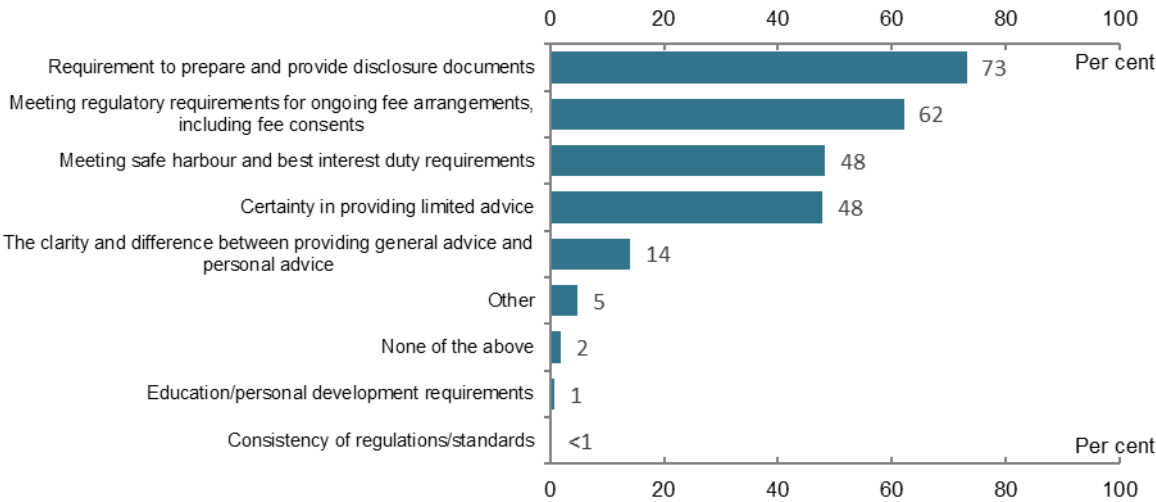


Question 40 and 41: Impact if exemptions for genuine education and training or IT software and support were removed



Regulatory framework

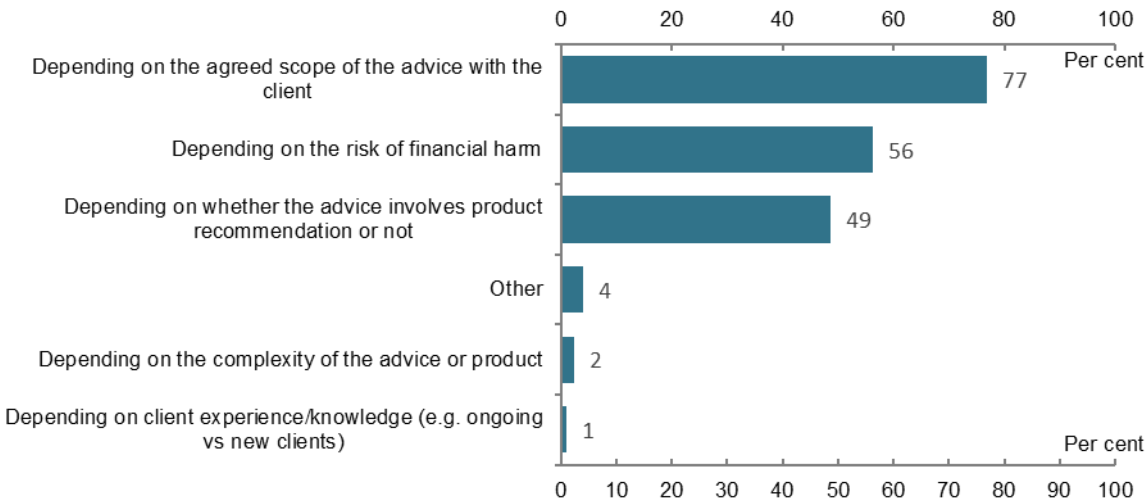
Question 42: Areas to address to most effectively reduce regulatory burden



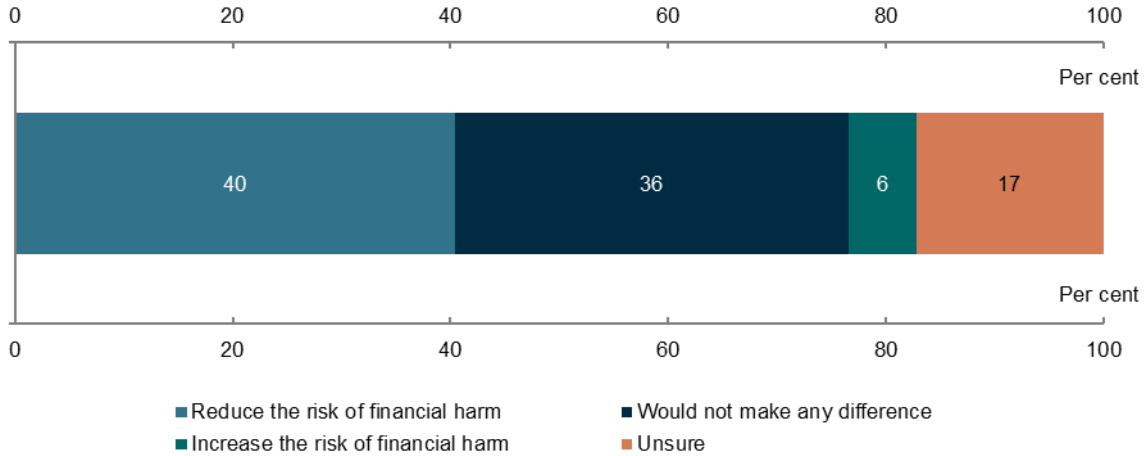
Question 44: Whether regulations for advice should vary depending on the complexity of the advice

72 per cent of respondents believed that regulations for advice should vary depending on the complexity of the advice.

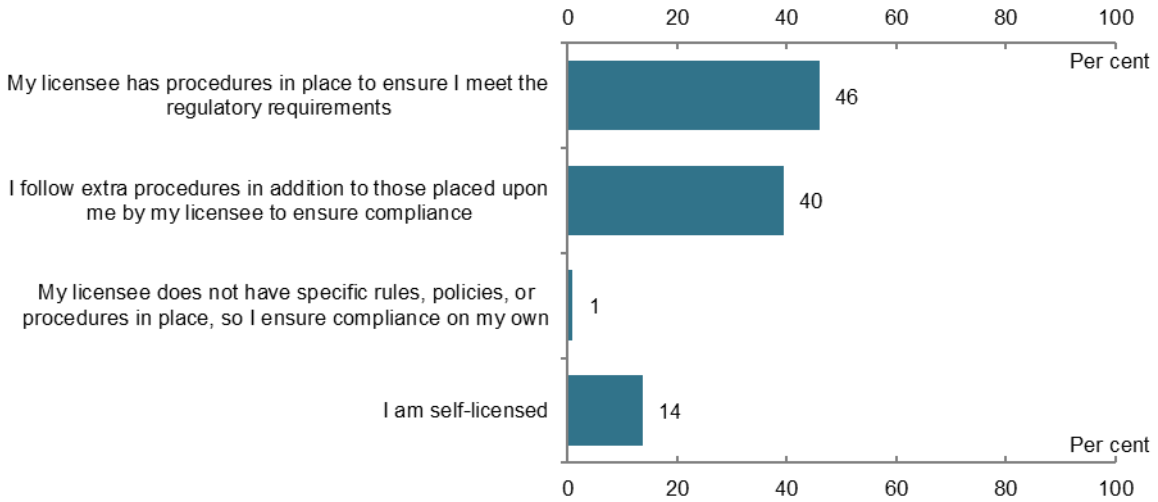
Question 45: How regulation should vary depending on advice (among those who considered regulation should vary depending on complexity of advice)



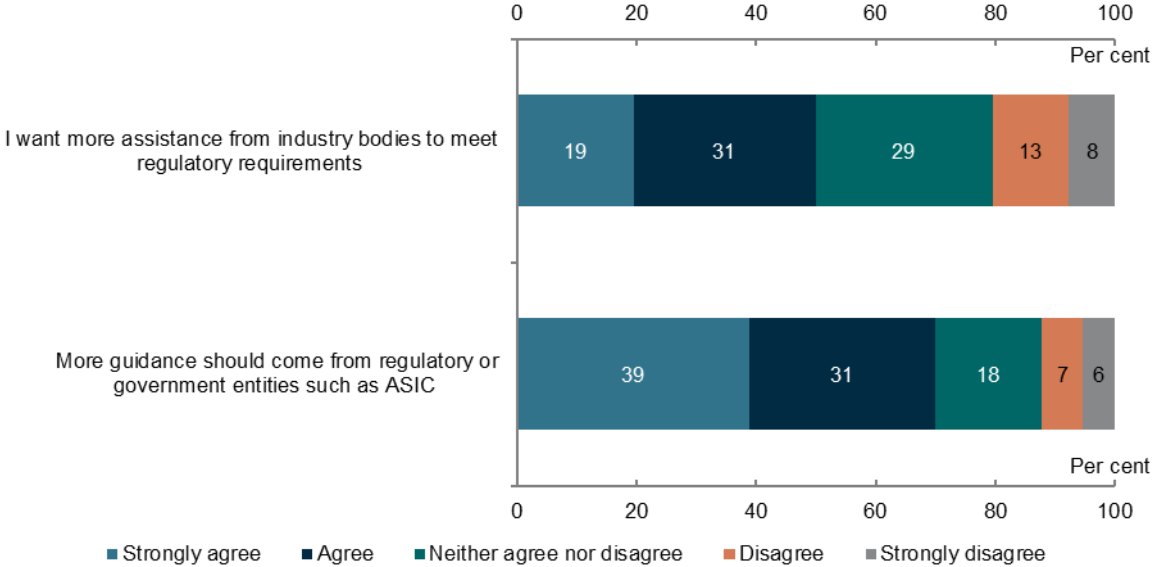
Question 46: Perceived impact if regulation of advice relating to risky products was increased



Question 47: Regulatory requirements set by licensees



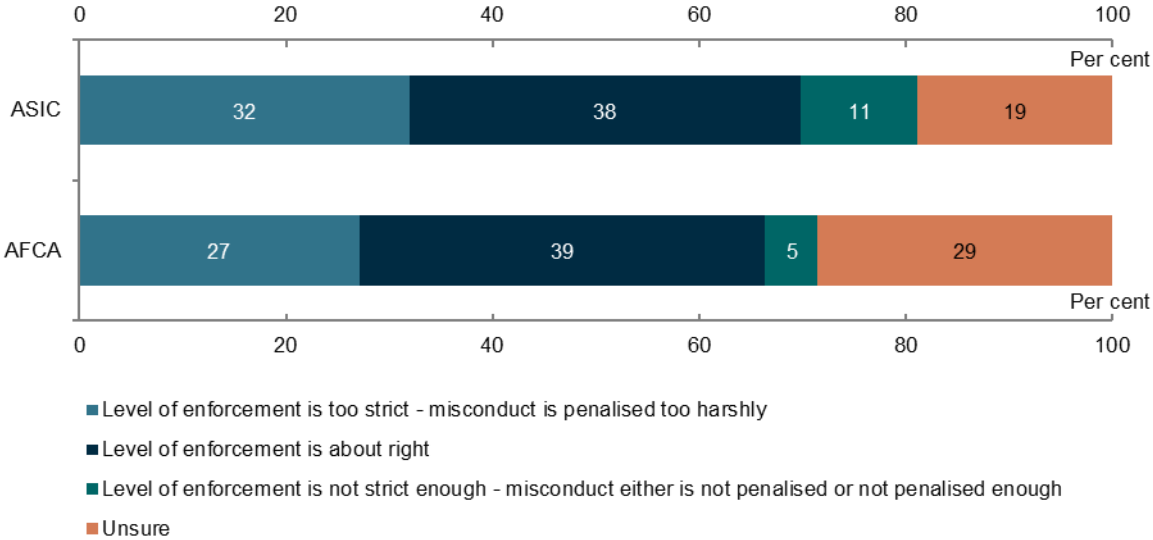
Question 48: Perceptions of guidance and assistance to meet regulatory requirements



Question 49: Use of ASIC regulatory guides to understand regulatory requirements

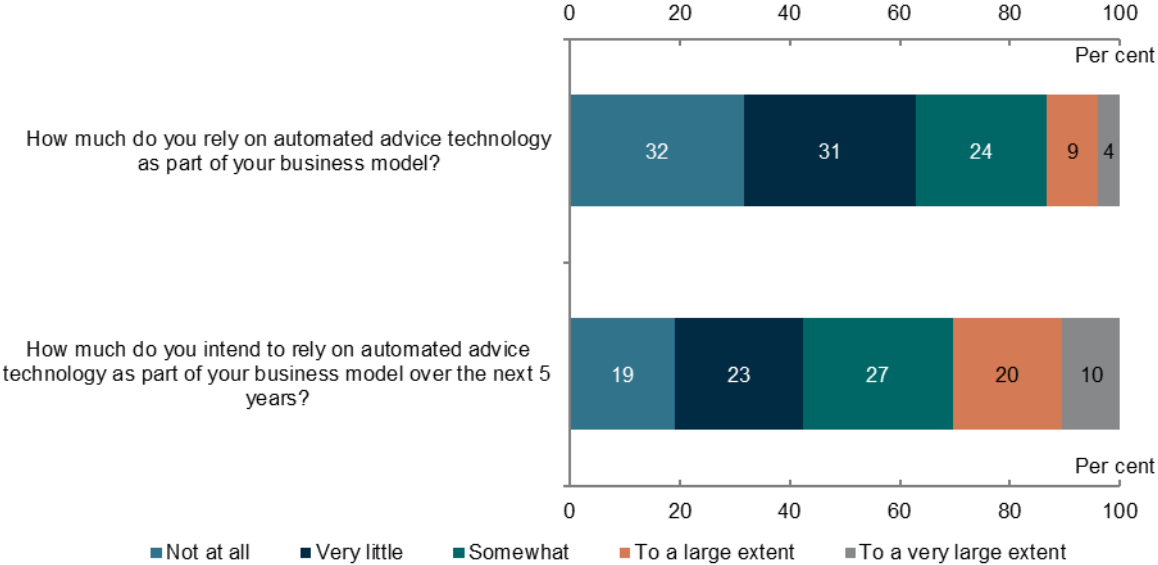
48 per cent of respondents responded that they used ASIC’s regulatory guides to understand regulatory requirements.

Question 50: Perceptions of the level of enforcement by ASIC and AFCA

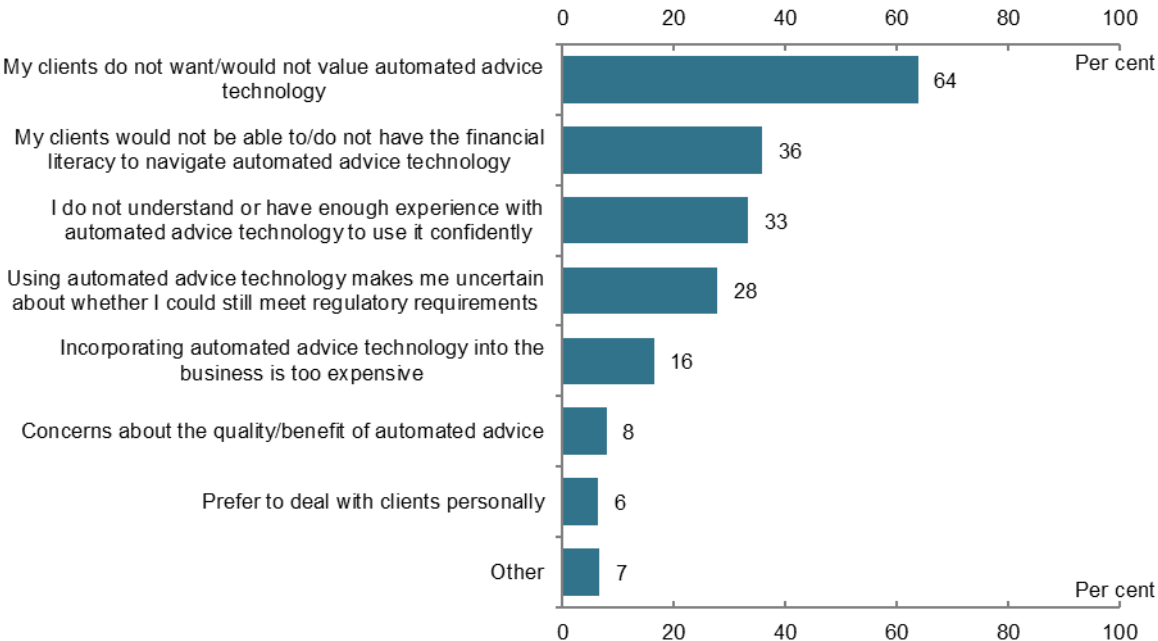


Digital advice and financial technology

Question 52 and 53: Current and intended reliance on automated advice technology



Question 54: Why do not intend to use automated advice technology in the next 5 years



Appendix 4: Conflicted remuneration

As part of the Review, a range of data sources were considered in relation to the remaining exemptions to the ban on conflicted remuneration in Chapter 7 of the Corporations Act, including the exemptions for general insurance and life risk insurance products. The data collection methodology and key findings from these data sources for general insurance and life insurance are set out below.

General insurance

We collected data about the general insurance industry from 2 main sources:

- General insurer and broker responses to a Treasury-initiated voluntary data request; and
- A 2019 Report by Finity Consulting (Finity) commissioned by ASIC on the general insurance industry, which specifically considered the distribution and remuneration arrangements of general insurance products sold to retail clients.

General insurers and brokers data request

Methodology

The Review issued a voluntary data request to a representative number of general insurers, which constituted a significant proportion of the general insurance market across many general insurance products. The insurers that participated in the data request made up approximately 62 per cent of the home building and contents insurance market and 72 per cent of the market for motor vehicle insurance (for the 2021/22 financial year).³⁸²

The Review requested data on the following general insurance products, in accordance with the definition of 'general insurance products' in section 761G(5) of the Corporations Act:

- Motor vehicle insurance;
- Home building insurance;
- Home contents insurance;
- Residential strata insurance;
- Sickness and accident Insurance;
- Consumer credit insurance;
- Travel insurance; and
- Pet insurance.

The data request was developed after consulting with ASIC, the participating general insurers and the Insurance Council of Australia. The purpose of the data collection was predominantly to understand:

- the operation of the general insurance market;

³⁸² APRA (2022c), *Quarterly general insurance performance statistics*.

- the role of intermediaries in distributing general insurance products and how this varied across different general insurance products; and
- insurers' remuneration arrangements with intermediaries, and how these varied between products and between distribution channels.

The Treasury Secretariat, in consultation with a number of insurance brokers and the National Insurance Brokers Association, issued a similar data request to international and domestic brokers. Similar to the request issued to insurers, the request to brokers was issued for the purpose of better understanding the role of brokers with insurers, as well as with their clients. A number of brokers also responded to this request.

For the purposes of the analyses included in this report, please note the following considerations:

- The data provided to the Review was unable to be independently validated. However, where it was possible to do so, sense checks were performed to ensure that the data was reasonable.
- Data was not provided by all insurers for the 2018/19 financial year, therefore, to maintain the confidentiality of the data, 2018/19 financial year data has been omitted from the analysis.
- For the 2021/22 financial year, data has only been provided up to 31 March 2022. So while the data for this financial year has been retained in the charts, it has not been specifically referred to in the analysis of the trends.
- Not all insurers provided data on the distribution channels for general insurance products, therefore, the analysis on distribution channels only includes home building and contents insurance and motor vehicle insurance.
- Not all insurers provided data on all of the product lines. So where it was not possible to maintain the confidentiality of the data, product lines have been excluded from the analyses.
- Due to the way data was provided, home building and contents insurance have been combined in the analysis as 'home insurance'.

Key findings

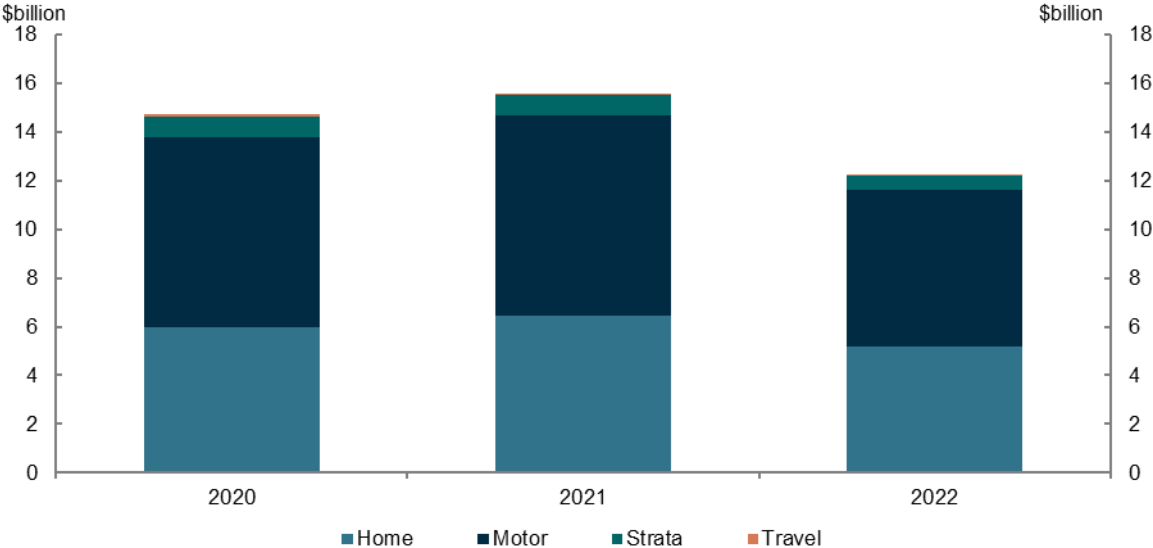
In summary, the data collected from insurers showed that:

- With the exception of travel insurance, the gross written premium (GWP) for all other product types increased slightly between 2019/20 and 2020/21;
- Direct sales is the primary distribution channel for motor vehicle insurance and home insurance;
- Total new business premiums increased for home insurance and motor vehicle insurance, but decreased for strata and travel insurance between 2019/20 and 2020/21;
- Total new business premiums increased for products sold through add on sales, agents, brokers and direct sales, but decreased for products sold through underwriting agencies and white label providers between 2019/20 and 2020/21; and
- The average commissions rates provided to intermediaries remained relatively stable between 2019/20 and 2020/21, with underwriting agencies generally attracting the highest commission rates.

Characteristics of sample

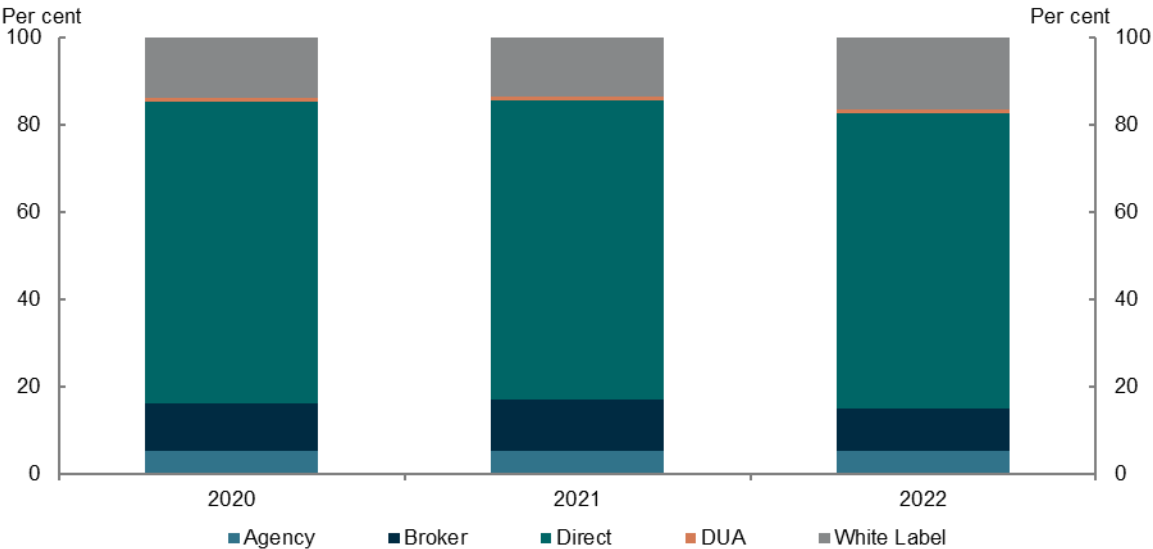
Overall, total GWP for home, motor, strata and travel insurance increased by 6 per cent from approximately \$14.7 billion in the 2019/20 financial year to \$15.6 billion in the 2020/21 financial year (Chart 1). During this timeframe, the GWP for home insurance increased by 8 per cent, while the GWP for travel insurance decreased by more than 60 per cent, which can likely be attributed to the travel restrictions introduced during the COVID-19 pandemic.

Chart 1: Total GWP, by product type



Between 2019/20 and 2020/21, home insurance was primarily sold through direct sales (approximately 68 per cent of GWP), followed by 13–16 per cent sold as white label products and about 11 per cent sold through insurance brokers (Chart 2).

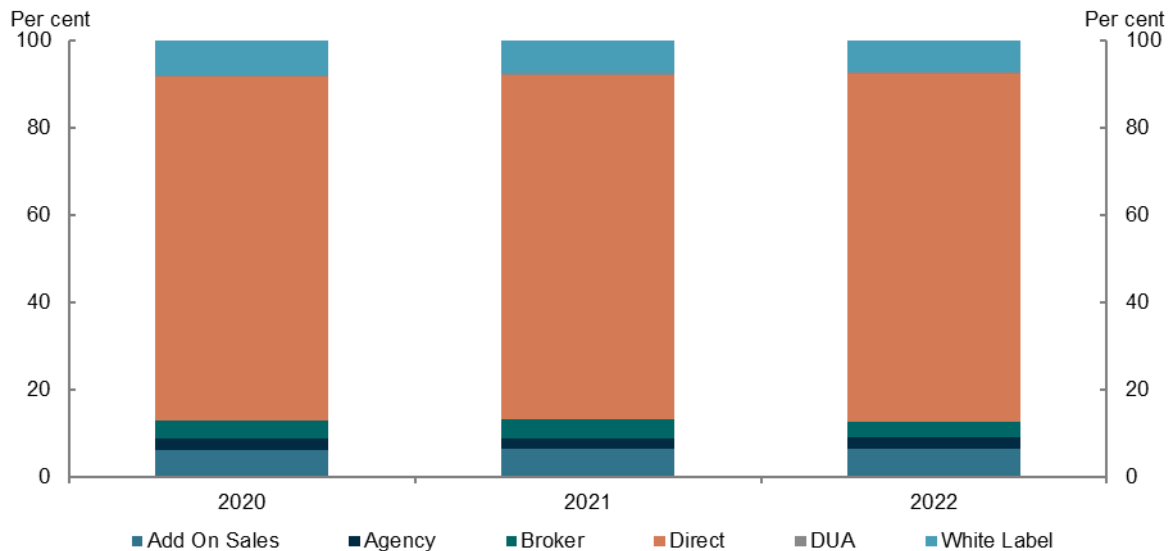
Chart 2: Home insurance, by distribution channel



* DUA means Delegated Underwriting Authority (also referred to in this report as an underwriting agency).

Between 2019/20 and 2020/21, motor vehicle insurance was also predominantly sold through direct sales (around 79 per cent of GWP), followed by white label products (7–8 per cent of GWP) add-on sales (6 per cent of GWP) and brokers (4 per cent) (Chart 3).

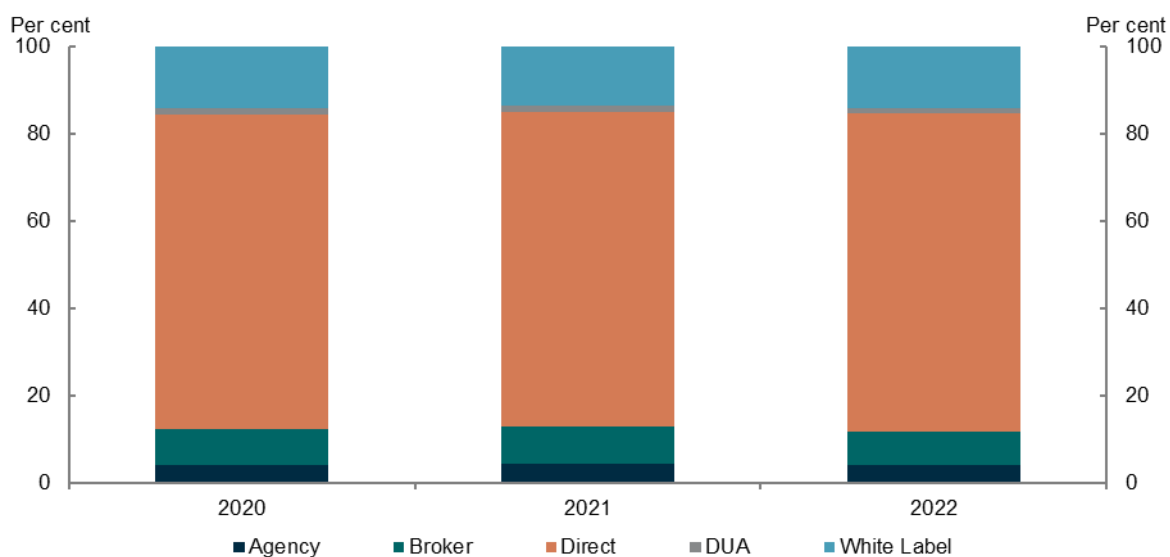
Chart 3: Motor vehicle insurance, by distribution channel



Overall, across all product types (home, motor, strata and travel insurance), the total number of in-force policies decreased by approximately 9 per cent between 2019/20 and 2020/21. This is driven by the decline in the number of in-force travel insurance policies, which fell by about 47 per cent. A likely major cause of this fall is the continued impacts of COVID-19 on travel during this period. The number of in-force policies for the other products (home, motor, strata) however remained stable.

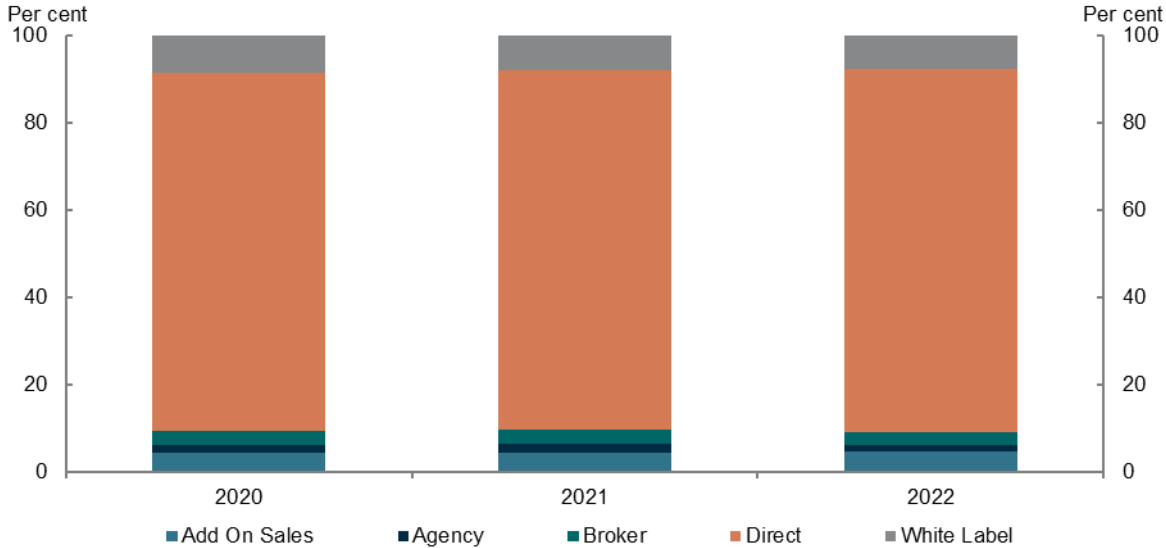
Between 2019/20 and 2020/21, around 72 per cent of in-force home insurance policies were sold through direct sales, followed by 14 per cent sold as white label products and 8–9 per cent sold through brokers (Chart 4).

Chart 4: Home insurance – proportion of in-force policies, by distribution channel



For motor vehicle insurance, nearly 83 per cent of in-force policies were sold through direct sales between 2019/20 and 2020/21, followed by 8 per cent sold as white label products, 4 per cent sold as add on sales and 3 per cent through brokers (Chart 5).

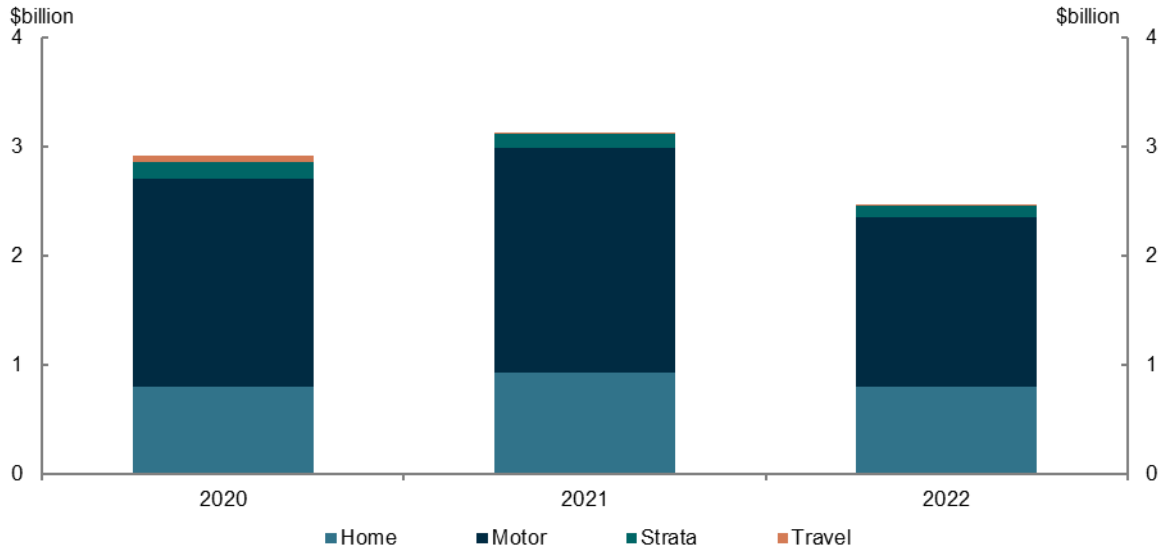
Chart 5: Motor vehicle insurance – proportion of in-force policies, by distribution channel



Premiums

Overall, total new business premiums for all product types (home, motor, strata and travel) increased by approximately 7 per cent between 2019–20 and 2020–21. The total new business premiums for home and motor vehicle insurance increased by 15 per cent and 9 per cent, respectively during this period. However, total new business premiums for strata and travel insurance decreased by 17 per cent and 99 per cent, respectively (Chart 6).

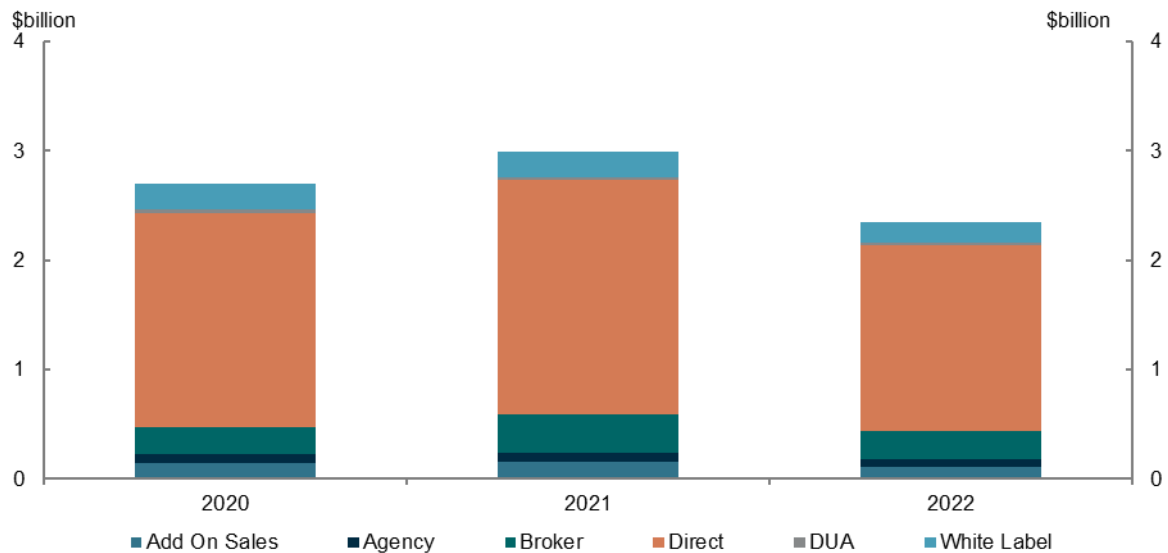
Chart 6: New business premiums (GWP), by product type – 2019/20 to 2021/22



For home insurance and motor vehicle insurance, total new business premiums increased between 2019/20 and 2020/21 for sales through brokers (by 40 per cent), agents (10 per cent), direct distribution channels (9 per cent) and add on sales (7 per cent). However, total new business

premiums decreased for products sold through underwriting agencies (13 per cent) and sold as white label products (3 per cent) (Chart 7).

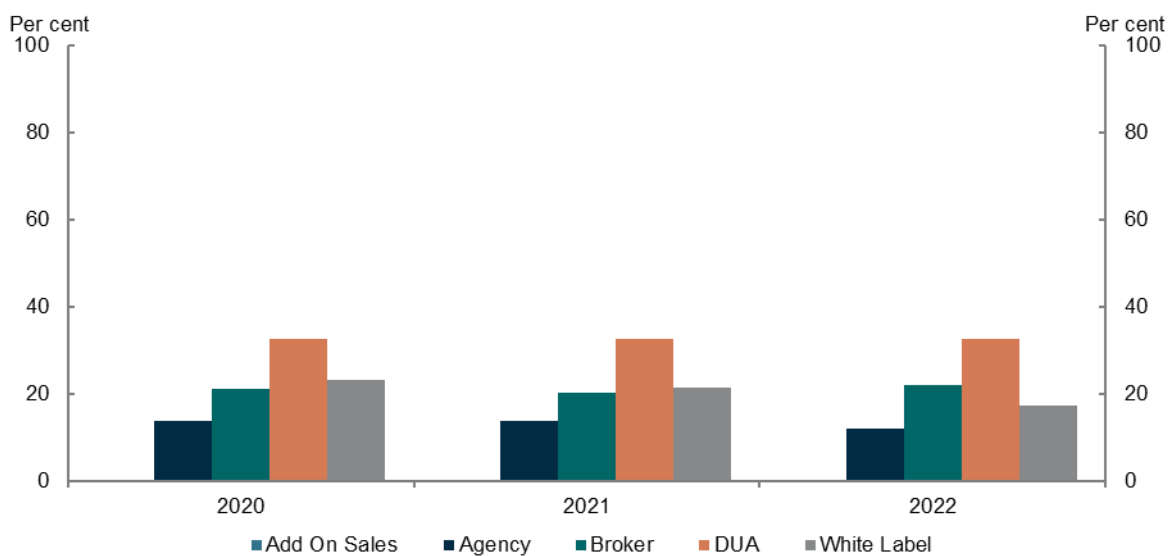
Chart 7: New business premium (GWP), by distribution channel – 2019/20 to 2021/22



Commission rates

Commission rates vary by product type and distribution channel. Average commission rates for home and contents insurance have remained relatively stable between 2019–20 and 2021–22, with underwriting agencies attracting the highest average commission rate of 32 per cent (Chart 8). Commissions rates provided to brokers also remained stable during this period, at around 21 per cent.

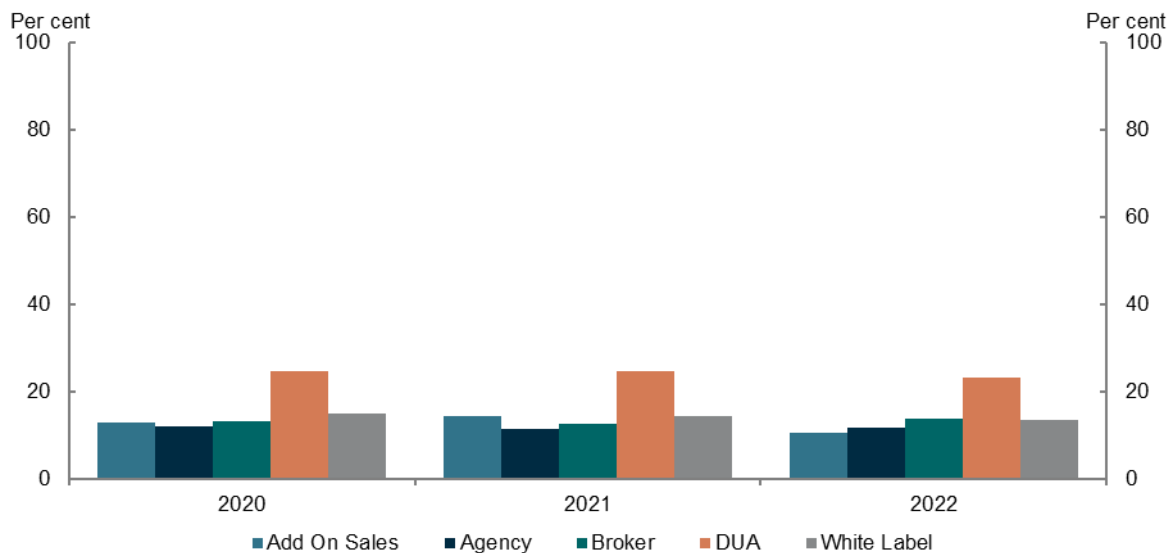
Chart 8: Commission rates (home insurance), by distribution channel – 2019/20 to 2021/22



Commission rates for motor vehicle insurance have also remained quite stable between 2019–20 and 2021–22 (Chart 9). Again, underwriting agencies received the highest average commission rate

(around 24 per cent), followed by distributors of white label products (14 per cent), brokers and add on sales (13 per cent) and agents (12 per cent).

Chart 9: Commission rates (motor vehicle insurance), by distribution channel - 2019/20 to 2021/22



Finity Report

Methodology

In 2019, and independently of the Review, ASIC commissioned a market information report from Finity Consulting (Finity) on the distribution and remuneration arrangements of general insurance products sold to retail clients. That report has been provided to the Review, with Finity’s permission, to provide information on the general insurance industry. The purpose of the report was to provide an information base, at a broad level. The Finity report was a factual analysis and did not specifically deal with whether any aspects of remuneration may be conflicted. It also did not provide analysis or recommendations regarding reform options.

The Finity report dealt with general insurance products sold to retail clients and considered motor vehicle insurance, home and contents insurance (‘home’), product add-on insurance (including consumer credit insurance sold by life insurers), travel insurance and pet insurance.

The distribution channels the Finity report considered were direct sales, white label providers, agents, brokers and delegated underwriting authorities (DUAs).

Key Findings

Distribution of general insurance products

The Finity report found that direct sales dominate the home and motor vehicle insurance markets, making up 70 and 80 per cent of sales by GWP. On the other hand, Finity found that travel, consumer credit and pet insurance are mainly sold through intermediaries. Table 1 below sets out the estimates of the relative prevalence of the different distribution methods for each product type. The findings are broadly consistent with those from the voluntary data request undertaken by the Review.

Table 1: Estimates of relative prevalence of distribution channel by product line

Product	Distribution channel (% GWP)			
	Direct	White Label	Agency	Broker
Home	70	15	10	5
Motor	80	10	5	5
Travel	30	10	40	n/a
Consumer Credit	n/a	60	40	n/a
Pet	20	10	70	n/a

Note: Strata and Sickness and Accident product lines were excluded due to their speciality nature.
 Note: Available distribution data was inconsistent in structure and availability. The table shows what the Finity report estimated were the most common arrangements, but there may inevitably be outliers that were not representative of the information shown.

Outside of the direct channel, the Finity report found that financial institutions are the major distributors of home and motor vehicle insurance, with the share of home and contents insurance sold to be higher because of the link with mortgage lending. Other notable providers of white label products include supermarket chains, private health insurers and Australia Post.

For the home and motor vehicle insurance markets, remuneration is typically based on commission, paid at the same rate on new business and renewals. Additionally, there was some evidence of profit share and soft dollar benefits being awarded by insurers. The Finity report found that the difference in the insurance premium between a white label product and an underwriting insurer’s direct product was typically between 10 to 25 per cent of GWP. Part of the difference was attributed to the distribution costs of intermediated products, as compared to products sold directly by the insurer. However, the Finity report also found differences in cost between the different intermediated channels (i.e. not all intermediated distribution channels are equal in terms of cost).

For travel insurance, the Finity report concluded that the premium for like-for-like products vary by channel based on the relative cost of distribution, including the level of commission paid. Otherwise identical insurance products arranged through travel agents and airlines was found to be generally more expensive, than if arranged with the insurer directly.

The Finity report found that pet insurance was largely underwritten by a single insurer, and distributed online through a variety of intermediaries. While the insurer was responsible for setting the ‘net price’ for each product, major distributors had some latitude to set a higher customer price based on their cost structure, profit margins and customer profile. The customer price was estimated to vary from 110 per cent to 200 per cent of the insurer’s net price, with the difference retained by the distributor.

Commission Rates

The Finity report found that commissions (as a per cent of GWP) were the most common form of intermediary remuneration. As Table 2 illustrates, commissions paid to intermediaries for home and motor vehicle insurance range was estimated to range from 10 to 30 per cent of GWP, with underwriting agencies likely, on average to receive a higher rate of commission and white label providers likely, on average, to receive a lower commission rate.

Travel and pet insurance, which are most commonly distributed by white label providers and agents, were, on average, likely to attract higher commission rates from 20 to 65 per cent of GWP. Under the law, commissions for consumer credit insurance are capped at 20 per cent.

Table 2: Commission estimates by product type

Product	Commission rate (% of GWP)
---------	----------------------------

	Direct	White Label	Agency	Broker	DUA
Home	n/a	10–20	15–25	15–25	20–30
Motor	n/a	10–15	10–20	10–15	20–25
Travel	n/a	20–25	35–65	n/a	n/a
Consumer Credit	n/a	20	20	n/a	n/a
Pet	n/a	20–30	30–40	n/a	n/a

* Strata and Sickness and Accident product lines were excluded due to their speciality nature.

Note: Available distribution data was inconsistent in structure and availability. The table shows what the Finity report estimated were the most common arrangements, but there may inevitably be outliers that were not representative of the information shown.

Life insurance

The Review considered 2 main data sources in relation to life insurance:

- A review of personal life insurance advice files: 2 sample sets of life insurance advice files were assessed for comparison, the first set from 2017 before the LIF reforms were introduced, and the second set from 2021 after the LIF reforms were fully implemented. Life insurance advice files were assessed for compliance with the best interests duty and related obligations and for significant concerns about consumer detriment.
- A life insurance industry data collection (LIDC): ASIC collected aggregate level data from life insurers every 6 months between 2017 and 2021 (inclusive) on product sales, premiums, commissions, lapses and clawbacks.

Throughout the LIF Review, ASIC has consulted with a stakeholder working group (consisting of advice and life insurance industry representatives, consumer advocates and Government agencies) to increase transparency about the LIF Review and to provide an opportunity for stakeholder guidance and feedback to ASIC.

Review of life insurance advice files

Sampling and data collection methodology

Two samples of life insurance advice files were assessed to determine whether the quality of life insurance advice has improved since the LIF reforms. This included:

- 521 life insurance advice files from 2017; and
- 522 life insurance advice files from 2021.

The sampling methodology was developed by ASIC in consultation with the LIF Working Group with efforts made to obtain a sample of life insurance advice files that was random, representative and able to be obtained in a practical and efficient manner (for both industry and ASIC).

For each sample set, ASIC identified active life insurance advisers by requesting a list of life insurance applications from most retail life insurers in May 2017 and February 2021, and randomly selecting a sample of advisers linked to those applications.

To further strengthen the random nature of the sampling, ASIC did not assess the advice related to the application based on which the adviser was identified. Rather, ASIC requested, under notice, for each of the advisers' AFS licensees to provide ASIC with a copy of that adviser's first life insurance advice provided within the relevant collection period. The first data collection period extended from May–Sept 2017, and the second data collection period was from February–June 2021.

Accordingly, the life insurance advice may have included recommendations in relation to a wide range of different subject matters, including but not limited to purchasing a new life insurance product, replacing a life insurance product or increasing, decreasing or cancelling existing cover.

The 2017 and 2021 sample sets were collected independently of each other, which means that clients, advisers and licensees involved in the 2017 sample were not necessarily also included in the 2021 sample (although, they were not specifically excluded, so it is possible that advice provided by the same adviser was assessed as part of both the 2017 and 2021 samples). Similarly, it was also possible that some advisers were sampled more than once even within a single set (i.e. 2 life insurance advice files produced by the same adviser).

The 2017 and 2021 sample sets were developed to provide a 95 per cent level of confidence that an observed change in the rate of compliance greater than or equal to 5 per cent reflected a statistically significant change in the quality of life insurance advice that was broadly representative of the industry. However, analysis involving smaller subsets of the sample (such as by age-group or whether the advice was initiated by the client or adviser) does not have the same 95 per cent level of confidence that the results are broadly representative of the industry.

Assessment methodology

File Reviewers

Life insurance advice files were assessed by file reviewers with appropriate skills, training and experience, for compliance with the best interests duty and related obligations. 50 per cent of the advice files were assessed by ASIC, with the remaining 50 per cent assessed by an external consultant with relevant expertise. A random allocation process was applied to allocate advice files between ASIC and the external consultant, subject to any conflicts of interest. The external consultant's views were their own. For quality assurance purposes, ASIC file reviewers also undertook random checks of more than 25 per cent of the files reviewed by the external consultant, for both sample sets.

Focus of assessment

Each of the files were assessed for their compliance with the best interests duty and related obligations, which included the following sections of the Corporations Act:

- section 961B(1) – provider must act in the best interests of the client;
- section 961G – resulting advice must be appropriate to the client; and
- section 961J – conflict between client's interests and those of provider, licensee, authorised representative or associates.

File reviewers also recorded whether they had significant concerns about consumer detriment arising from non-compliant advice.

Primary advice document reviewed

All of the assessments were undertaken on the advice contained within the 'primary advice document' that was obtained as part of the random sample. By definition, the primary advice document contained life insurance advice.

Licensees were also required to provide to ASIC other documents on the client file that related to the primary advice document, such as file notes, e-mails, fact finds and application forms. Where the client file contained multiple SOAs or ROAs, the assessment related to the advice in the primary advice document (and the related advice process as evidenced by other documents on the client file). The advice in prior or subsequent SOAs or ROAs was not assessed. Where a ROA was the primary advice document, any prior SOAs that related to that ROA were given consideration as necessary to assess the advice in the ROA and related conduct.

Isolating assessments of life insurance related advice from other financial product advice

Although the LIF advice file reviews were focused on assessing the quality of life insurance related advice, the random selection process led to many of the primary advice documents also containing advice about other topics, such as investment advice and superannuation advice. To ensure that

concerns relating to other financial product advice did not impact the life insurance related advice results, the assessments for each file were considered and recorded at 2 levels:

- an assessment with regard only to the life insurance related advice (and related advice process); and
- an assessment with regard to all of the advice (and related advice process), including the life insurance related advice.

Key findings

Overall, the LIF Review found that:

- compliance with the best interests duty and related obligations had improved, with the proportion of files that demonstrated compliance with the best interests duty increasing from 37 per cent of assessed files in 2017 to 58 per cent in 2021; and
- the proportion of files which raised significant concern about consumer detriment declined from 12 per cent in 2017 to 7 per cent in 2021.

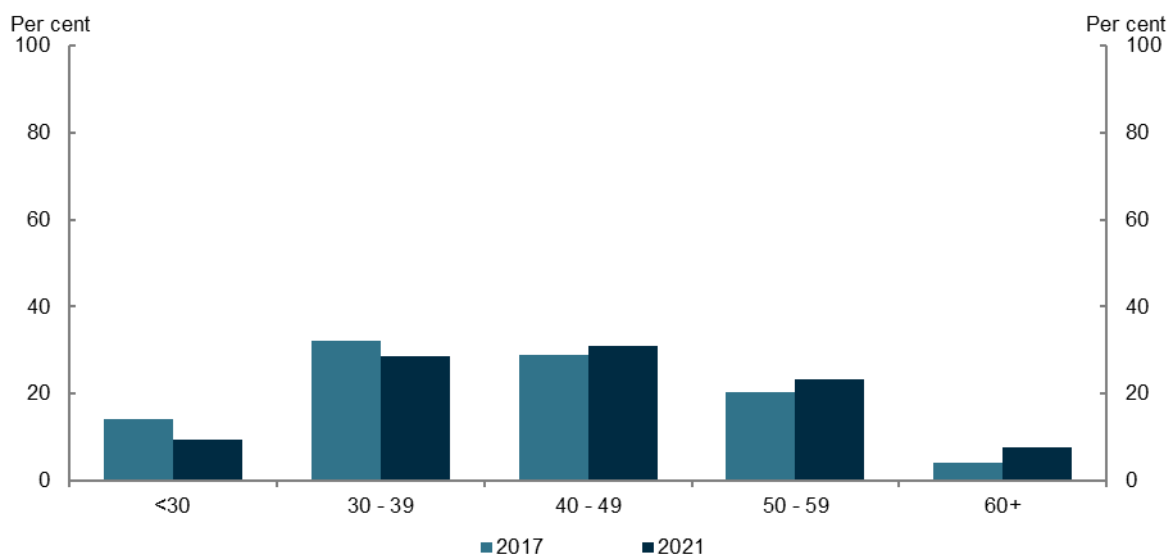
Please note that these advice file review results and those below relate only to the assessment of life insurance related advice (even where the advice file may have also included advice on topics unrelated to life insurance).

Composition of advice files

Overall, the LIF Review considered a total of 521 life insurance advice files in 2017 and 522 advice files in 2021. The following charts examine the 2017 and 2021 sample sets, by age, by whether the life insurance advice was initiated by the client or the adviser and main remuneration method (commission or no commission).

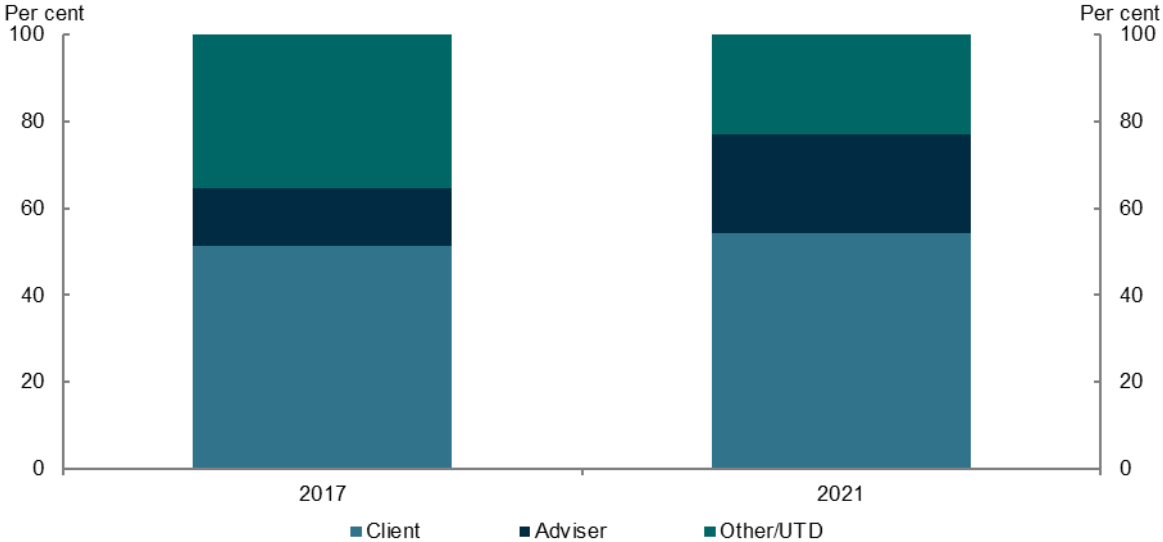
The sample sets included life insurance advice provided to clients aged under 30 years of age to those aged over 60 years of age. In 2017, the largest age cohort was aged 30–39 years, while in 2021 the largest cohort were those aged 40–49 years (Chart 10).

Chart 10: Proportion of files, by age group



In both 2017 and 2021, the sample sets included a greater proportion of files where the life insurance advice was initiated by the client (as compared to advice initiated by the adviser) (Chart 11).

Chart 11: Proportion of files (client initiated vs adviser initiated)



Across both years, the initiator of the advice could not be determined for a proportion of the files. These are included in the Other/UTD (unable to be determined) category in this Chart.

The following 2 charts illustrate the proportion of life insurance advice initiated by the client or by the adviser within each age group, for each of 2017 and 2021. Clients in the over 60s age group appeared more likely to have initiated life insurance advice, with 64 per cent of advice files in the over 60s age initiated by the client in 2017 and 65 per cent in 2021 (Charts 12 and 13).

Chart 12: Proportion of files (client initiated vs adviser initiated), by age group – 2017 only

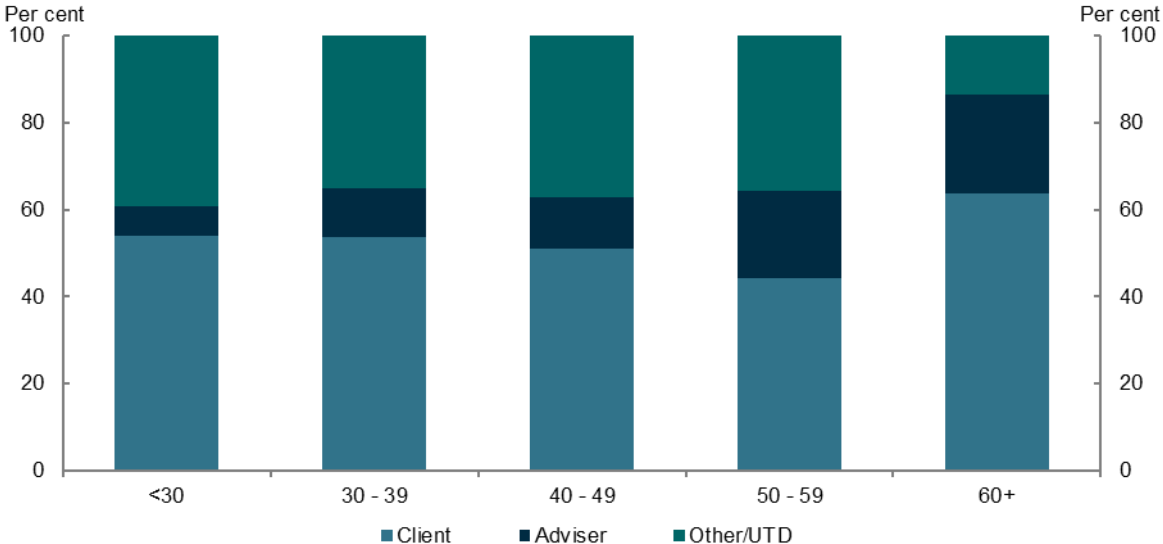
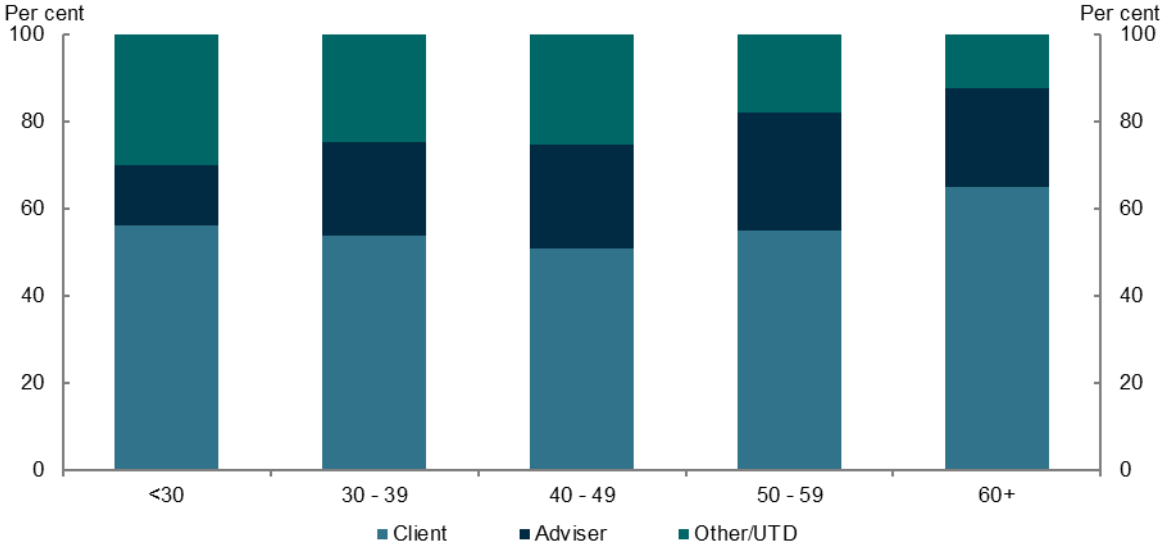
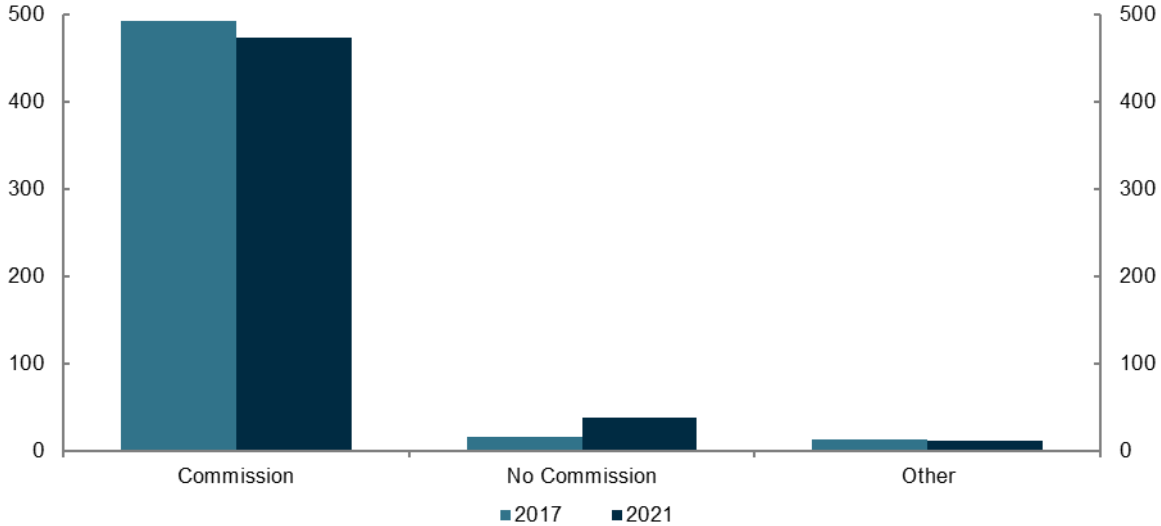


Chart 13: Proportion of files (client initiated vs adviser initiated), by age group – 2021 only



The LIF Review found that there has not been a significant shift in the proportion of life insurance advice for which advisers are remunerated by a commission. The number of advice files for which the main remuneration method was a commission decreased marginally between 2017 and 2021 (from 95 per cent to nearly 91 per cent) (Chart 14).

Chart 14: Total number of files, by remuneration model (commission vs no commission)

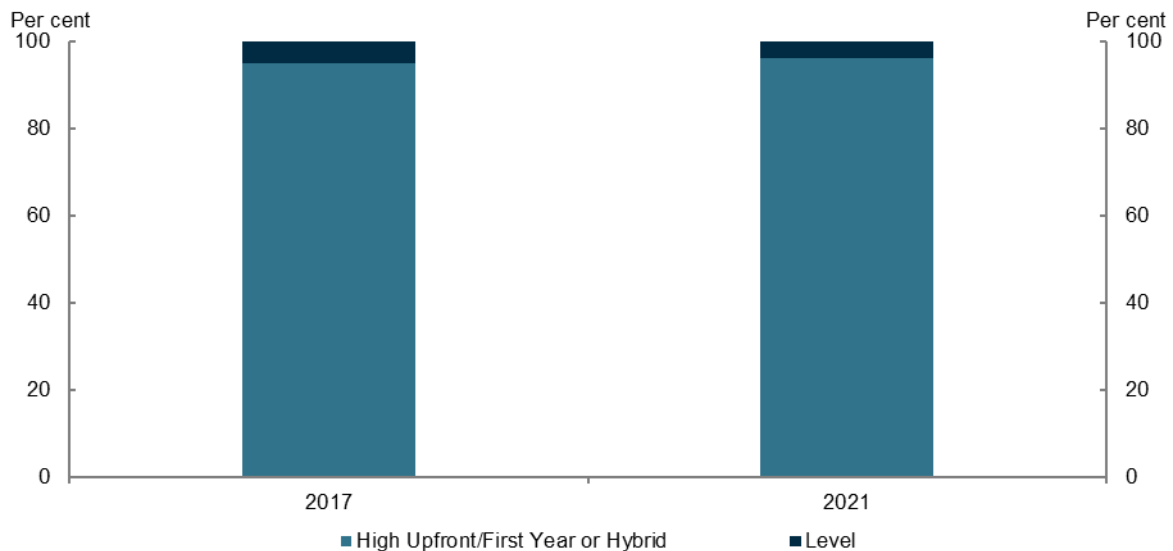


Prior to the introduction of the LIF reforms, upfront commissions were generally around 100 to 130 per cent of the new business premium (with ongoing commissions at approximately 10 per cent). In 2021, following the implementation of the LIF reforms, upfront commissions were capped at 60 per cent of the new business premium (with ongoing commissions also capped at 20 per cent).

A hybrid commission in 2017 would generally have involved an upfront commission of 70 per cent and an ongoing commission of around 20 per cent. A level commission is where the commission rate for the year in which the life insurance product is issued is the same as it is for subsequent years for the life of the product.

Of the files for which the main remuneration method was either an upfront or a level commission, the LIF Review found that the commission was primarily in the form of an upfront commission (Chart 15).

Chart 15: Proportion of files, by commission type (Upfront vs Level)



Quality

The LIF Review found that, overall, the quality of life insurance advice provided to clients improved from 2017 to 2021. Quality was assessed in the following ways:

- compliance with the best interests duty and related obligations; and
- whether significant concerns about consumer detriment arose from the life insurance advice.

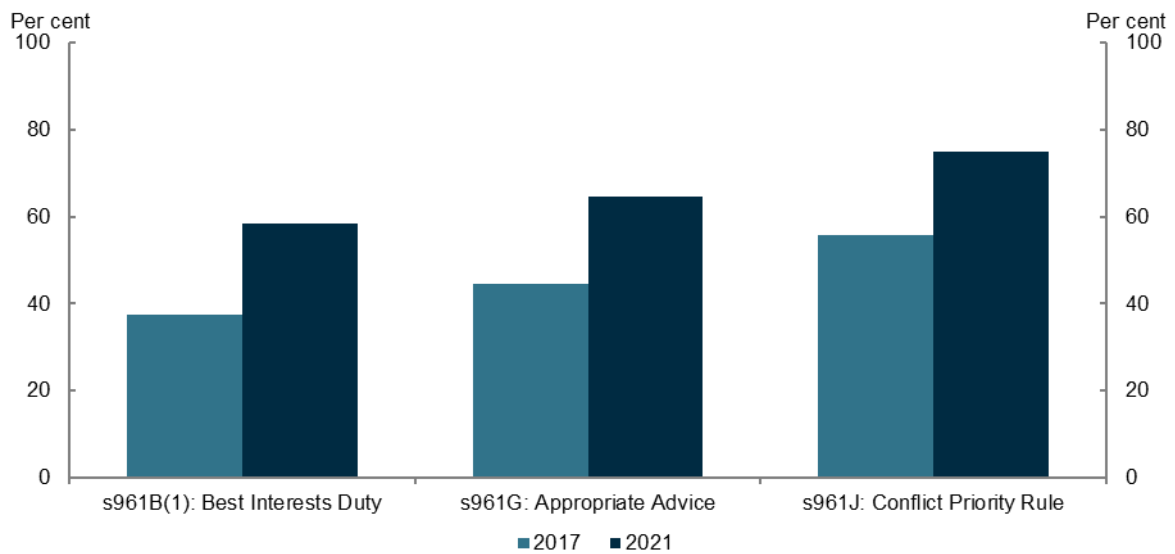
Proportion of files that did not demonstrate compliance with the best interests duty

The following charts consider the proportion of files that did not demonstrate compliance with the best interests duty and related obligations between 2017 and 2021 by duty, by age group and by whether the advice was initiated by the client or by the adviser.

The LIF Review found that compliance with the best interests duty and each of the related obligations had improved between 2017 and 2021:

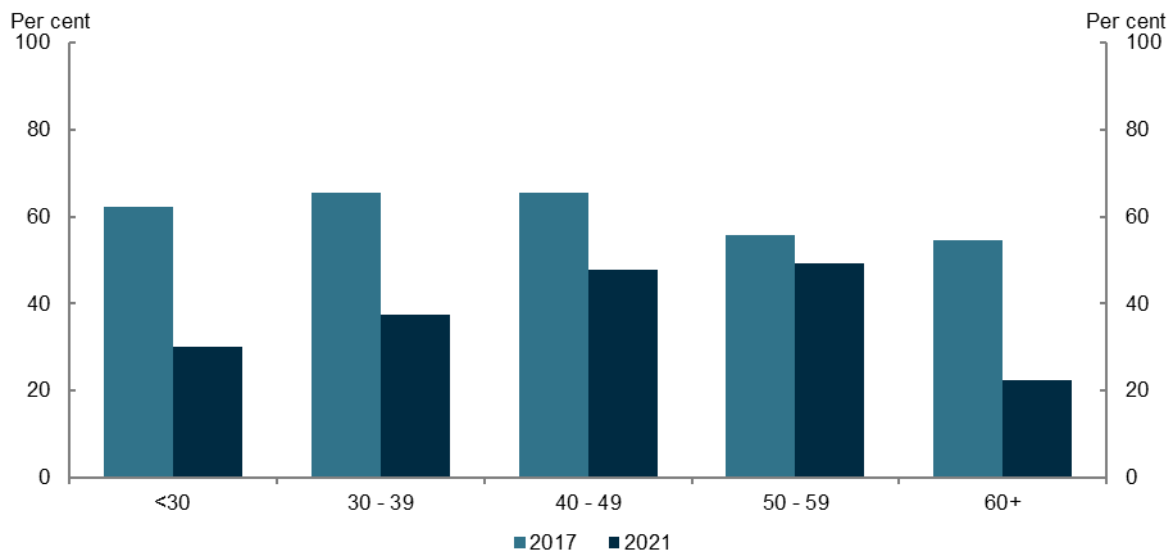
- Best interests duty (section 961B(1)) – improved from 37 per cent in 2017 to 58 per cent in 2021;
- Appropriate advice (section 961G) – improved from 45 per cent in 2017 to 65 per cent in 2021; and
- Conflict priority rule (section 961J) – improved from 56 per cent in 2017 to 75 per cent in 2021 (Chart 16).

Chart 16: Proportion of files that complied with the best interests duty and related obligations



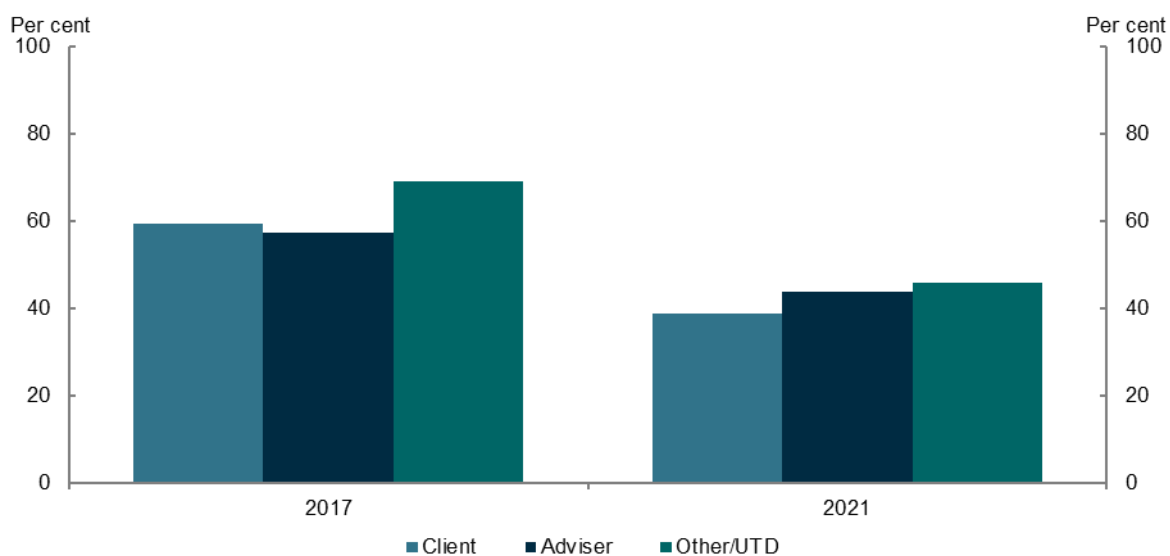
63 per cent of files in 2017 and 42 per cent of files in 2021 were found not to have demonstrated compliance with the best interests duty. However, there was an improvement (decrease in non-compliance) in the results for each age group between 2017 and 2021. The most significant decrease was observed in the youngest cohort (clients aged under 30 years), with non-compliance decreasing from 62 per cent in 2017 to 30 per cent in 2021 (Chart 17). Clients in the under 30s cohort accounted for 14 per cent of the advice files in 2017 and 10 per cent in 2021.

Chart 17: Proportion of files that did not demonstrate compliance with the best interests duty, by age group



The proportion of advice files that did not demonstrate compliance with the best interests duty was similar, regardless of whether the advice was initiated by the client or by the adviser (Chart 18).

Chart 18: Proportion of files that did not demonstrate compliance with the best interests duty (client initiated vs adviser initiated)



Please note that the ‘other/unable to determine (UTD)’ category includes instances where it could not be determined from the client file that the adviser or client initiated the life insurance related advice.

Please note that further analysis on the quality of advice based on remuneration model (commission vs no commission) was not possible due to the small number of files classified as ‘no commission’.

Reasons for not demonstrating compliance with the best interests duty

An assessment that a life insurance advice file did not demonstrate compliance with the best interests duty in section 961B(1) of the Corporations Act was conducted in accordance with paragraphs RG175.269–RG175.272,³⁸³ which in summary involved a two-step process:

- first: each advice file was assessed to determine whether the adviser met each of the safe harbour steps in sections 961B(2)(a)-(g) of the Corporations Act; and
- second:
 - if the advice file demonstrated that the adviser met each of the safe harbour steps – the advice file was deemed to have complied with the best interests duty in section 961B(1) of the Corporations Act; or
 - if the advice file did not demonstrate that the adviser had met all of the safe harbour steps – the file reviewer was required to undertake a further consideration of the advice process, client circumstances and the advice outcome as a whole. If, after further consideration, the file reviewer believed that sufficient steps were undertaken to produce the same standard of advice that would have been provided if all of the safe harbour steps had been met, the file reviewer could pass the file for satisfying the best interests duty notwithstanding that the safe harbour was assessed as not being met. This included giving consideration to whether the client was likely to be in a better position if the client followed the advice.

Table 3: The best interests duty safe harbour steps in the Corporations Act are:

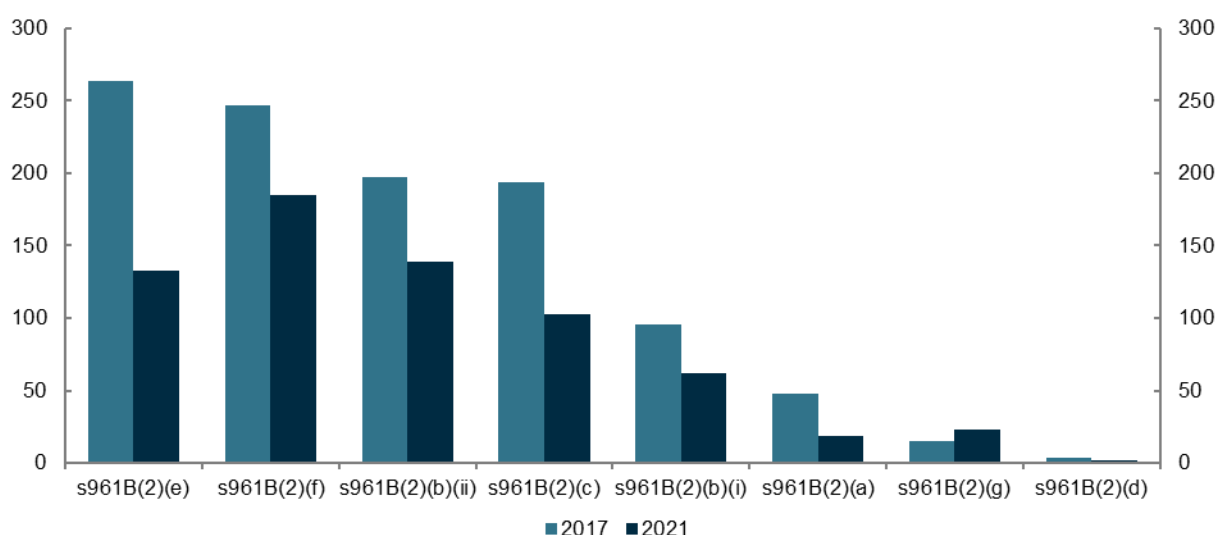
Corporations Act provision	Step
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383 For more information please see, ASIC (2021d), pages 72–73.

Section 961B(2)(a)	Identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions
Section 961B(2)(b)(i)	Identified the subject matter of the advice that has been sought by the client (whether explicitly or implicitly)
Section 961B(2)(b)(ii)	Identified the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the client's relevant circumstances)
Section 961B(2)(c)	Where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information
Section 961B(2)(d)	Assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice
Section 961B(2)(e)	If, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product: conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and assessed the information gathered in the investigation
Section 961B(2)(f)	Based all judgements in advising the client on the client's relevant circumstances;
Section 961B(2)(g)	Taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances

For each of the safe harbour steps (with the exception of section 961B(2)(g)), there was a decline in the number of files that did not demonstrate that the adviser met that step. The most significant improvement was in relation to section 961B(2)(e) (Chart 19).

Chart 19: Number of files that did not demonstrate that the adviser met each safe harbour step



For most of the safe harbour steps, the proportion of files that demonstrated that the adviser met that step was similar, whether the advice was initiated by the client or by the adviser (Charts 20 and 21).

Chart 20: Proportion of files that did not demonstrate that the adviser met each safe harbour step (client initiated vs adviser initiated) – 2017 only

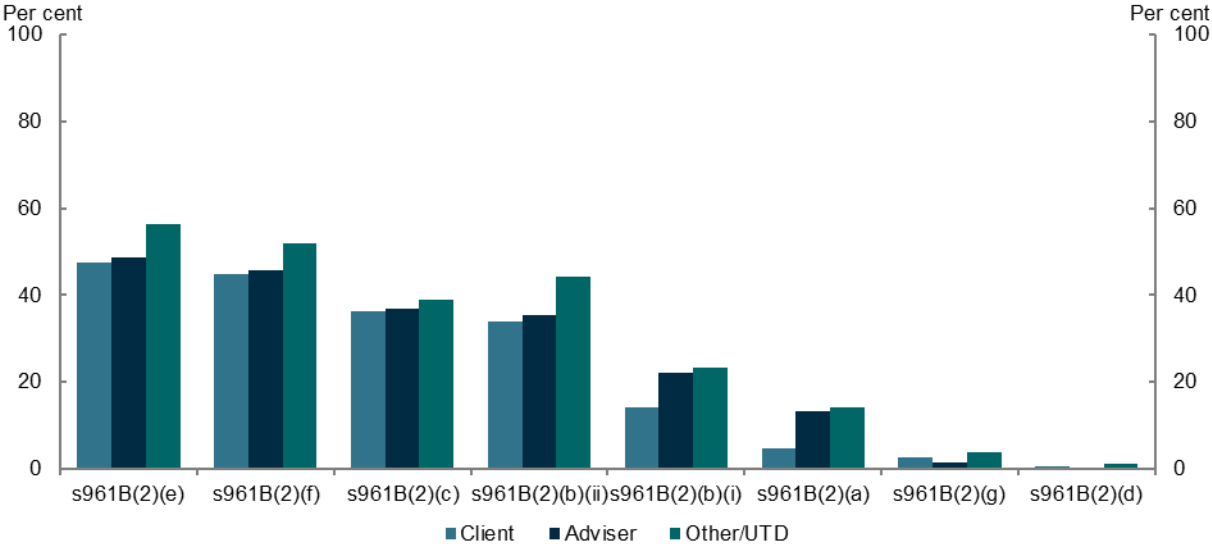
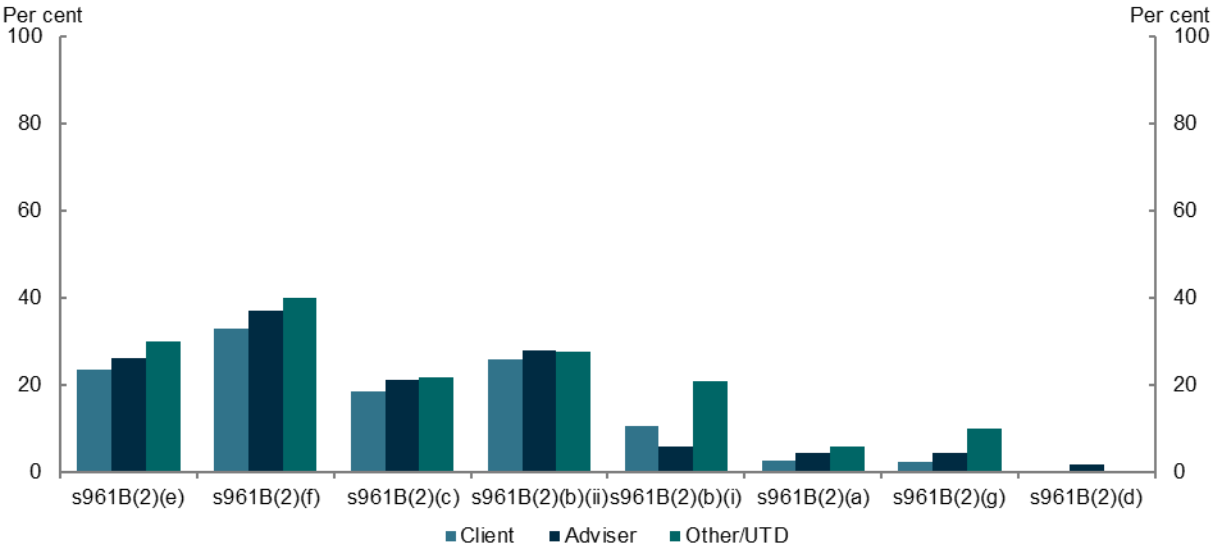


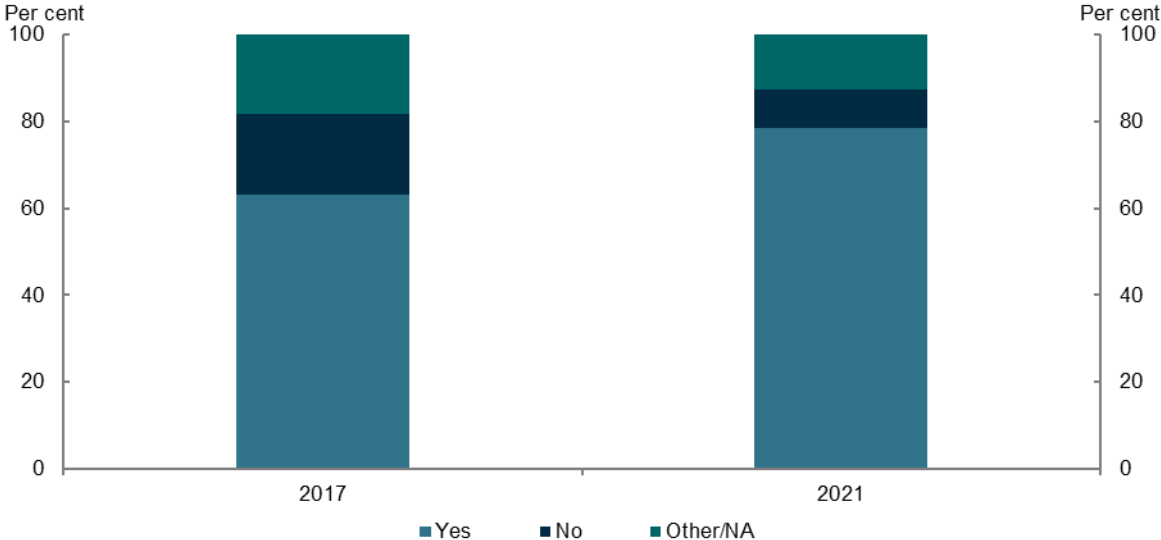
Chart 21: Proportion of files that did not demonstrate that the adviser met each safe harbour step (client initiated vs adviser initiated) – 2021 only



Consideration of other matters when providing life insurance advice

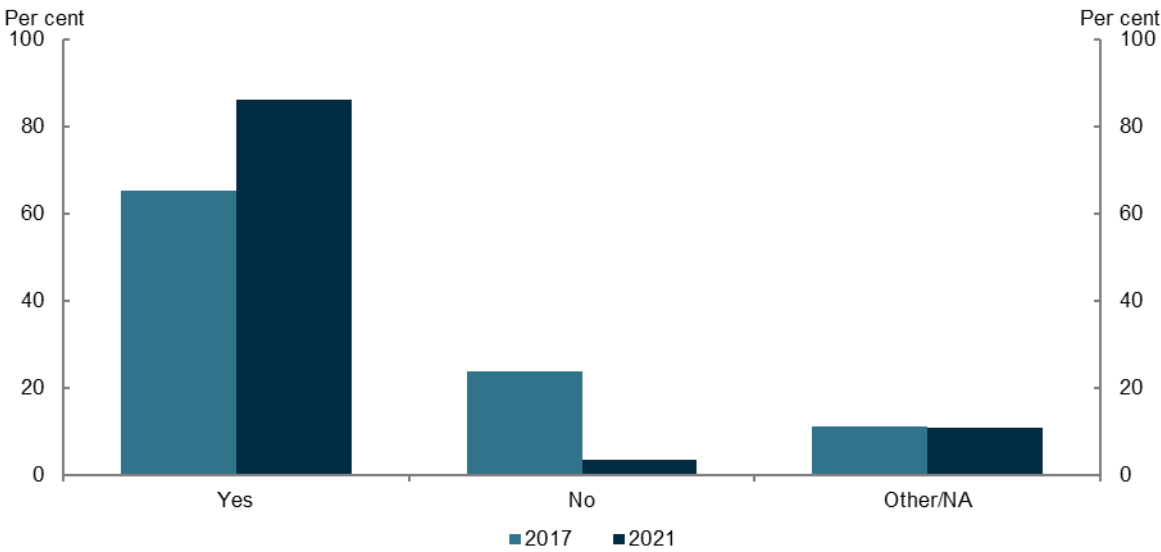
The proportion of files where there was evidence that the adviser had made adequate inquiries into the client’s existing life insurance products increased from 63 per cent in 2017 to 79 per cent in 2021 (Chart 22).

Chart 22: Whether the adviser made adequate inquiries into the client’s existing insurance products



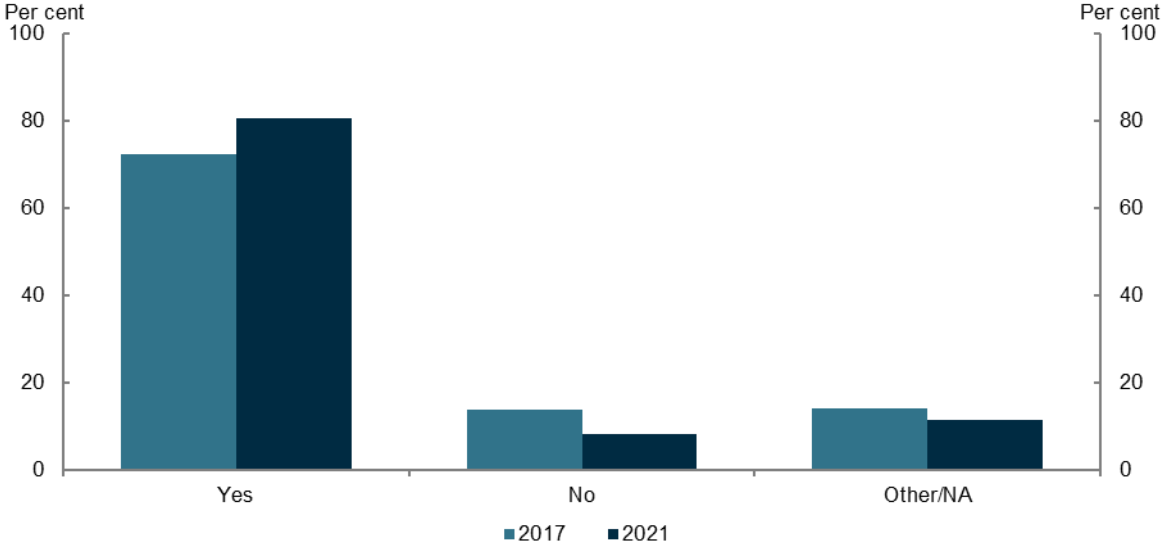
The proportion of files where there was evidence that the adviser considered life insurance products issued by more than one insurer increased from 65 per cent in 2017 to 87 per cent in 2021 (Chart 23).

Chart 23: Whether the adviser considered products issued by more than one insurer



Finally, there was also an increase in the proportion of files where there was evidence that the adviser had given adequate consideration to placing the client’s insurance inside superannuation vs outside superannuation (retail life insurance product) from 72 per cent in 2017 to 81 per cent in 2021 (Chart 24).

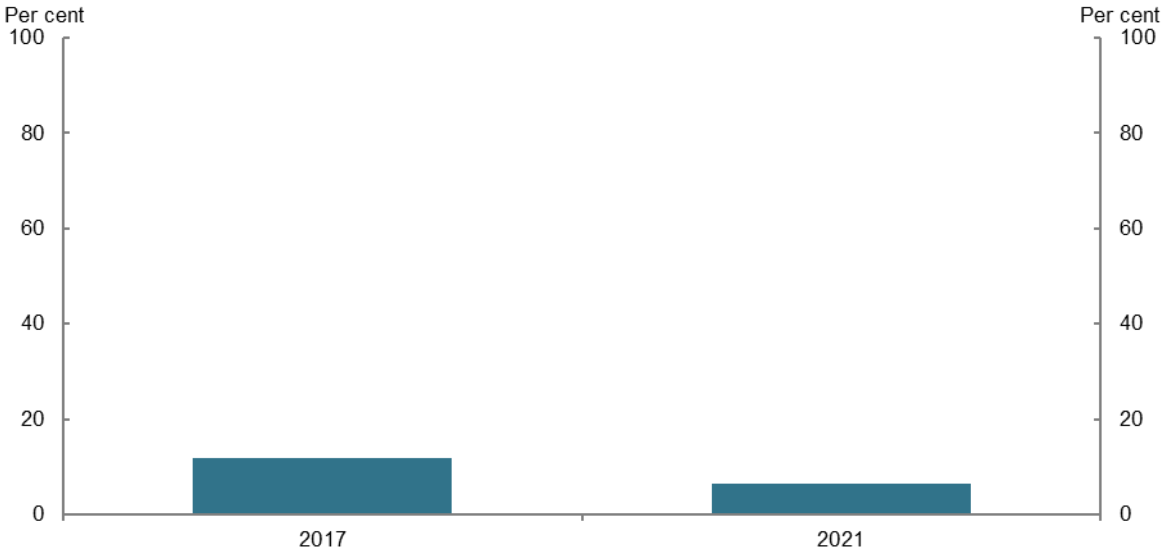
Chart 24: Whether the adviser has adequately considered placing insurance inside vs outside superannuation



Significant concerns about consumer detriment

Overall, there was a reduction in the proportion of files which raised a significant concern about consumer detriment from 12 per cent in 2017 to 7 per cent in 2021 (Chart 25).

Chart 25: Proportion of files that raised a significant concern about consumer detriment

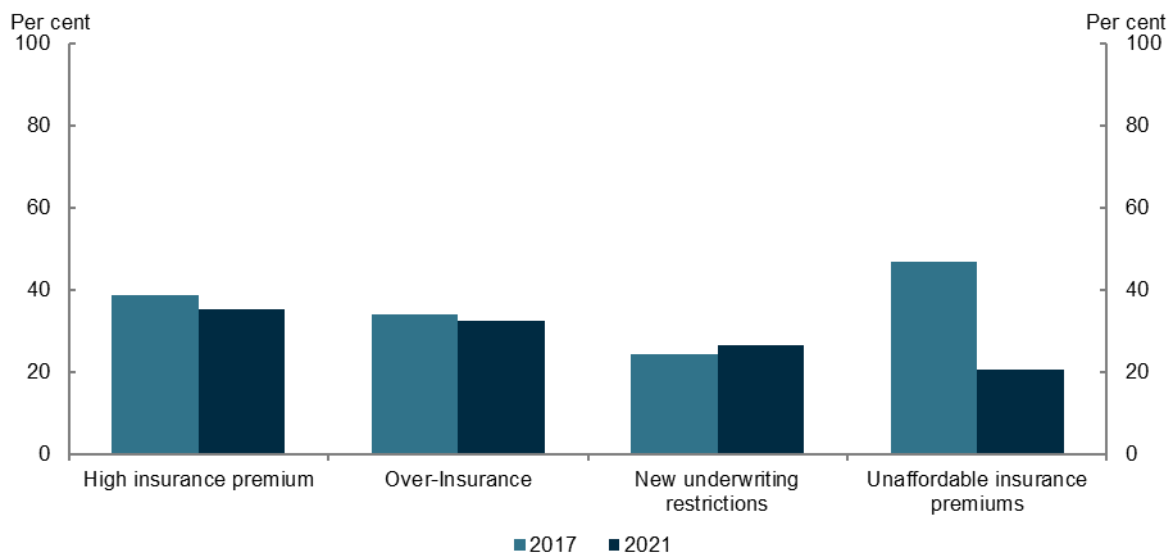


All of the files which were assessed as raising a significant concern about consumer detriment (in 2017 and 2021) were also found to not demonstrate compliance with the best interests duty.

Between 2017 and 2021, the main reasons for the significant concerns about consumer detriment arising from the files were:

- ‘High insurance premiums’: significant concerns about unjustified high insurance premiums (compared on a like for like basis).
- ‘Over-insurance’: significant concerns about over-insurance (the sum insured materially exceeded the client’s needs without justification).
- ‘New underwriting restrictions’: significant concerns about new or additional underwriting restrictions (i.e. exclusions/loadings).
- ‘Unaffordable insurance premiums’: significant concerns about insurance premiums appearing unaffordable or materially impeding other objectives without justification (Chart 26).

Chart 26: Proportion of significant concerns about consumer detriment, by most prevalent categories



Life Insurance Data Collection (LIDC)

Methodology

Planning for the data collection – Stakeholder consultation

In December 2015, ASIC released a consultation paper *CP 245 Retail life insurance advice reforms*,³⁸⁴ which set out ASIC's proposals to implement the retail life insurance industry reforms by making a legislative instrument that would set out:

- the maximum levels of upfront and ongoing commission payments to be paid to advisers; and
- the amount of upfront commissions to be repaid to life insurers under clawback arrangements.

CP 245 also sought feedback on the type of information ASIC proposed to collect from life insurers, such as information about covers sold, covers in-force, covers lapsed, commission data and clawback data. This included details about product types (life, TPD etc.) and how those covers were sold (i.e. with personal advice, general advice or no advice).

Feedback was sought from life insurers, AFS licensees and representative of licensees authorised to provide life insurance advice, and consumers.

ASIC's response to the key issues arising from the submissions to this consultation paper were published in Report 527, which was released in June 2017.³⁸⁵

Objectives for the collection

The questions insurers were asked were designed to provide information that will assist in understanding (among other things):

- The effect of the LIF reforms on the rate of first year commissions paid and clawback arrangements;
- Whether premiums are changing over time;
- Whether distribution methods are changing over time; and
- Whether lapse rates are changing over time.

ASIC engaged an external consultant to design the questions and data collection template, and consult with insurers to ensure the information being requested could be provided.

Types of data collected

For the purposes of this report, the data collection covered the following product types:

- Death (or 'Life');
- Total and permanent disability (or 'TPD');
- Trauma (or 'Critical Illness'); and

384 ASIC (2015), Consultation Paper 245: *Retail life insurance advice reforms*.

385 ASIC (2017), Report 527: *Response to submissions on CP 245 Retail life insurance advice reforms*.

- Disability Income Insurance (also known as Individual Disability Income Insurance (IDII) or Income Protection).

For the purposes of this report, the data collection covered the following distribution channels:

- Products sold by financial advisers with commissions paid;
- Products sold by financial advisers on a nil commission basis; and
- Products sold by direct method with general advice or no advice.

Group life products for members of a superannuation entity or products for a member of a default superannuation fund were specifically excluded from the LIDC.

Key findings

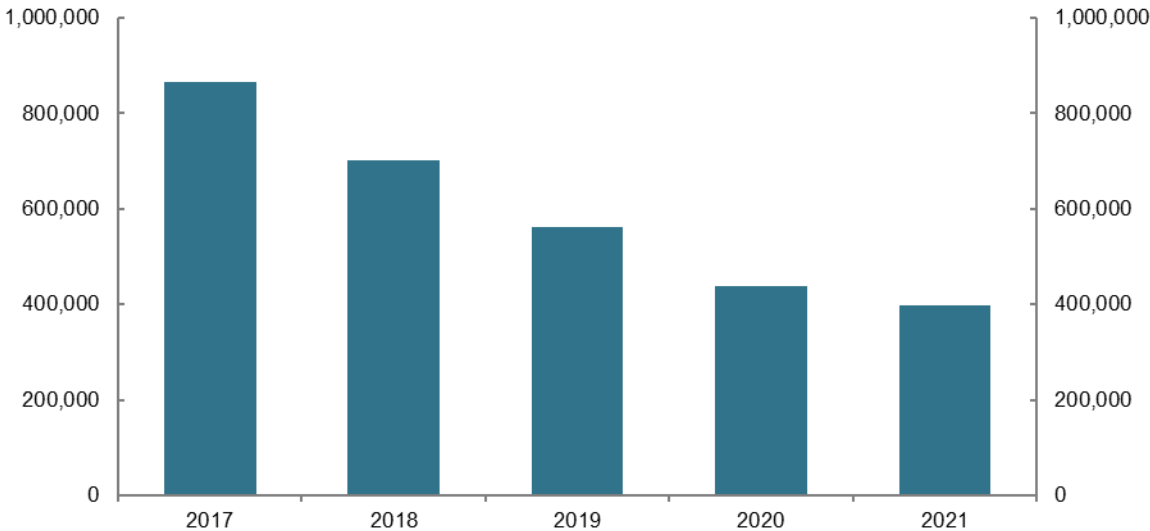
In summary, the LIDC found that:

- The number of new life insurance products sold between 2017 and 2021 declined. Declines in the number of covers sold were observed across all of the variables analysed (total covers, by cover type and by distribution channel).
- The average premium for all life insurance cover increased; however, the rates of change varied by product type.
- The average first year commission provided to a financial adviser in connection with the sale of a life insurance product declined (which was expected given the introduction of commission caps), while the proportion of life insurance products sold with a commission increased marginally.
- Year 1 and Year 2 lapse rates (for which clawbacks apply) for death cover sold during the data collection period declined across all distribution channels, while Year 3 lapses appeared to be relatively stable. However, it is too early to observe any trends in lapses for covers sold in the later data collection periods.

Life insurance market

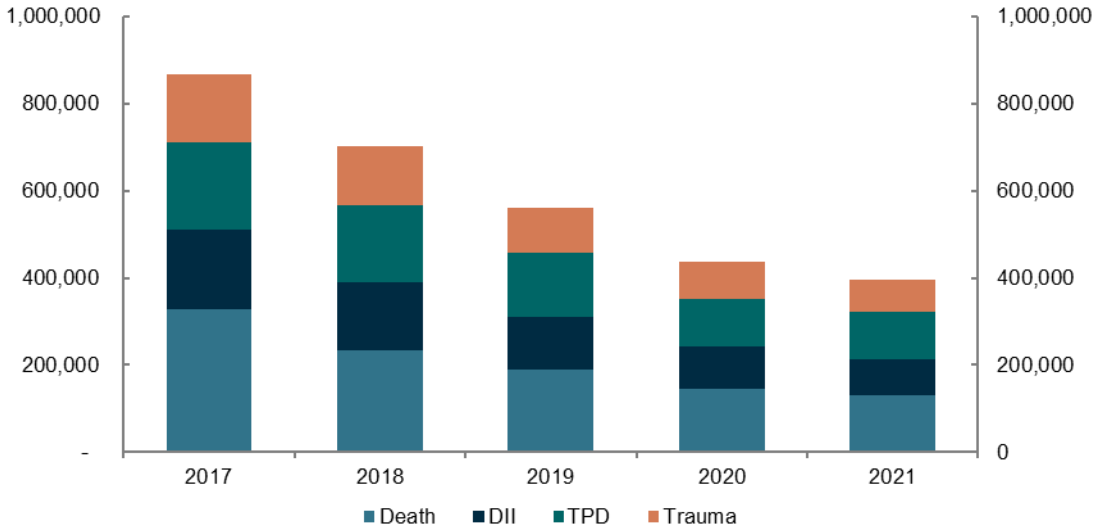
The charts below illustrate key changes in the life insurance market between 2017 and 2021, in particular changes in the number of covers sold, new cover sales by product type and distribution channel and the number of existing covers in-force. Between 2017 and 2021, there was a 54 per cent decline in the number of new covers sold (basic and rider) (Chart 27).

Chart 27: Total number of new covers sold (basic and rider)



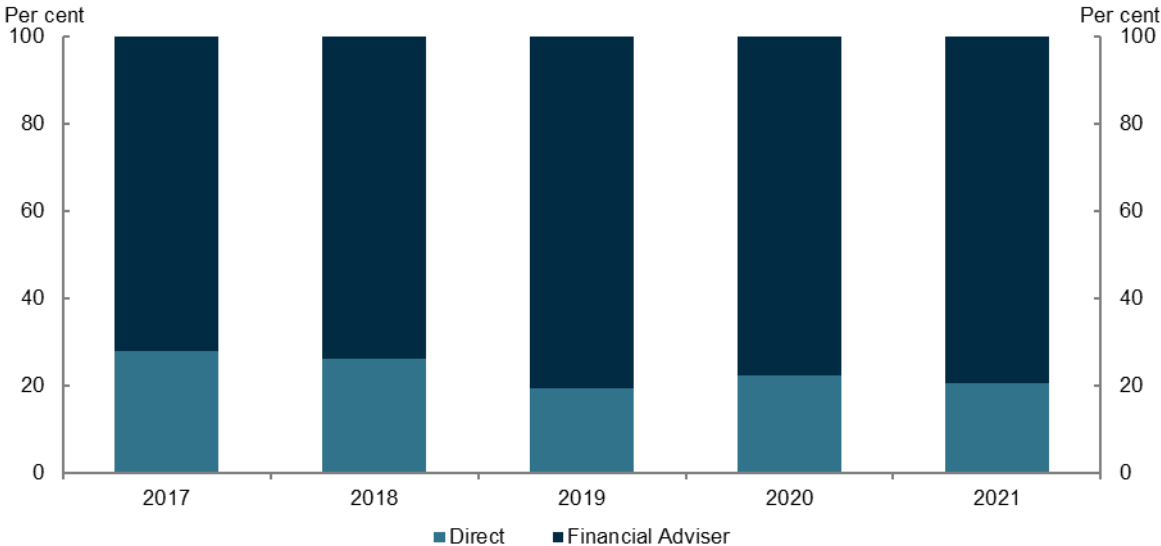
Between 2017 and 2021, the number of new covers sold (basic and rider) declined across each product type. Death cover was most affected, decreasing by 60 per cent over this period, followed by income protection (54 per cent decrease), trauma cover (51 per cent decrease) and TPD cover (47 per cent) (Chart 28).

Chart 28: Total number of new covers sold, by product type (basic and rider)



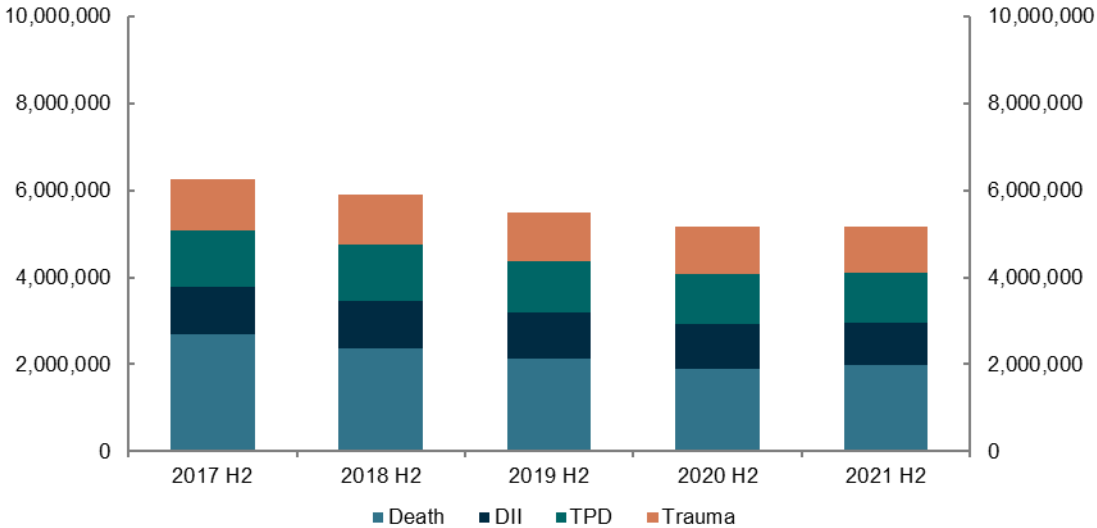
Life insurance is more likely to be sold through a financial adviser than through direct channels. Between 2017 and 2021, the proportion of all types of new basic-only life insurance cover (i.e. covers not sold as riders) sold through a financial adviser (as compared to covers sold through direct channels) increased from 72 per cent in 2017 to 80 per cent in 2021. This is due to the significant decline in the products purchased through direct channels (66 per cent decrease, compared to a 49 per cent decrease in sales through a financial adviser) (Chart 29).

Chart 29: Proportion of new covers sold, by distribution channel (basic-only)



The number of existing covers in-force (basic and rider) also declined across each product type between 2017 and 2021 (as determined as at 31 December of those years). As for new product sales, death cover was again the most affected (decreasing by 26 per cent), with the remaining product types all decreasing by approximately 11 per cent (Chart 30).

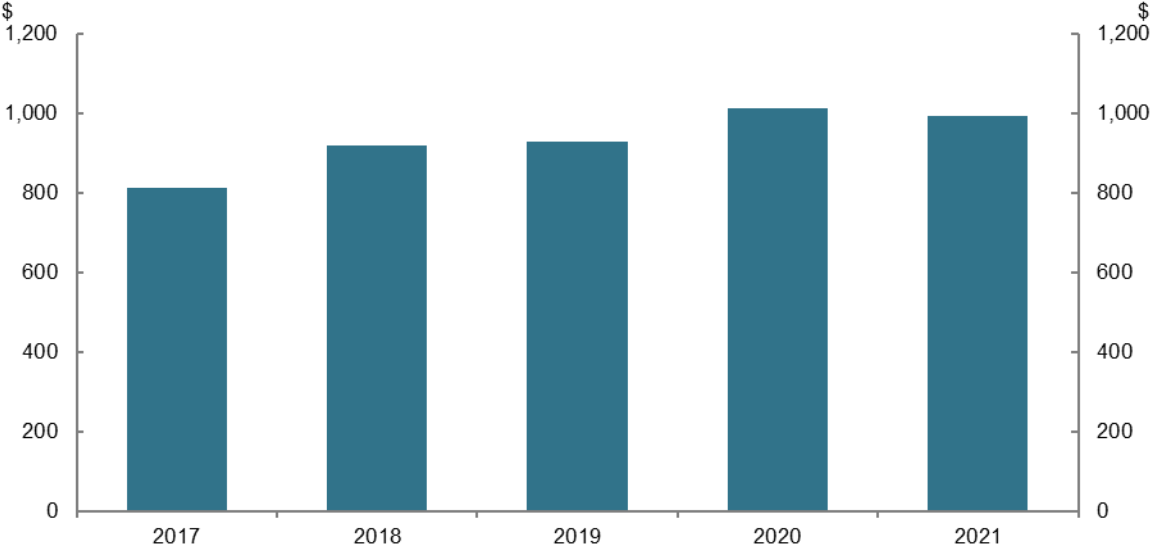
Chart 30: Number of existing covers in-force, by product type (basic and rider)



Premiums

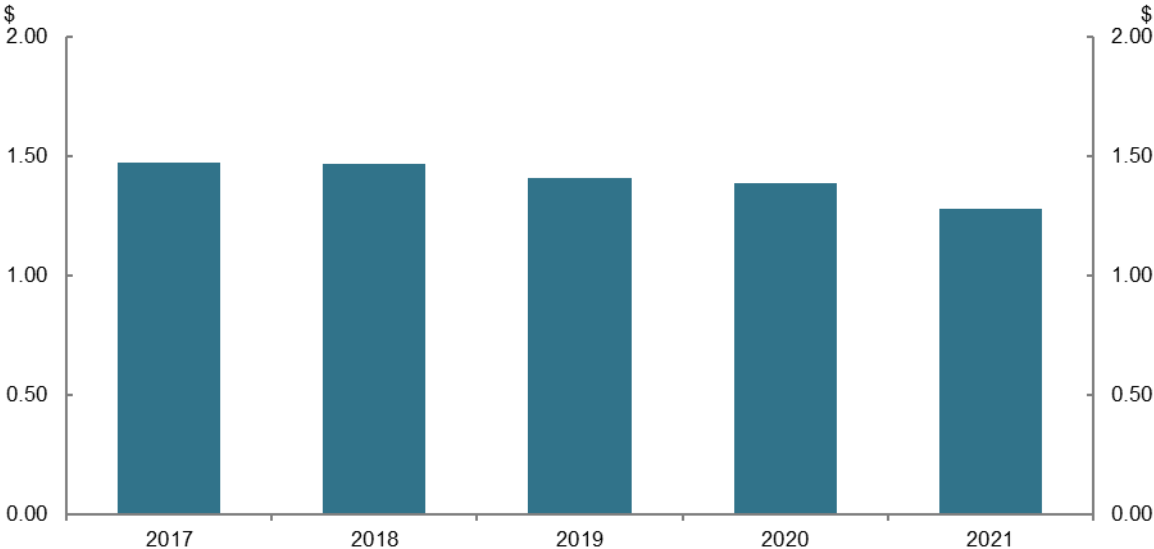
Overall, the average premium for life insurance cover increased. This could be due to a number of factors including, an increase in the average sum insured, a change in the mix of product types being purchased, a change in the age of those purchasing life insurance, and a change in the underlying premium rate structure itself for some products. Between 2017 and 2021, there was an estimated 23 per cent increase in the average premium for death cover (basic and rider) (Chart 31).

Chart 31: Average premium for death cover (basic and rider)



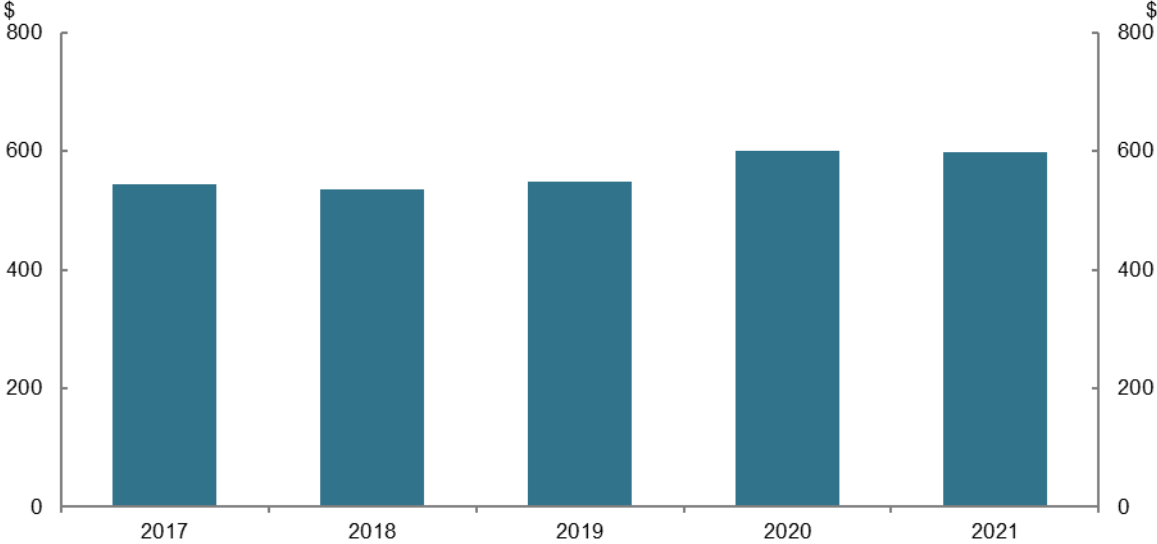
This may be explained, to some extent, by the significant increase in the average sum insured for new (basic and rider) death cover (the average sum insured increased by approximately 41 per cent over this period). Increasing sums insured may also have been a factor in the average premium per \$1,000 of sum insured for death cover, across the collection, declining by 13 per cent between 2017 and 2021 (Chart 32).

Chart 32: Average premium per \$1,000 sum insured for death cover (basic and rider)



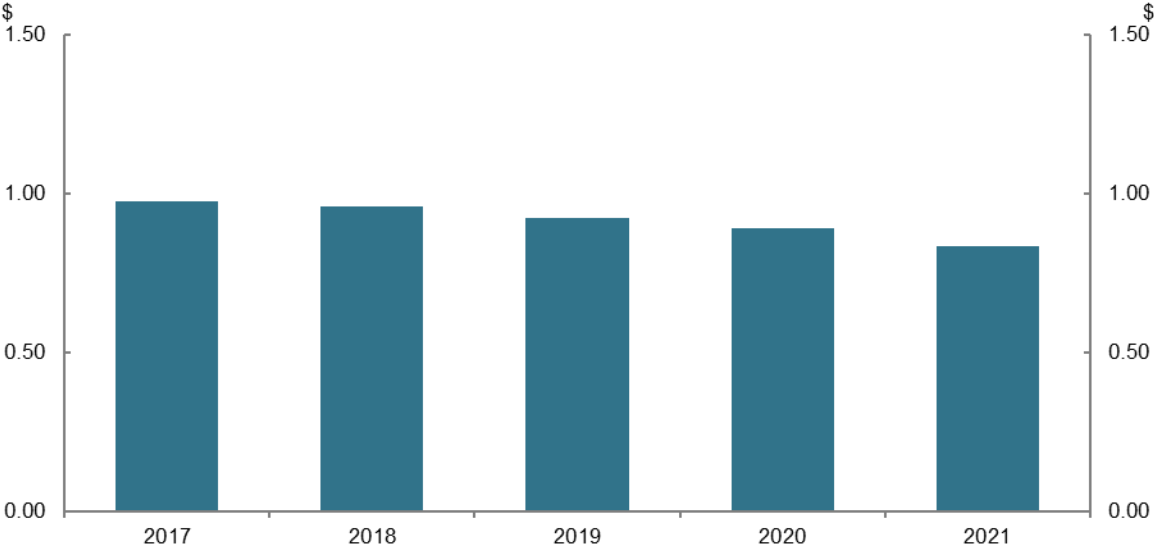
The average premium for TPD cover (basic and rider) increased by 10 per cent over this period (Chart 33).

Chart 33: Average premium for TPD cover (basic and rider)



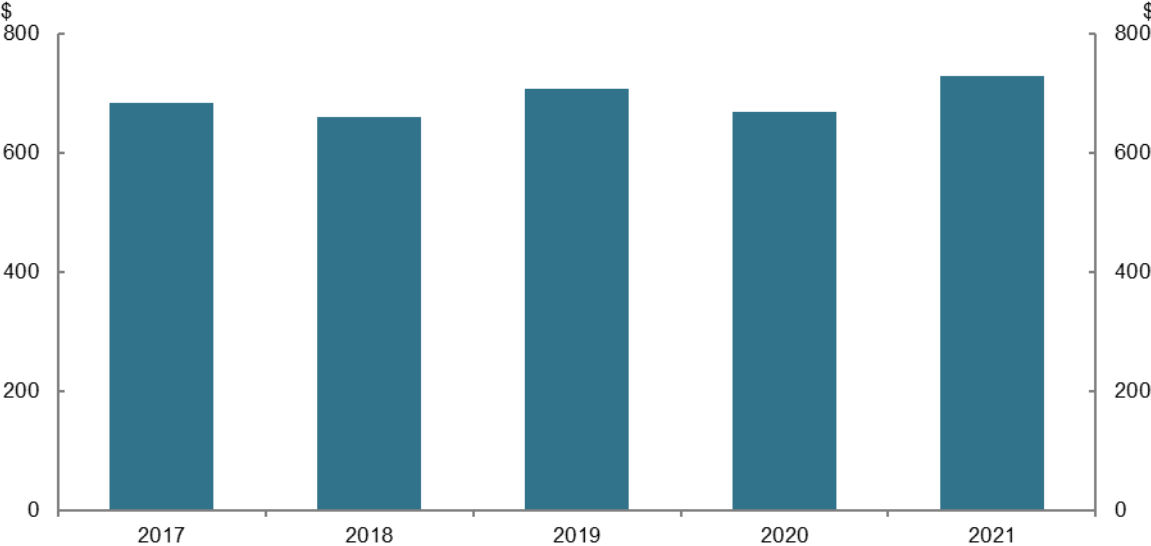
The average premium per \$1,000 sum insured, across the collection, declined by approximately 14 per cent between 2017 and 2021 (Chart 34).

Chart 34: Average premium per \$1,000 sum insured for TPD cover (basic and rider)



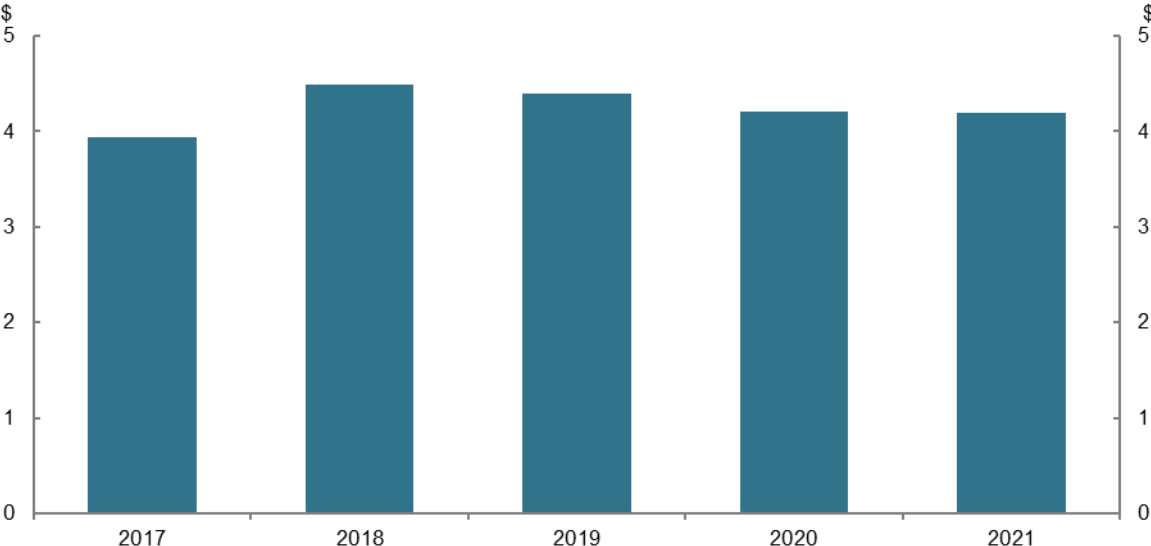
The average premium for trauma cover (basic and rider) was found to have increased by an estimated 7 per cent between 2017 and 2021 (Chart 35).

Chart 35: Average premium for trauma cover (basic and rider)



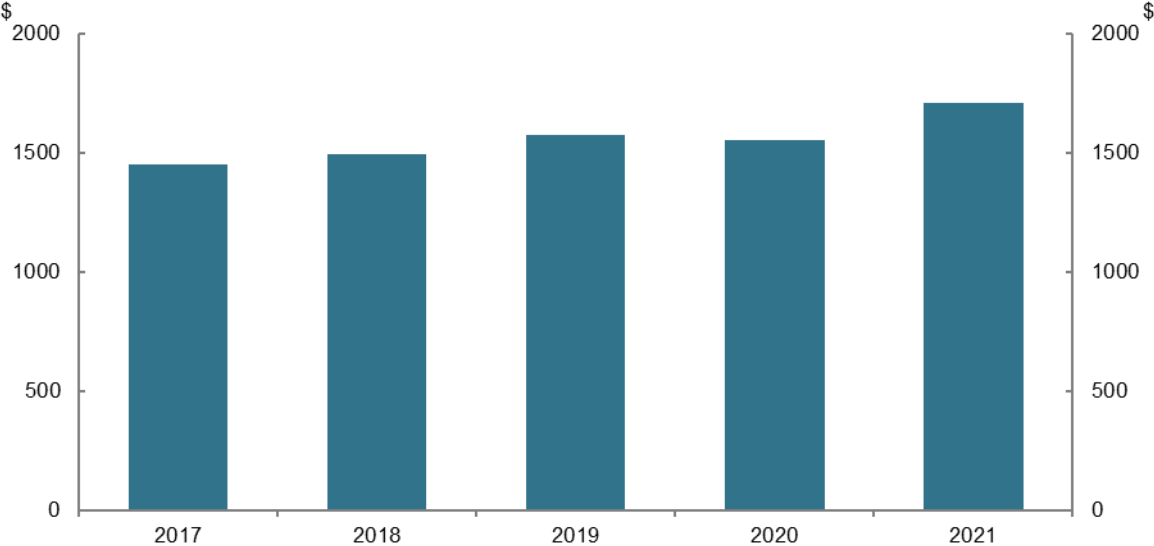
The average premium per \$1,000 sum insured, increased by the same amount as average premiums for trauma cover (approximately 7 per cent between 2017 and 2021) (Chart 36).

Chart 36: Average premium per \$1,000 sum insured for trauma cover (basic and rider)



Finally, the average premium for income protection (basic and rider) increased by nearly 18 per cent noting that, of the 4 cover types, it is the most expensive, in dollar terms (Chart 37).

Chart 37: Average premium for income protection (basic and rider)



Commissions

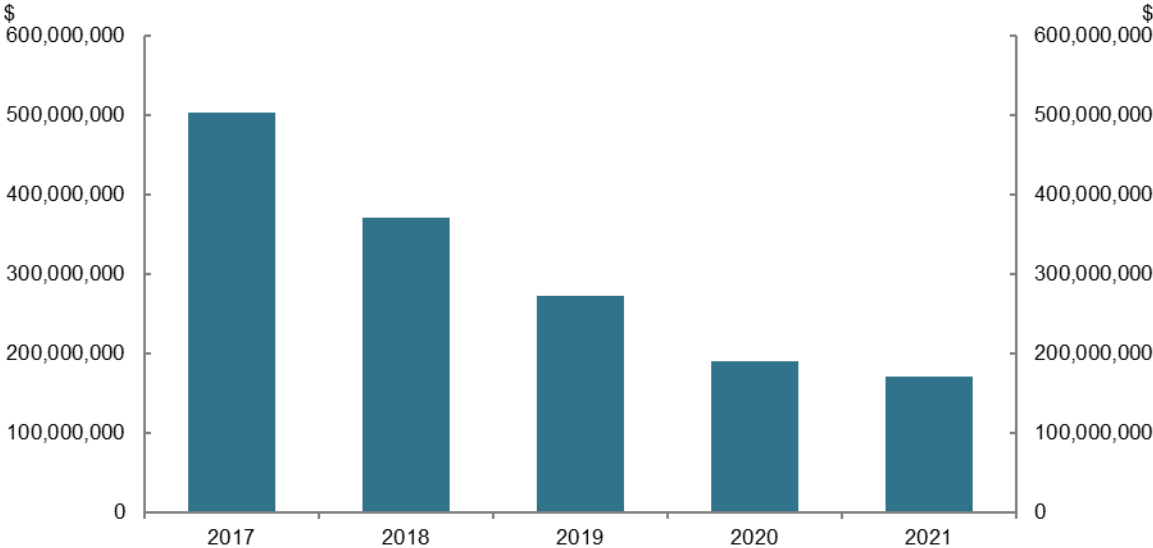
As expected, the implementation of the LIF reforms in 2018 resulted in a significant reduction in first-year commissions for all product types between 2017 and 2021. The LIF reforms resulted in commission caps, which were implemented as follows:

- In 2018, first year commissions were capped at 80 per cent of the premium;
- In 2019, first year commissions were capped at 70 per cent of the premium; and
- Since 2020, first year commissions have been capped at 60 per cent of the premium.

Prior to the implementation of the LIF reforms, it was common for life insurers to pay upfront commissions of greater than 100 per cent of the first year’s premium.

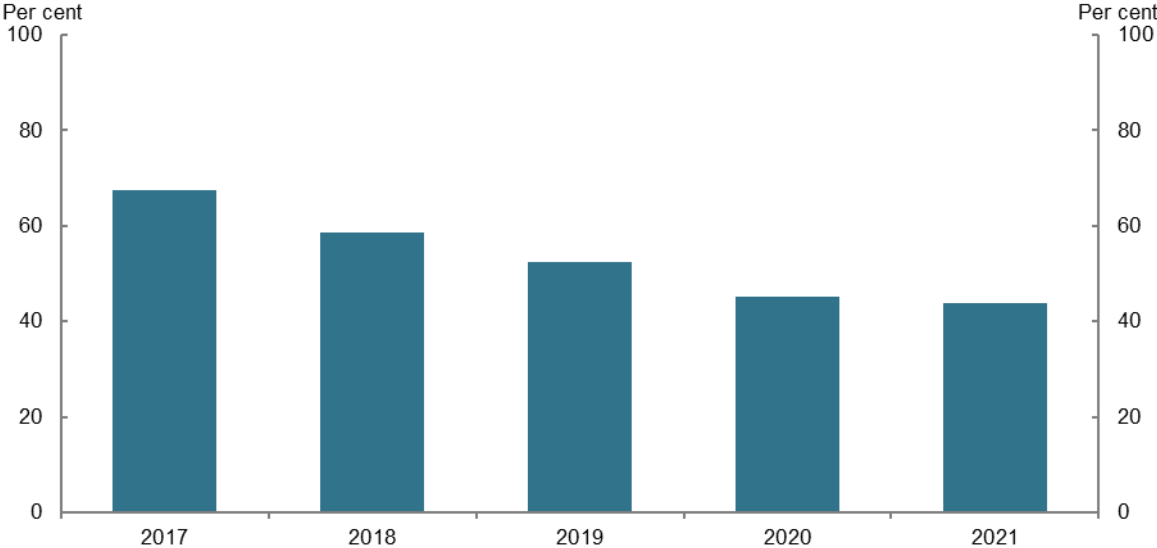
Between 2017 and 2021, across all distribution channels, total first year commissions provided in connection with the sale of life insurance products (basic and rider) declined by 66 per cent (Chart 38).

Chart 38: Total first year commission (basic and rider)



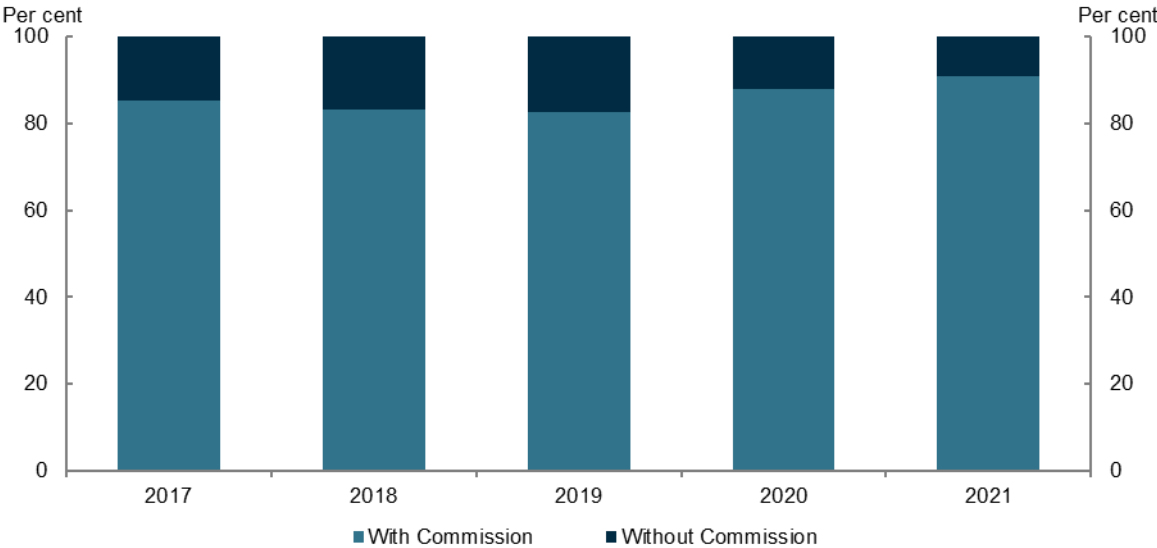
Between 2017 and 2021, across all distribution channels, the average first year commission rate for the sale of life insurance products (basic and rider) fell from approximately 67 per cent in 2017 to 44 per cent in 2021 (Chart 39).

Chart 39: Average first year commission rate (basic and rider)



Between 2017 and 2021, the proportion of new life insurance products (basic-only) sold through a financial adviser (with commission) marginally increased from 85 per cent in 2017 to 91 per cent in 2021 (Chart 40).

Chart 40: Proportion of new products sold through a financial adviser, by remuneration method (basic-only)



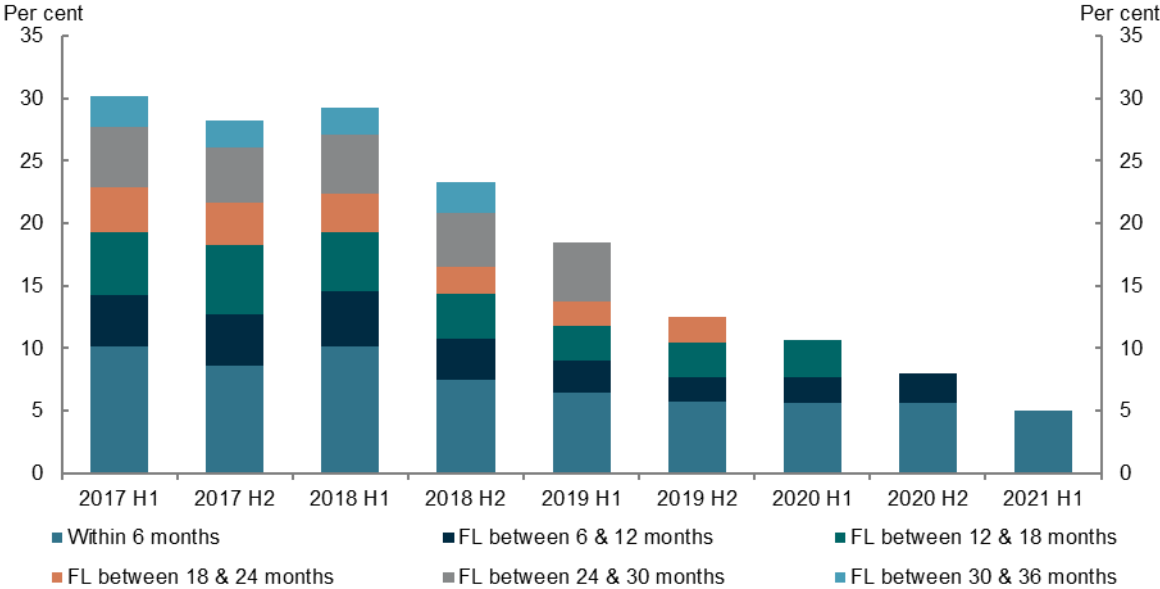
Lapses

Given the complexity of isolating and accurately reporting on lapses between basic covers and their riders, the lapse data below is for death cover only because death cover was almost always sold as a basic cover (not as a rider).

Since the implementation of the LIF reforms in 2018, life insurance products that lapse in Year 1 are subject to a clawback rate of 100 per cent of the premium, while products that lapse in Year 2 are clawed back at a rate of 60 per cent.

The proportion of death covers (basic-only) which lapsed in Year 1 declined from just over 14 per cent for covers sold in the first half of 2017 to 8 per cent for covers sold in the second half 2020. Lapses in Year 2 declined from nearly 9 per cent for covers sold in the first half of 2017 to nearly 5 per cent for covers sold in the 2nd half of 2019, while lapses in Year 3 remained relatively steady at around 7 per cent for covers sold in 2017 and 2018 (Chart 41).

Chart 41: Proportion of death cover (all distribution channels) which lapsed, by age and period of sale (basic-only)

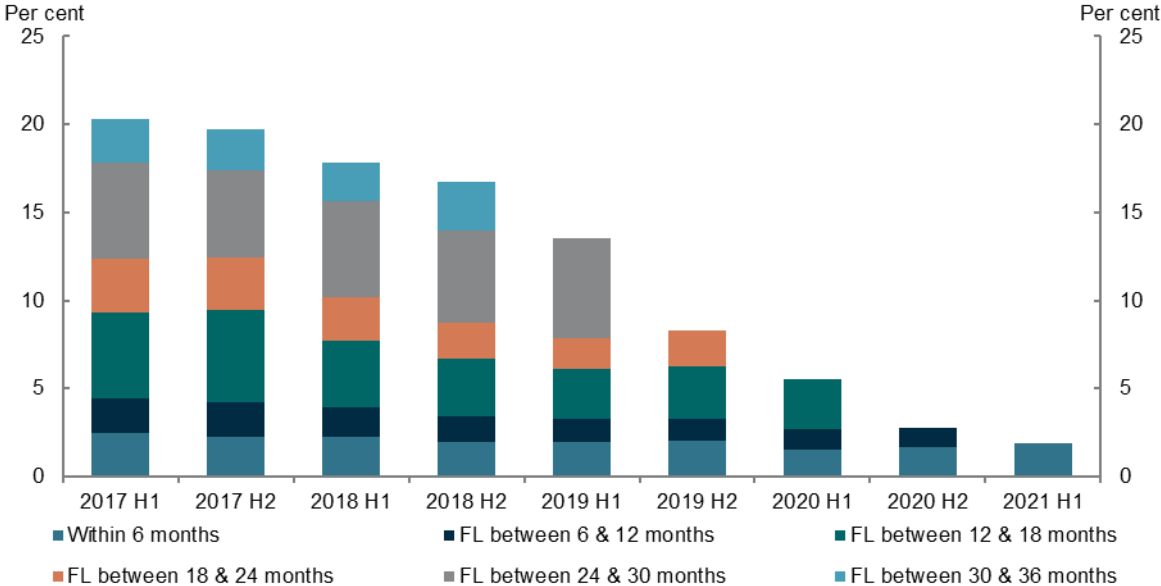


* FL means 'full lapse'.

* Given the data collection timeframe, full 3-year lapse data was only available for covers sold before 2019.

The proportion of death covers (basic-only) sold through a financial adviser (with a commission), which lapsed in Year 1 declined slightly from 4 per cent for covers sold in the first half of 2017 to 3 per cent for covers sold in the second half of 2020. Cover that lapsed in year 2 was found to decline from 8 per cent for covers sold in the first half of 2017 to 5 per cent for covers sold in the second half of 2019. Year 3 lapses remained stable at 8 per cent (for covers sold in the first half of 2017 and the second half of 2018) (Chart 42).

Chart 42: Proportion of death cover (sold through financial adviser with commission) which lapsed, by age and period of sale (basic-only)

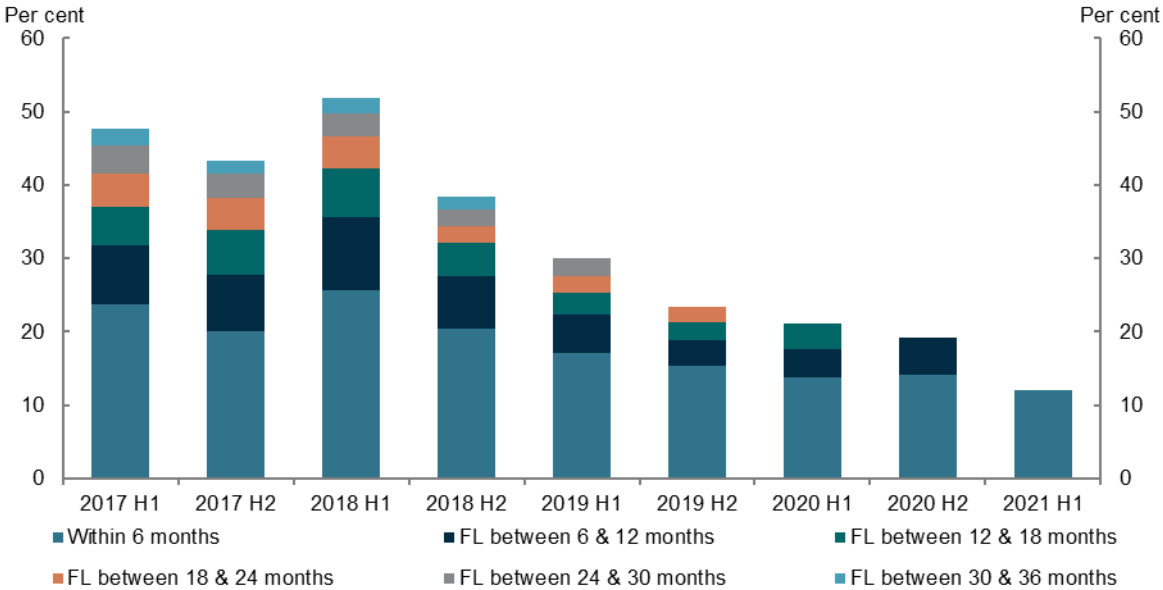


* FL means 'full lapse'.

* Given the data collection timeframe, full 3-year lapse data was only available for covers sold before 2019.

For basic death covers purchased through direct channels, Year 1 lapses decreased from 32 per cent for covers sold in the first half of 2017 to 19 per cent for covers in the second half of 2020; Year 2 lapses decreased from 10 percent for covers sold in the first half of 2017 to nearly 5 per cent for covers sold in the second half of 2019; and Year 3 lapses decreased from 6 per cent for covers sold in the first half of 2017 to 4 per cent for covers sold in the second half of 2018 (Chart 43).

Chart 43: Proportion of death cover (sold through direct channels) which lapsed, by age and period of sale (basic-only)



* FL means 'full lapse'.

* Given the data collection timeframe, full 3-year lapse data was only available for covers sold before 2019.

Exceptions to the ban on conflicted remuneration

Table 4: extract of the conflicted remuneration provisions in the Corporations Act and associated regulations

Provision	Exemption
Section 963B(1)(a) of the Corporations Act Section 963C(1)(a) of the Corporations Act Regulation 7.7A.12G of the Corporations Regulations	Monetary and non-monetary benefit is given to the licensee or representative solely in relation to a general insurance product
Section 963B(1)(b) of the Corporations Act Regulations 7.7A.12EB of the Corporations Regulations Regulation 7.7A.12EC of the Corporations Regulations	Monetary benefit is given to the licensee or representative in relation to a life risk insurance product(s) (other than group life policies in superannuation or policies issued in respect of default superannuation members) where either of the conditions in section 963B(1)(b)(iii) of the Act apply
Section 963B(1)(ba) of the Corporations Act	Monetary benefit is given to the licensee or representative in relation to consumer credit insurance
Section 963B(1)(c) of the Corporations Act	Monetary benefit is given to the licensee or representative in relation to the issue or sale of the financial product (other than a life risk insurance product) and financial product advice in relation to the product, or products of that class, has not been given by the licensee or representative in the 12 months immediately before the benefit is given
Section 963B(1)(d)(i) of the Corporations Act	Monetary benefit is given to the licensee or representative by a retail client in relation to the issue or sale of a financial product by the licensee or representative to the client
Section 963B(1)(d)(ii) of the Corporations Act	Monetary benefit is given to the licensee or representative by a retail client in relation to financial product advice given by the licensee or representative to the client
Section 963B(1)(e) of the Corporations Act	Monetary benefit is a prescribed benefit or is given in prescribed circumstances
Regulation 7.7A.11C of the Corporations Regulations	Benefit is given in relation to information about life risk insurance products
Regulation 7.7A.11D of the Corporations Regulations	Benefit is given in relation to dealings in life risk insurance products
Regulation 7.7A.12B of the Corporations Regulations	Monetary benefit is a stamping fee given to facilitate an approved capital raising
Regulation 7.7A.12C of the Corporations Regulations	Monetary benefit is given for advice that relates to an interest in a time-sharing scheme
Regulation 7.7A.12D of the Corporations Regulations	Monetary benefit consists of a percentage, of no more than 100 per cent, of a brokerage fee
Regulation 7.7A.12E of the Corporations Regulations	Monetary benefit is given to the provider by a retail client in relation to the provider dealing in a financial product on behalf of the client
Regulation 7.7A.12EA of the Corporations Regulations	Monetary benefit is given to a financial services licensee or representative as part of the sale of all, or part, of the AFS licensee or representative's financial advice business

Provision	Exemption
Section 963C(1)(b) of the Corporations Act Regulation 7.7A.13 of the Corporations Regulations	Non-monetary benefit is less than \$300 and identical or similar benefits are not given on a frequent or regular basis
Section 963C(1)(c) of the Corporations Act Regulations 7.7A.14 of the Corporations Regulations Regulation 7.7A.15 of the Corporations Regulations Regulation 7.7A.15A of the Corporations Regulations	Non-monetary benefit has a genuine education or training purpose relevant to the carrying on of a financial services business
Section 963C(1)(d) of the Corporations Act	Non-monetary benefit is the provision of information technology software or support related to the provision of financial product advice to persons as retail clients in relation to the financial products issued or sold by the benefit provider
Section 963C(1)(e)(i) of the Corporations Act	Non-monetary benefit is given to the licensee or representative by a retail client in relation to the issue or sale of a financial product by the licensee or representative to the client
Section 963C(1)(e)(ii) of the Corporations Act	Non-monetary benefit is given to the licensee or representative by a retail client in relation to financial product advice given by the licensee or representative to the client
Section 963C(1)(f) of the Corporations Act	Non-monetary benefit is a prescribed benefit or is given in prescribed circumstances
Section 963D of the Corporations Act Regulation 7.7A.12H of the Corporations Regulations	Monetary or non-monetary benefit given to a licensee or representative and the benefit is in whole, or in part, remuneration for work carried out, or to be carried out, by the licensee or representative as an agent or employee of an Australian ADI only providing financial product advice in relation to a basic banking product, general insurance product or consumer credit insurance (or any combination of these products)

References

Legislation

Australian Securities and Investments Commission Act 2001.

ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784.

ASIC Corporations (Life Insurance Commissions) Instrument 2017/510.

Competition and Consumer Act 2010.

Consumer Duty Instrument 2022 (UK) FCA 2022/31.

Corporations Act 2001.

Corporations Amendment (Financial Advice Measures) Act 2016.

Corporations Amendment (Further Future of Financial Advice Measures) Act 2012.

Corporations Amendment (Future of Financial Advice) Act 2012.

Corporations Amendment (Life Insurance Remuneration Arrangements) Act 2017.

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