

26 September 2022

Quality of Advice Review
Financial System Division
Treasury
Langton Cres
Parkes ACT 2600

Quality of Advice Review – Proposals Paper

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

ISA acknowledges that the proposals contained in the Proposals Paper around personal advice and general advice may improve access and affordability of advice to Australians. However, in our view, they fail to strike an appropriate balance between access, affordability, quality and consumer protection.

The proposals should be assessed by considering whether the benefits to advisers and product issuers in providing more advice to consumers outweigh the risks to consumers of receiving poor advice. In our view, the risks posed to consumers by the proposals around the regulation of personal and general advice outweigh any other benefits.

The best interests duty was a critical piece of the FOFA reforms. Replacing it with the good advice obligation – alongside the proposed category of personal advice providers who are not required to meet the professional standards – will materially change how advice is offered and regulated. In our view, these proposals will likely lead to lower quality of advice, which could be the catalyst for consumer harm.

We accept there is consumer research to show that the meaning of general advice is not well understood by consumers, but it would be counterproductive to de-regulate general advice on that basis. The general licensing obligations together with the ban on conflicted remuneration offer some protection to consumers from being mis-sold financial products that are unsuitable or of poor quality.

However, we do broadly support some of the proposals relating to disclosure documents and we consider that these proposals could be implemented separately from the other proposals.

ISA also makes the following three observations about the proposals in the Proposals Paper.

- ▶ First, the proposals around personal advice and removing the Statement of Advice requirements rely on the ‘professionalism’ of financial advisers to achieve their objective. However, the professional standards reforms have not been fully implemented and the Government is currently consulting on proposals to wind back elements of those reforms. While there are many professional financial advisers, it cannot be said that the financial advice industry has fully transitioned to a profession and therefore the implicit justification for the proposed lighter touch regulation contained in the Proposals Paper is absent.

- ▶ Second, the proposals around personal advice, general advice and removing the Statement of Advice requirements rely on consumers to exercise judgement about: what advice they need, the skills and competence of the person providing the advice, the relevance of the advice for them and what recourse they have should the advice or information ultimately be poor. While the regulatory bar on the provision of advice and information is lowered for advisers and those giving information and guidance, the responsibility on consumers is increased and therefore the risk of harm.
- ▶ Third, ASIC's recently released Corporate Plan indicates that it is undertaking surveillance on superannuation trustees' distribution practices in relation to choice products, including examining the role of financial advisers and their licensees in the distribution of underperforming choice products. It appears that even under current regulatory settings, ASIC is concerned about how consumers are being distributed poor superannuation products. The Review would benefit from understanding the practices about which ASIC is concerned and considering whether those practices would be more or less likely to occur under the proposals in the Proposals Paper.

Please find our submission in the attached appendix. If you have any questions, please feel free to contact me at ecebon@industrysuper.com



Ella Cebon
Senior Policy Manager

Questions

Intended outcomes

1. Do you agree that advisers and product issuers should be able to provide to personal advice to their customers without having to comply with all of the obligations that currently apply to the provision of personal advice?

The proposals in the Proposals Paper contain significant and sweeping changes to the way in which personal and general advice is delivered. In ISA's view, the proposals should be assessed by considering whether the benefits of the proposals to advisers and product issuers in providing more advice to consumers outweigh the risks to consumers of receiving poor advice.

Applying this reasoning, advisers and product issuers should not have to comply with any obligations that, based on clear evidence, provide little or no protection or benefit to consumers. In our view, some of the disclosure obligations fit into this category, however the best interests duty and the professional standards do not.

Weakening or removing any other obligations (such as the conduct obligations that apply to advisers that were introduced by the FOFA reforms and the application of the professional standards to personal advisers) should only be considered if there is clear evidence to indicate:

- concerns with the operation of the current regime are well documented, e.g., through a post-implementation review by Government,
- the quality of advice provided by the industry has improved and this improvement can be sustained under the proposals, and
- the industry as a whole can be considered a 'profession'.

Presently, this does not appear to be the case – partly due to the continuing implementation of the professional standards introduced by the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017*. In other words, we consider that the benefits of these proposals do not outweigh the risks to consumers. This is the basis for many of our concerns about the draft proposals.

What should be regulated?

2. In your view, are the proposed changes to the definition of 'personal advice' likely to:

- a) reduce regulatory uncertainty?**
- b) facilitate the provision of more personal advice to consumers?**
- c) improve the ability of financial institutions to help their clients?**

In our view, the proposed changes to the definition of “personal advice” and more importantly, the duties and professional standards that would (or would not) attach to giving personal advice, may result in poor advice being given to consumers and increase the likelihood of consumer harm because there will no longer be a requirement for personal advice to be provided by a qualified adviser who is subject to the professional standards, including the Code of Ethics. Please see our responses to questions 4 and 7 for further information, including examples of advice that may satisfy the proposed obligations and yet would likely be considered poor advice by community standards.

Further, while the proposed changes to the definition of ‘personal advice’ will improve regulatory certainty in terms of the distinction between personal advice, general advice and information, there will be some regulatory uncertainty around the boundary between advice that can and cannot be provided by a non-relevant provider. This is discussed further in our response to question 7.

3. In relation to the proposed de-regulation of ‘general advice’ - are the general consumer protections (such as the prohibition against engaging in misleading or deceptive conduct) a sufficient safeguard for consumers?

a) If not, what additional safeguards do you think would be required?

We do not consider that the proposed de-regulation of general advice provides sufficient safeguards for consumers. While the prohibition against engaging in misleading or deceptive conduct is an important safeguard for consumers, it does not sufficiently deal with consumer harm caused by receiving:

- conflicted information/advice, or
- information/advice by an inexperienced or incompetent person/adviser.

This could result in consumers being recommended, informed of, or sold products that are of poor value or unsuitable for them and being unable to access dispute resolution procedures if needed (notwithstanding the design and distribution obligations).

For example, the proposed de-regulation of general advice could result in unlicensed influencers who are paid by product issuers to promote a financial product through social media (where this does not clearly amount to arranging for a person to deal in a financial product) being largely unregulated, unless their conduct meets the high bar of being misleading or deceptive. Based on ASIC’s comments in the media, we understand the key consumer protection it relies on to minimise

harm caused by the conduct of finfluencers – including those earning lucrative salaries from promotional deals with financial firms – is to assess whether the finfluencer is providing general advice and if so, whether they are licensed to do so. De-regulating general advice as proposed will therefore restrict ASIC’s ability to take action in these cases.

Accordingly, we consider that only licensees and their representatives should be able to provide general advice (to ensure the general obligations in section 912A of the Corporations Act would apply), and the ban on conflicted remuneration should apply to the provision of that information/advice.

Of further concern is that the proposals will lead to a differential approach that depends on whether the provider is an AFSL holder or not – although that is not entirely clear from the paper. If this is the case, it will likely result in AFSL holders restructuring so that part of their business (such as their call centre teams who provide information about financial products) do not operate under an AFSL – therefore bypassing the general licensee obligations, which include the obligation to act efficiently honestly and fairly, manage conflicts of interests and have a complying dispute resolution system. This could potentially result in poor outcomes for consumers.

While we support bans on conflicted remuneration, we query whether there is any data or evidence about the effectiveness of the conflicted remuneration provisions relating to information given about life risk insurance products. Ideally, this data should be collected and assessed before the Review commits to a preferred model for the conflicted remuneration provisions that would apply to the provision of information about a financial product.

Finally, we note that this proposal relies, in part, on the fact that there are 108 current licensees with an authorisation to give general advice only. This figure ignores the representatives who are authorised by the licensee to only give general advice.

How should personal advice be regulated?

4. In your view, what impact does the replacement of the best interest obligations with the obligation to provide ‘good advice’ have on:

- a) the quality of financial advice provided to consumers?
- b) the time and cost required to produce advice?

For most providers, the proposal would likely reduce the time and cost required to produce advice. However, that will likely come at the expense of the quality of advice to consumers (whether deliberately or not) and therefore the risks of this proposal outweigh the benefits. This is likely to be more apparent where the consumer is seeking more comprehensive/complex advice or where the advice is being used as an acquisition or retention tool by the provider.

This simply reflects that the good advice obligation sets a lower bar than the best interests duty (and the associated safe harbour), which subsequently means that providers have to do less – including in terms of procedural steps – to satisfy themselves that the good advice obligation is met. In particular, it appears that

advisers will still be able to meet the good advice obligation while recommending a product that overall, represents poor value for the consumer. We have set out some examples below to illustrate our concern.

Example 1

A consumer is seeking advice to consolidate their superannuation accounts – one of which has failed the last performance test and one of which has performed poorly on the last APRA MySuper product heatmap. It would appear that an adviser would satisfy the good advice obligation even if they recommended the consumer consolidate the accounts into the product that has performed poorly on the heatmap. The member may benefit from consolidating the accounts, but we doubt that the advice can be considered ‘good’ by community standards.

Example 2

A member approaches an adviser about their retirement adequacy. It would appear that an adviser would satisfy the good advice obligation if they recommended that the member make voluntary contributions to their super fund, without any consideration of the fund’s investment strategy, investment risk or any debts the member may have etc. because the member would likely benefit from making those voluntary contributions.

Additionally, whether the proposed good advice obligation is met depends on the information available to the provider at the time the advice is provided. We assume this is preferred because it is a clear and simple test, however we query whether it creates a loophole whereby advisers may choose not to make any further reasonable enquiries so as to meet the good advice obligation more easily.

Of course, if the adviser is a relevant provider under the proposals (i.e., meets the professional standards), the best interests duty is effectively retained through the Code of Ethics. However, our view is that the same high standard should apply to all providers of personal advice (see our response to question 7 for further information) and given its importance, this high standard should be set out entirely in the primary law.

Finally, we note that while the Proposals Paper characterises the best interests duty as focusing on process rather than content, that is only due to the associated safe harbour (which industry advocated for as they wanted certainty about how to meet the duty) and the way ASIC has been regulating this duty. In our view, if the good advice obligation is implemented by the Government, it seems likely that similar calls for certainty about how to meet the obligation will risk it focusing on process rather than content and it will evolve in the same way as the best interests duty.

5. Does the replacement of the best interest obligations with the obligation to provide ‘good advice’ make it easier for advisers and institutions to:

- a) provide limited advice to consumers?**
- b) provide advice to consumers using technological solutions (e.g. digital advice)?**

Please see our response to question 4.

6. What else (if anything) is required to better facilitate the provision of:

- a) limited advice?
- b) digital advice?

Please see our response to questions 4 and 7 and our submission to the Review on the Issues Paper.

7. In your view, what impact will the proposed changes to the application of the professional standards (the requirement to be a relevant provider) have on:

- a) the quality of financial advice?
- b) the affordability and accessibility of financial advice?

Consistent with our response to question 4, while the proposal may improve the affordability and accessibility of financial advice, it will also likely reduce the quality of financial advice provided to some consumers. Additionally, it means the financial advice industry will not fully transition to being a 'profession', which we consider is a critical factor when assessing whether lighter regulation of the industry is appropriate.

We understand the proposal:

- is partly intended to compensate for the proposed expanded definition of personal advice (i.e., that some providers of general advice – who are not currently required to meet the professional standards – would otherwise be required to do so under the proposed definition of personal advice), and
- aims to boost the number of personal advice providers across the industry, which we acknowledge is currently contracting.

However, there is a high risk that the proposal will incentivise some providers to structure their personal advice offering to avoid the requirement to be a relevant provider where possible (given it is the more cost-effective and less burdensome approach) – even if the advice they provide is complex or there are conflicts of interest. A possible structure could be where the advice is paid for by a third party instead of the consumer, or where an institution absorbs the cost of providing the advice on the basis that the advice will likely generate sales of financial products issued by the institution (thereby offsetting the cost of the advice). In our view, the different commercial arrangements of funds means that the latter structure is more likely to be employed by a retail institution. In this sense, it raises

questions about whether the proposal is sector neutral, given the potential impact it could have on retail operations to drive commercial outcomes at the expense of consumer protections.

Example 3

A consumer approaches their bank seeking comprehensive advice on their wealth planning needs. Seeing the opportunity to recommend that the consumer create an investment portfolio and rollover their super (noting the consumer is not a member of the bank's super fund), the bank (or their financial advice partner) decides not to charge a fee to the consumer for the advice. Comprehensive and complex advice is then provided to the consumer by a non-relevant provider, who is not required to act in the best interests of the consumer and does not meet the education and training requirements that form part of the professional standards. The consumer subsequently acts on the advice, which generates profit for the bank and outweighs the cost of providing advice.

In our view, this shows that allowing different obligations and duties (and ultimately standard of advice) to apply depending on whether the client has paid a fee for the advice is inherently flawed.

Therefore, it is likely that under the proposal, many providers of personal advice will not meet the professional standards, despite those standards forming a key part of the framework to improve the quality of financial advice. In combination with our concerns about the good advice obligation, we consider there are significant risks to consumers if these proposals are implemented.

We appreciate that the Proposals Paper indicates there is an expectation that licensees should choose to ensure that certain types of advice are only provided by a relevant provider (such as where the advice is more complex, or the consumer is vulnerable), even if it is not required under the proposal. However, this is unrealistic and given the reliance on the licensee's judgement, will inevitably mean that there will be varying approaches. For example, advice providers who are *not* relevant providers are likely to find it difficult to identify when a particular matter that is initially considered to be 'simple advice' becomes 'complex advice'. This would result in an odd situation where in many cases, relevant providers and non-relevant providers give the same type of advice to consumers – but are subject to different duties and obligations, have different training and qualifications and are likely to charge significantly different fees/costs.

While it is difficult to anticipate how exactly this would operate in practice, we envisage that it would be extremely difficult to enforce any relevant expectations. Perhaps more concerning is how consumers will be unable to distinguish between the two types of personal advisers. This distinction will be important because it can materially affect how consumers value/act upon the advice they receive, including what they consider to be a reasonable fee/cost for the advice.

Finally, we do not accept that reducing the regulatory obligations on financial advisers is an appropriate policy response to declining numbers of financial advisers. It is hard to think of any other profession where this would be a preferred or optimal solution.

8. In the absence of the professional standards, are the licensing obligations which require licensees to ensure that their representatives are adequately trained and competent to provide financial services sufficient to ensure the quality of advice provided to consumers?

a) If not, what additional requirements should apply to providers of personal advice who are not required to be relevant providers?

There should be a consistent minimum level of training and competence amongst financial advisers who provide personal advice, to ensure high quality consumer outcomes and to boost public confidence in the industry. As the Review would be aware, the professional standards of advisers have been the subject of lengthy and detailed reviews over the last decade, with ASIC repeatedly finding that adviser training and professional standards are one of the barriers to improving the quality of advice, and more recently, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry finding that prevention of poor advice begins with education and training.

These findings were made even with the existing licensing obligation on licensees to ensure their representatives are adequately trained and competent to provide financial services in the law. We note that prior to the introduction of the professional standards, ASIC RG 146 *Licensing: Training of financial product advisers* set out the minimum training standards for advisers, which was intended to assist licensees to comply with the licensing obligation. Despite this, ASIC's surveillances consistently found that advisers were not adequately trained or competent to deliver financial advice to consumers, which subsequently led to the introduction of the professional standards reforms.

In our view, this shows that reliance on the licensing obligation on its own is insufficient and will result in highly inconsistent approaches across the industry, including highly inadequate approaches.

Superannuation funds and intra-fund advice

9. Will the proposed changes to superannuation trustee obligations (including the removal of the restriction on collective charging):

a) make it easier for superannuation trustees to provide personal advice to their members?

b) make it easier for members to access the advice they need at the time they need it?

ISA supports proposals to facilitate the provision of advice by super funds to their members. However, we are concerned that under the proposed changes, it seems unlikely that many funds will meaningfully expand their intra-fund advice offering, which we consider is an important way for funds to provide advice to existing members at scale. In substance, section 99F currently provides comfort to trustees that they can collectively charge for some limited personal advice, notwithstanding other legislative obligations. Removing this provision may make it more difficult to justify collectively charging for advice and we anticipate that

many funds will likely take a conservative approach to intra-fund advice (i.e., maintaining the status quo) to minimise scrutiny. As a consequence, it may not be easier for members to access advice from their funds when they need it.

Alternatively, some other funds may choose to collectively charge for other types of advice – including complex advice – that is only provided to a very small number of members. This is also not an ideal outcome, given the disproportionate impact it could have on administration fees for a broader cohort of members. While the consideration of administration fees in the annual performance test may limit the likelihood of this scenario occurring in practice (alongside balancing of other duties imposed on trustees), we query whether it is easier for funds that have a greater ability to absorb costs through their corporate group structures/commercial arrangements (i.e., retail funds) to adopt such an approach to acquire and retain members.

Accordingly, if the aim of Proposal 6 is to improve access to personal advice for members and provide increased regulatory certainty for trustees, our view is that section 99F should be retained with amendments that expressly permit personal advice being provided to the member about retirement adequacy, Age Pension eligibility and the member's household (to the extent it is pertinent to the member's retirement). We note ISA has made a separate submission to the Review on this issue.

Disclosure documents

10. Do the streamlined disclosure requirements for ongoing fee arrangements:

- a) reduce regulatory burden and the cost of providing advice, and if so, to what extent?
- b) negatively impact consumers, and if so, how and to what extent?

ISA's longstanding view is that all ongoing fee arrangements for superannuation products should be banned, and advisers should be required to charge for specific services when those services are provided. This is discussed further in our submission on the Issues Paper.

However, if ongoing fee arrangements continue to be permitted for choice products, we support maintaining the current disclosure requirements for those arrangements. This will ensure there is the highest level of transparency and accountability around what the adviser is charging for, which will minimise the risk of consumers being charged a fee for no service and inappropriate account balance erosion.

11. Will removing the requirement to give clients a statement of advice:

- a) reduce the cost of providing advice, and if so, to what extent?
- b) negatively impact consumers, and if so, to what extent?

It is not clear to us how this proposal will materially reduce costs for advice providers and whether Statements of Advice are really of limited value in the event of a dispute (anecdotal evidence provided to us indicates otherwise). Further, we note there has been some commentary that Statements of Advice for the most part, cannot be relied upon to accurately set out the advice that was given to consumers and the basis for that advice. If this is correct, it illustrates that many financial advisers cannot be trusted to keep accurate and complete records, which are necessary from a consumer protection perspective if the proposals are implemented.

ASIC Class Order [CO 14/923] currently prescribes at a high level, some of the matters that advisers need to record, including information that was relied on and action taken by the provider that indicates the provider has acted in the best interests of the client etc. In our view, similar provisions that are comprehensive and actively enforced are needed to ensure good record keeping across the industry.

Additionally, if this proposal is implemented, we query whether a requirement for advisers to *offer* a written record of advice is a better alternative to the proposed requirement that advisers provide a written record of advice to a client on request. This is likely to result in better outcomes for consumers – particularly those who may not know they can request a written record of advice or may feel uncomfortable requesting it.

12. In your view, will the proposed change for giving a financial services guide:

- a) reduce regulatory burden for advisers and licensees, and if so, to what extent?
- b) negatively impact consumers, and if so, to what extent?

We broadly support these proposed changes.

Design and distribution obligations

13. What impact are the proposed amendments to the reporting requirements under the design and distribution obligations likely to have on:

- a) the design and development of financial products?
- b) target market determinations?

We broadly support these proposed changes.

Transition and enforcement

14. What transitional arrangements are necessary to implement these reforms?

No comment.

General

15. Do you have any other comments or feedback?

As stated in our response to question 1, the proposals contained in the Proposals Paper should be assessed by considering whether the benefits of the proposals to advisers and product issuers in providing more advice to consumers outweigh the risks to consumers of receiving poor advice. In our view, the risks posed to consumers by the proposals around the regulation of personal and general advice outweigh any other benefits.

The best interests duty was a critical piece of the FOFA reforms. Replacing it with the good advice obligation – alongside the proposed category of personal advice providers who are not required to meet the professional standards – will materially change how advice is offered and regulated. In our view, these proposals will likely lead to lower quality of advice, which could be the catalyst for consumer harm.

We accept there is consumer research to show that the meaning of general advice is not well understood by consumers, but it would be counterproductive to de-regulate general advice on that basis. The general licensing obligations together with the ban on conflicted remuneration offer some protection to consumers from being mis-sold financial products that are unsuitable or of poor quality – beyond the consumer protection provisions in the ASIC Act.

However, we do broadly support some of the proposals relating to disclosure documents (subject to our comments above) and we consider that these proposals could be implemented separately from the other proposals.

ISA also makes the following three observations about the proposals in the Proposals Paper.

- First, the proposals around personal advice and removing the Statement of Advice requirements rely on the ‘professionalism’ of financial advisers to achieve their objective. However, the professional standards reforms have not been fully implemented and the Government is currently consulting on proposals to wind back elements of those reforms. While there are many professional financial advisers, it cannot be said that the financial advice industry has fully transitioned to a profession and therefore the implicit justification for the proposed lighter touch regulation contained in the Proposals Paper is absent.
- Second, the proposals around personal advice, general advice and removing the Statement of Advice requirements rely on consumers to exercise judgement about what advice they need, the skills and competence of the person providing the advice, the relevance of the advice for them and to

understand what recourse they have should the advice or information ultimately be poor. While the regulatory bar on the provision of advice and information is lowered for advisers and those giving information and guidance, the responsibility on consumers is increased and therefore the risk of harm.

- Third, ASIC's recently released Corporate Plan indicates that it is undertaking surveillance on superannuation trustees' distribution practices in relation to choice products, including examining the role of financial advisers and their licensees in the distribution of underperforming choice products. It appears that even under current regulatory settings, ASIC is concerned about how consumers are being distributed poor superannuation products. The Review would benefit from understanding the practices about which ASIC is concerned and considering whether those practices would be more or less likely to occur under the proposals in the Proposals Paper.