

Chapter 6

The cost and accessibility of financial advice

6.1 This chapter examines the cost and accessibility of financial advice. Following on from Chapter 4 the committee discusses the relevance of advice when making investment choices within a fund. It reflects on barriers to the affordability of superannuation advice caused by the breadth of application of the 'advice provisions' in the *Corporations Act 2001* (Corporations Act). It also considers possible remedies to enable the legislative framework to achieve greater proportionality between consumer protection and accessibility of advice. Finally, the committee examines the problem of incomprehensible disclosure documents provided by financial product issuers.

Legislative framework

Licensing of advice

6.2 The Corporations Act stipulates that financial services businesses, including those who provide financial product advice, must hold an Australian Financial Services (AFS) licence.¹ Authorised representatives or employees of AFS licence holders (licensees) are not required to hold a licence themselves. AFS licences are issued and monitored by the Australian Securities and Investments Commission (ASIC), which imposes a number of obligations on licensees and their representatives.²

6.3 Individuals or entities that do not hold an AFS licence (or representatives of non-licensees) are generally not permitted to provide financial advice. One exception is accountants, who have been provided with an exemption from the requirement to be licensed when providing advice on the 'establishment, operation, structuring or valuation' of a self-managed superannuation fund (SMSF).³ This is discussed in Chapter 8.

1 Section 911A. Section 766A(1)(a) states that a financial service includes the provision of financial product advice.

2 See section 914A of the Corporations Act. ASIC's AFS licence conditions are outlined in Pro Forma 209 and include the following requirements: training for authorised representatives, various financial requirements, dispute resolution and retention of key documents.

3 The exemption only applies to accountants who are members of one of the three major accounting organisations. See ASIC, *QFS 123*, <http://www.asic.gov.au/asic/asic.nsf/ASIC+FSR+FAQ+DisplayW?ReadForm&unid=1567F3AC0FAB85C4CA256F65001B317A>, (accessed on 28 March 2007).

Definitions of advice

Corporations Act

6.4 The Corporations Act describes the circumstances that constitute the provision of financial product advice, split into two categories: personal advice and general advice. Differing disclosure requirements under part 7.7 of the act apply depending on whether advice is personal or general in its nature. Those seeking to provide services that fall within the act's definition of financial product advice are required to hold an AFS licence.

6.5 Under section 766B(1) of the Corporations Act, 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.

6.6 Section 766B(3) of the act defines personal advice 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...; or
- (b) a reasonable person might have expected the provider to consider one or more of those matters.

6.7 Section 766B(4) defines general advice as: '...financial product advice that is not personal advice.'

ASIC Guidance

6.8 ASIC's policy statement on providing financial product advice indicates that ASIC takes a number of circumstances into account when distinguishing between personal and general advice, for the purposes of administering section s766B(3)(b) of the Corporations Act. In the context of the evidence received during this inquiry, the most significant of these circumstances include:

- whether personal advice was offered to the client or whether it was requested, including requesting advice as to the decision a client should make;
- whether or not the adviser requested information about the client's relevant personal circumstances; and

- whether the advice appears to be tailored to the client's relevant personal circumstances.⁴

6.9 The policy states that *consideration* of personal circumstances is the critical factor:

If an adviser receives or possesses information about the client's relevant personal circumstances this does not, by itself, mean that any advice given to that client is necessarily personal advice. Whether such advice is personal advice will generally depend on whether the adviser has *considered* (or whether a reasonable person might expect the adviser to have *considered*) that information in providing the advice.⁵

6.10 ASIC has distinguished between financial product advice and factual information on the basis that financial product advice involves a qualitative judgment, whereas factual information is objectively ascertainable.⁶

Disclosure requirements

General advice

6.11 Where the advice provided is only of a general nature, section 949A of the Corporations Act stipulates that the client must be warned that the advice has not taken into account their own objectives, financial situation or needs and the client should consider the appropriateness of the advice in that light. Further, in accordance with sections 941A and 941B the client must be provided with a Financial Services Guide (FSG). The FSG is required to include information on remuneration, commission and other benefits derived from the provision of the advice.⁷

Personal advice

6.12 Of greater concern to the industry has been the disclosure requirements pertaining to the provision of personal advice. Once the provision of advice enters the realm of personal advice, which is essentially the consideration of a person's individual circumstances, the need to provide a Statement of Advice (SoA) is triggered.

Under sections 947B and 947C of the Corporations Act the SoA must include:

4 ASIC, *Policy Statement 175*, 'Licensing: Financial product advisers – Conduct and disclosure', November 2005, p. 5.

5 ASIC, *Policy Statement 175*, 'Licensing: Financial product advisers – Conduct and disclosure', November 2005, p. 5.

6 Mr Mark Adams, Director Policy and Research, ASIC, *Committee Hansard*, 20 November 2006, Canberra, p. 62.

7 This requirement applies to all financial product advice. Detailed information on FSG disclosure requirements is contained in ASIC's policy statement 175.

- the advice provided to the client;
- the basis on which the advice was provided;
- information about remuneration, commissions and other benefits resulting from the provision of the advice; and
- any conflicts of interest that may be capable of influencing the entity providing the advice.⁸

6.13 A number of witnesses indicated that these disclosure requirements are too onerous to be applied as broadly as they currently are.

The role and significance of financial advice on superannuation

6.14 The advent of Super Choice and the autonomy it has provided superannuation fund members has brought greater attention to the role of the funds and professional advisers in assisting consumers to navigate their way through the options they now face.

6.15 While most participants in the inquiry agreed that fund members need improved access to some form of straightforward guidance on superannuation, the extent to which detailed personal advice was necessary to ensure optimal retirement outcomes was the subject of dispute. Financial advisers in particular tended to argue that a person's retirement income could be improved with appropriate advice on investment strategies within funds, as well as assisting clients with how best to integrate superannuation into their overall financial affairs. Alternatively, industry superannuation funds in particular responded that default fund arrangements are sufficient for the needs of most ordinary fund members; therefore detailed advice on investment strategies is usually unnecessary and not justified by the expense.

6.16 An examination of these issues provides context for the committee's later discussion on facilitating the provision of accessible general financial advice on superannuation in the context of financial services reform (FSR) disclosure requirements.

Background: the effect of choice

6.17 The implementation of Super Choice has provided consumers with greater autonomy over their superannuation investment, which will potentially create a greater demand for professional advice that is tailored to their own circumstances.⁹

8 The SoA must also contain a number of other statements, qualifications and warnings. Further detail can be found in ASIC's policy statement 175, pp. 47-49. The most significant of these is the additional requirement under s947D to outline the costs and benefits of switching products, in part or whole, where this course of action has been recommended.

6.18 Perhaps more significantly though, by allowing consumers almost unlimited choice in the marketplace, the Super Choice regime has sought to encourage a more competitive and efficient market in superannuation products. A notable consequence of this competition is for product providers to offer a broader, more diverse range of options to satisfy the requirements of the market, thus adding to the complexity of the choice consumers face. For example, the consumer advocate organisation Choice told the committee that:

...competition in financial services is about creating product complexity and creating differentiation in products. That competitive trend is the one that creates the need for advice. You cannot ask a consumer to choose between 200 various investment options on a particular platform and know exactly which one suits their interests.

It is those sorts of moves to try to bang on additional services, to make the product have even more bells and whistles, that generate the need for them to have advice on that product. Faced with 200 options, they need advice on which particular investment option suits their stage of the life cycle on the basis of where they are at that particular point in time.¹⁰

6.19 The opportunity to exercise greater choice on superannuation, combined with the added complexity of that decision in a competitive market, has focused attention on the importance of financial advice and the manner in which it is provided.

Basic superannuation advice, information and education

6.20 The committee notes widespread agreement across the industry over consumers' need for at least basic professional guidance on superannuation-related matters. Increased choice and complexity are salient factors in this, as referred to above. Importantly, a worrying lack of financial literacy regarding superannuation has also crystallised this view. Addressing this problem is vital.

6.21 A lack of consumer engagement with and understanding of superannuation has carried over from the previous employer-based, passive model of fund membership. Understandably then, the vast majority of contributors to the inquiry agreed with the general proposition that the provision of basic, limited advice on superannuation would be beneficial to fund members. Moreover, there was a broad level of consensus among industry participants that FSR had limited the capacity of advisers and funds to provide this kind of cost-effective guidance and education to

9 In February 2006 ASFA reported that changes in fund will often continue to be related to employment shifts or an employer's changed default fund arrangements, rather than due to Super Choice. It suggested that a conscious exercising of choice may occur when individuals change jobs and decide to remain in the old fund, when declines in investment returns provoke a shift, or simply when people find the time to change funds. See Ross Clare, *The introduction of choice of superannuation fund – results to date*, AFSA Research Centre, February 2006, p. 15.

10 Dr Nick Coates, Senior Policy Officer Superannuation and Financial Services, Choice, *Committee Hansard*, 7 March 2007, Sydney, p. 34.

consumers. The specific nature of the problems associated with the FSR regime, the circumstances under which advice should be provided without costly disclosure requirements, and possible reforms to alleviate current regulatory impediments are examined later in the chapter.

6.22 In order to put the debate in context, the following sections identify the major differences of opinion as to the extent of personal financial advice that superannuation fund members require, or that may be practically offered on a widespread basis.

Is individually tailored financial advice needed?

6.23 As referred to by Choice above, one compelling reason for seeking professional advice is uncertainty in the face of a complex decision. Mercer Human Resource Consulting (Mercer) told the committee that 'many people are scared of making their own decisions without getting advice, because the whole system is so complex'.¹¹

6.24 The committee also heard that the provision of personal financial advice was essential to maximising fund members' retirement income. The most contentious claims focused on the superior retirement income that could be achieved by exercising member investment choice within funds on the basis of personal advice, as opposed to remaining in the funds' often conservative default option. Without criticising the adequacy or performance of default options generally, SuperRatings told the committee that approximately 82 per cent of Australians default on their investment and/or insurance structures.¹² However, the argument that it is beneficial to receive professional advice on choosing an optimal investment strategy was made by a number of organisations.

6.25 Promina Financial Services, while also advocating the importance of holistic financial advice, commented on choosing investment options:

...the majority of clients who do not seek financial planning advice merely invest in the default investment option already set up for their fund. While these investment options may have sound investment strategies, they may tend to be quite conservative and may not allow a client to maximise the full potential for their savings.¹³

6.26 Financial Planning Association of Australia (FPA) drew attention to large industry funds such as REST and HostPlus, which 'disclose that 99% of members are invested in their default or balanced option, due to the apparent absence of individual

11 Mr John Ward, Principal and Manager, Mercer Human Resource Consulting, *Committee Hansard*, 25 October 2006, Melbourne, p. 73.

12 Mr Jeff Bresnahan, Managing Director, SuperRatings, *Committee Hansard*, 7 March 2007, Sydney, p. 12.

13 Promina Financial Services, *Submission 37*, p. 3

advice'. It suggested that this approach was detrimental to members' retirement income:

Whilst in the current market returns on these funds have been quite good it must be suggested that at least a percentage of those members would have been better off having received advice and placed in less conservative strategies such as Australian share funds or emerging market funds where returns have been up to 50% higher in the current economic environment. In these cases the benefits of receiving professional financial planning advice would most likely result in a greater retirement payout.¹⁴

6.27 In evidence to the committee FPA reinforced the view that assisting choice through the provision of advice is generally preferable to remaining in the default option:

There is a lot of evidence to indicate that a number of members are simply not exercising choice or not necessarily thinking about their choice and are opting into default funds which, for all intents and purposes, may work in some circumstances but certainly do not necessarily, in our view, maximise opportunities for members. For example, is there enough choice between a 20-year-old and a 50-year-old in their potential default strategy? Our proposition is that we think too many people are going into default funds and not necessarily understanding or making active choice ... If someone is not confident enough or does not have enough information to make a decision, then advice might be able to help them determine an appropriate investment strategy that is right for their needs.¹⁵

6.28 While not supporting the provision of yearly advice, the Association of Financial Advisers told the committee that there needs to be 'continual contact' between advisers and their clients to 'keep clients focused on where they started and where they need to be going, because there are lots of distractions in terms of where they should be putting their money'.¹⁶ It emphasised the net benefit of spending on advice: 'people who get advice generally have far better outcomes than people who do not get advice, taking into account the fees that they pay for that advice'.¹⁷

6.29 In contrast, a number of contributors argued that detailed personal advice is unnecessary for most superannuation fund members, given the adequacy of funds' default arrangements. Members Equity Bank commented that arguments for the provision of detailed financial advice had been exaggerated:

14 FPA, *Submission 38*, p. 6

15 Ms Jo-Anne Bloch, CEO, FPA, *Committee Hansard*, 24 October 2006, Sydney, p. 39.

16 Mr Michael Murphy, Past President, AFA, *Committee Hansard*, 20 November 2006, Canberra, p. 82.

17 Mr Michael Murphy, Past President, AFA, *Committee Hansard*, 20 November 2006, Canberra, p. 84.

...for the vast majority of people, the financial advice that they require is very basic. For ordinary working Australians, I am not sure that there has been a case made out for the need for complex financial advice.¹⁸

6.30 In his submission, Mr Peter Mair also countered the assertion that individually tailored financial advice was critical:

There are, of course, few aspects of personal uniqueness that have much practical bearing on the way retirees structure their affairs to maximize their financial well being. Some plain advice aimed at the main demographic segments, and made readily-available, could generally break the back of what most consumers need to be told about superannuation and, so forearmed, they would be less likely to be snowed by a self-serving adviser unfairly capturing their confidence.¹⁹

6.31 Superpartners, a superannuation fund administrator, suggested that the majority of members under their administration were justifiably content with remaining in the default option:

...we deal with in excess of five million accounts and most of our membership—in excess of 90 per cent—are really only interested in the default option. That suits them very well. The performance of the default option in most funds has been excellent, as you may have seen. Starting from that perspective, most members of the funds are well served.²⁰

6.32 It also emphasised that remaining in the default option did not equate with neglect by the trustee:

...the default option does not mean that there is a default of monitoring. The default option, like any other option, under the management and the trustee, must be regularly reviewed and monitored under its statutory investment strategy. The default option is monitored by the trustee board's investment committee on monthly reports, consisting of asset rebalancing on the advice of a professional investment consultant and other fund managers.²¹

6.33 The Australian Council of Trade Unions (ACTU) commented that default options are designed to be appropriate for all members:

The design of the default fund is supposed to suit anyone. It is meant to be a 'set and forget' option—that is why it is the default fund. You are meant to be able to enter it as a young person and leave it at retirement and have had sufficient return on the investment. Now perhaps someone going for growth

18 Mr Anthony Beck, Head Workplace Business, Members Equity Bank, *Committee Hansard*, 25 October 2006, Melbourne, p. 31.

19 Mr Peter Mair, *Submission 22*, p. 2

20 Mr Frank Gullone, CEO, Superpartners, *Committee Hansard*, 25 October 2006, Melbourne, p. 4.

21 Mr Paul Collins, Manager Legal Services, Superpartners, *Committee Hansard*, 25 October 2006, Melbourne, p. 6.

in the early stages of their life, switching into the balanced fund in the middle and then a more stable option at the end would end up with the same account balance. But the idea of the default fund is to try to make it a set and forget fund for people who do not wish to exercise that choice.²²

6.34 Industry Funds Forum (IFF) responded strongly to FPA's contention that the default option left fund members worse off than had they received advice, claiming that the argument is 'intellectually bankrupt' by relying on the benefit of hindsight with respect to returns on recently well performing asset classes.²³ It also noted the connection between the relative youthfulness of those funds' membership and their preference for the default option:

...REST and HOSTPLUS are unusual funds in this important respect—that is, the vast majority of their members are very young people. For many it is their very first job and they are part-time and casual workers. They earn modest incomes. Nine per cent of a modest income is a modest superannuation amount accumulating in your early 20s or so to a modest superannuation balance. Under those circumstances, most people do not have a great engagement with their superannuation. I think we all know that is true of the general population, but it is certainly true of young people who are decades away from retirement and who have a very small amount of money in superannuation. To expect that those people would seek out a financial advisor is simply unrealistic.²⁴

6.35 Mirroring the view of Superpartners, IFF concluded that members of these funds had not been neglected in the absence of personal advice:

...both those funds are very mindful of the composition of their membership and have put a lot of effort into determining the default option, knowing that many of their members will go into that option. The investment performance of the default options of both those funds has been very good. If you see all of that in totality, those funds have served their members interests particularly well.²⁵

Committee view

6.36 The committee is of the opinion that most fund members will not seek individually tailored financial advice on superannuation, particularly on choosing their own investment strategy. A combination of apathy, inertia and a perception of those with low or moderate fund balances that the cost and effort would not justify the benefits are the principal reasons. Also important is a belief that the fund managers are

22 Ms Catharine Bowtell, Industrial Officer, ACTU, *Committee Hansard*, 5 March 2007, Melbourne, p. 44.

23 Mr Ian Silk, Convenor, IFF, *Committee Hansard*, 25 October 2006, Melbourne, p. 120.

24 Mr Ian Silk, Convenor, IFF, *Committee Hansard*, 25 October 2006, Melbourne, p. 121.

25 Mr Ian Silk, Convenor, IFF, *Committee Hansard*, 25 October 2006, Melbourne, p. 121. See also HOSTPLUS, *Committee Hansard*, 6 March 2007, Melbourne, pp. 60-61.

experts and will do a good job. While the committee acknowledges that there is merit in the argument that all members would benefit to some extent from personal guidance on superannuation, the reality is that people cannot be coerced into taking such an active role in managing their superannuation affairs.

6.37 This consumer behaviour is not necessarily irrational; the performance of default fund investment options has been good. Indeed, remaining in the default option may be a conscious decision for many fund members. It is unsurprising that largely disengaged consumers have no qualms about allowing funds' financial investment specialists to set an investment strategy on their behalf, at minimal cost. This is particularly self-evident when investment returns are healthy. Whether the next downturn in the rate of investment returns triggers members' interest in utilising professional advice to become more actively involved in the management of their superannuation investments remains to be seen.

6.38 However the committee notes the concerns that were raised over some members being inappropriately placed in conservative investment strategies. This particularly relates to people who are not close to retirement and could potentially benefit from a more aggressive investment strategy. Although funds with skewed demographic characteristics are able to tailor their default options to cater for their members accordingly, any superannuation fund with a single default investment strategy is prone to attract such criticism. The committee draws no conclusion on the financial benefits of balanced investment options compared with high risk/high growth strategies. Rather, it notes the objection to leaving younger, longer term, fund members in the same default option as near-retirees.

6.39 Health Super informed the committee that their default investment strategies varied depending on the age of the member:

We ... have a life cycle default option, or strategy, that effectively puts people in long-term high growth up until they are 50, when we write to them to ask them if they want to change their investment option. If not, we dial it down to medium-term growth, which is a 70 growth-30 defensive split, until they are 60. If they then decide to stay in it beyond 60, it will be dialled down to fifty-fifty.²⁶

6.40 It added:

The bulk of people do not make a member investment choice as such, and that is still our experience to date. There are some people who are financially astute who make that member investment choice, but I do not think the vast majority do. We also looked at the demographic of our membership base, and we believe that in the long term growth assets will

26 Mr Christopher Clausen, CEO, Health Super, *Committee Hansard*, 6 March 2007, Melbourne, p. 44. The long term high growth option is a 90-10 split.

outperform defensive assets, hence the reason for establishing a life cycle default strategy.²⁷

6.41 The committee sees merit in Health Super's approach. Whether or not superannuation fund members are actually disadvantaged by remaining in 'balanced' default options, a minor tailoring of default investment strategies may negate a perceived need for advice on this aspect of superannuation. That is, advice that fund members not within a normal investment cycle of retirement could benefit from being in higher risk/higher growth options. This would assist in guiding members in an appropriate direction without trying to encourage the provision of costly financial advice that is unlikely to be sought.

The provision of affordable limited advice

6.42 Despite the difference of opinion over the need for detailed personalised advice and the adequacy of superannuation default options, there was broad consensus over the inadequacy of the current regulatory arrangements to allow for the provision of basic, limited advice on superannuation. The overwhelming criticism of the present legislative framework for the provision of financial advice is the breadth of the definitions of 'financial product advice' under section 766B of the Corporations Act.

6.43 The committee heard that these legislative provisions had restricted fund members' access to advice on issues where consumer protection should not, on the face of it, be a serious concern. For instance, the Australian Bankers' Association (ABA) offered the common view that the requirement for a SoA was triggered too easily, especially when members are merely seeking information on their fund's options:

The advice regime has unnecessarily restricted the provision of information and education on some financial products, where inadvertently the consumer may provide some basic personal information, and therefore any information provided to the consumer may be considered advice.²⁸

6.44 The committee was told that this problem has manifested itself in the context of two types of consumer-adviser interaction:

1. licensed advisers and their (potential) clients: due to onerous disclosure requirements, licensed financial advisers are not able to provide cost-effective advice in response to a straightforward client query; and
2. non licensed entities and superannuation fund members: non-licensed entities (mostly funds, but also accountants) are reluctant to provide information on

27 Mr Christopher Clausen, CEO, Health Super, *Committee Hansard*, 6 March 2007, Melbourne, p. 45.

28 ABA, *Submission 88*, p. 12.

internal fund options and superannuation structures because of concerns over providing non-compliant advice.

6.45 Both these scenerios turn on the wide spectrum of communications that may be deemed to constitute 'financial product advice', with 'personal advice' posing a particular problem for licensed advisers. According to many contributors to this inquiry, the consequence has been that the FSR measures intended to protect consumers have actually prevented them from accessing beneficial free or inexpensive financial guidance from their financial adviser, superannuation fund or accountant.

Advice from AFS licensees and their representatives

6.46 Organisations representing licensed financial advisers told the committee that the range of communications between advisers and their clients that fall within the scope of 'personal advice' is too broad, triggering costly disclosure requirements for even the most limited forms of advice. Consequently, this is inhibiting the ability of licensed advisers to provide consumers with affordable, basic advice on superannuation fund options.

6.47 There was particular concern that 'vanilla' advice on issues such as salary sacrifice, co-contributions, consolidation of small account balances, insurance structures and investment options was not being provided on the basis that it would cost more to consumers than it is worth.²⁹ This cost, the committee was told, is directly attributable to the extensive disclosure that must accompany personal advice.

6.48 The full gamut of disclosure requirements was generally supported where advice recommends the sale of a product, for instance through a recommendation to transfer an account from one fund to another. It was apparent through the inquiry that there was little support for the same requirements to apply to advice where consumer protection issues are not as relevant.

6.49 For example, SuperRatings told the committee that disclosure for simple, non-sales advice is too onerous:

...the licensing requirements of the planners at the moment are too onerous on simple stuff. Co-contribution, salary sacrifice, the investment option and the level of insurance all fall under that category where you need a complete 20-page or 50-page statement of advice to get any of that advice. We are not talking about product advice there. I know it is individual advice, but we are not talking about changing products; we are looking at what is in the best interests of that particular member—whether they can improve their savings or their risk position.³⁰

29 See for example Mercer Human Resource Consulting, *Committee Hansard*, 25 October 2006, p. 74.

30 Mr Jeff Bresnahan, Managing Director, SuperRatings, *Committee Hansard*, 7 March 2007, Sydney, p. 13.

6.50 Some submitters used practical examples to demonstrate the nature and extent of the problem. Mercer stated that the cost of straightforward advice was prohibitive for many, with advisers often taking the decision to withhold advice on the basis that it would cost the customer more than it is worth.³¹ It suggested:

...there should be some greater flexibility. Somebody may come along and say, 'I've got \$4,000 in this fund and I've \$1,000 in this fund; what should I do?' If they go to a financial adviser, he will charge them \$700 minimum to say, 'Yes, I think you should put it all in that fund,' by the time he goes through and analyses all of the person's individual circumstances, which he is required to do. You cannot get it too far wrong if you have \$4,000 in one fund and \$1,000 in another. The client just wants a five-minute piece of advice to verify that what he is planning on doing makes sense. He does not want to spend \$700.³²

6.51 Bendigo Financial Planning highlighted the case of a typical customer with:

...3-5 small existing policies totalling no more than \$15,000 and has become frustrated with the lack of any meaningful service from any of the super providers. The customer wants to know the most appropriate place to rollover and consolidate their super and make future contributions.³³

6.52 Using this example, it outlined the costs associated with the SoA requirements:

The SOA must include comprehensive comparisons between each "from" fund and the recommended "to" fund, clarifying and explaining differences in costs, fees, benefits, Management Expense Ratios, terms and conditions etc. The standard number of hours to complete any sort of meaningful assessment is around 10-15. Consequently, to simply meet our costs the customer would be required to pay between \$1,500 and \$3,000 for the work to be completed. Our experience is that customers are not prepared to pay this. Typically they are confused and can't understand why such a simple request can't be satisfied with a simple solution.³⁴

6.53 Bendigo Financial Planning concluded that the regime was illogical and detrimental to those it was intended to protect:

We have found that these customers, often seeing a financial planner for the first time, lose confidence in the financial planning industry and are bewildered as to how a regulatory environment has evolved where a

31 Mercer Human Resource Consulting, *Committee Hansard*, 25 October 2006, Melbourne, pp. 74-75.

32 Mr John Ward, Principal and Manager, Mercer Human Resource Consulting, *Committee Hansard*, 25 October 2006, Melbourne, p. 72.

33 Bendigo Financial Planning, *Submission 44*, p. 1.

34 Bendigo Financial Planning, *Submission 44*, pp. 1-2.

qualified professional financial planner cannot provide a solution to a simple but important superannuation need.³⁵

Advice from non-licensed entities

6.54 The committee also heard that superannuation funds' ability to communicate with their members about options within the fund, or respond to members' enquiries was also hampered by the Corporations Act disclosure requirements. These concerns are outlined below.

When does information become advice?

6.55 Funds expressed uncertainty about exactly what information they could provide to their members, thus tending to limit the provision of advice that could be construed to take into account personal characteristics. The Association of Superannuation Funds of Australia (ASFA) told the committee that the legislative boundaries on advice remained unclear:

Despite numerous attempts at clarification by [ASIC] and others, the boundaries between information, general advice and personal advice remain uncertain. Notably, the definition of "financial product advice" is very broad and captures a considerable portion of the communications between a superannuation fund trustee and a member.³⁶

6.56 REST Superannuation described the effect on its communication with members:

...the financial services legislation has limited the way that we and superannuation funds can communicate with our members because of the potential for it to be construed as advice. We and many other superannuation funds that I am aware of have taken a very conservative view in the communications to our members because of the risks involved.³⁷

6.57 In particular, REST Superannuation noted the effect on young people with low fund balances:

Approximately 75% of REST members are under 35 years of age with an average account balance of around \$3,500. This is not a traditional market for financial advisers. Yet the importance of seeking basic advice on investment choices and the value of making voluntary contributions early to ensure an adequate level of income in retirement cannot be understated. The limitations of REST's licence restrict our ability to provide education to our members that would assist in making basic decisions yet such early life decisions have a strong impact on future savings. As the barrier to advice is

35 Bendigo Financial Planning, *Submission 44*, p. 2

36 ASFA, *Submission 68*, p. 18.

37 Mr Damian Hill, CEO, REST, *Committee Hansard*, Sydney, 24 October 2006, p. 64.

currently too high, members seek advice instead predominantly from family or friends. As result, they may be ill-advised.³⁸

6.58 Industry Super Network, however, downplayed the restriction the advice provisions had on funds providing basic information:

...funds should not be overly frightened of the regulation in terms of what it prevents them from doing. Most funds want to act in bona fides and give people basic information, true information about their fund. In most cases I find it hard to read the regulations as preventing a fund from adequately and forthrightly explaining their fund and the benefits of their fund. Obviously, there are regulations around it. It is open, therefore, to interpretation. ... But, by and large, I think the funds now can and do communicate pretty well to their members the basics of how their scheme works and how the system works.³⁹

Is facilitating a benefit projection 'advice'?

6.59 The committee also received evidence concerning the regulatory impediments to funds offering their members superannuation benefit projections. It is difficult for consumers to reach a decision on the right amount to contribute to superannuation without an approximation as to how much will be required to meet their desired retirement income objectives. To this end, calculating projected benefits on varying contribution levels allows fund members to determine appropriate contribution levels for their future needs.

6.60 Citing the Swedish government's 'orange envelope' model of pension projections and UK funds' legislative obligation to provide annual projections, ASFA suggested that annual benefit projections to members should be facilitated to better 'plan for their retirement and encourage long term savings'.⁴⁰ However, ASFA claimed that benefit projections to members are hindered by legal concerns over the provision of potentially misleading information:

Currently, ASIC Policy Statement 170 places strong restrictions on the use of prospective financial information. These restrictions, combined with concerns over future legal action by disgruntled members, results in the provision of benefit projections by funds being rare.⁴¹

6.61 Other funds expressed concern that their ability to provide projected benefit calculators has been restricted by ASIC's determination that these projections may constitute the provision of personal advice under section 766B of the Corporations Act. ASIC's policy statement 167 states:

38 REST Superannuation, *Submission 54*, 5.

39 Mr Gary Weaven, Spokesperson, Industry Super Network, *Committee Hansard*, Melbourne, 6 March 2007, p. 19.

40 ASFA, *Submission 68*, p. 20.

41 ASFA, *Submission 68*, p. 20.

[PS 167.56] Calculators that provide financial product advice are subject to the licensing provisions, unless an exemption applies. A calculator involves financial product advice if it produces recommendations or statements of opinion that are (or could reasonably be regarded as being) intended to influence the user in making a decision about a particular financial product or class of financial products: see s766B. Whether a particular calculator involves financial product advice will, therefore, depend on the facts of the particular case.

...

[PS 167.58] It is unlikely that a calculator will produce a recommendation. However, a calculator may produce a statement of opinion that is (or could reasonably be regarded as being) intended to influence the user in making a decision about a particular financial product or class of financial products. Therefore, in our view, it is likely that some calculators involve financial product advice.

...

[PS 167.61] Calculators typically require the user to input some information about their financial objectives, financial situation or needs (eg information about their initial investment, investment timeframe, ongoing investments, salary, age, attitude to risk). The calculator then uses this information to generate a result. In doing so, the calculator has taken into account at least one aspect of the user's objectives, financial situation or needs. For these reasons, in our view, the financial product advice provided by many calculators is likely to be personal advice.⁴²

6.62 The Investment and Financial Services Association (IFSA) expressed its concern over the regulatory treatment of projected benefit calculations:

It is a pretty sad situation. The industry got to a point about 12 months ago where we had to take calculators off our websites. These calculators allow the individual to put in their own circumstances—they might put in the rate of return, a cost structure, how long they will be contributing, and their age—and the calculator then works out their result. But we had the spectre of the regulator telling us that we cannot trust an individual to pick some figures to put into the calculator. So they could do it on their spreadsheet at home, but if Colonial First State put up a calculator, to use an example, all of the input variables had to be governed by what the regulator said. We are trying to give you advice to the effect that we need some clarification on that front so the calculators can be done personally.⁴³

6.63 In a similar vein, the Corporate Superannuation Association argued:

42 ASIC, [PS 167] *Licensing: Discretionary powers*, January 2007, pp. 25-26.

43 Mr Richard Gilbert, CEO, IFSA, *Committee Hansard*, 24 October 2006, Sydney, p. 100.

...there should be a clearer delineation between personal advice and simple arithmetic because there seems to be a lot of confusion in the minds of the regulator as to what simple arithmetic is and what personal advice is.⁴⁴

6.64 It stated:

Calculators are simply a method of working out compound interest depending on what assumptions are plugged in. If you are a 55-year-old woman and you want to work until you are 65, then the relevant period is 10 years. I cannot see that if you plug 10 years as opposed to 15 years into a calculator it is personal advice. It is just not. It is simply putting one of the factors in the calculation necessary to produce the compound rate of return.⁴⁵

6.65 While the ABA acknowledged this position, it warned of the potential pitfalls of benefit projections:

There are some advantages for consumers in providing benefit projections. However, this could create an expectation from consumers that the projection will be realised. Consumers tend not to understand the underlying assumptions and parameters used in projections and the impact that a small variation in an assumption can have on overall performance. Furthermore, assumptions may not be borne out in practice for an individual member, so disclaimers required would confuse and thereby limit the value of the projection. While the ABA considers that the current restrictions on forecasts are probably excessive, any form of standardisation is likely to cause difficulties.⁴⁶

6.66 The problems associated with funds' projected benefit tools were highlighted in June 2005 following ASIC's review of online superannuation calculators. It found that putting the same data into 24 different online calculators produced 'widely differing results'. While ASIC acknowledged that differences may be reasonably attributed to factors such as variations in assumptions or methodology, it deemed that consumers were not always provided with the necessary supplementary information to interpret the results meaningfully.⁴⁷

6.67 Following this review and just prior to the introduction of Super Choice on 1 July 2005, ASIC indicated it would provide conditional regulatory relief from holding an AFS licence when enabling consumers to calculate projected benefits using generic financial calculators. ASIC said:

44 Mr Mark Cerche, Chairman, Corporate Superannuation Association, *Committee Hansard*, 5 March 2007, Melbourne, p. 30.

45 Mr Mark Cerche, Chairman, Corporate Superannuation Association, *Committee Hansard*, 5 March 2007, Melbourne, p. 32.

46 ABA, *Submission 88*, p. 14.

47 ASIC, *Press release IR 05-32*, 'ASIC provides relief and guidance for providers of superannuation calculators', 22 June 2005.

The relief ... means that providers of superannuation calculators, who meet certain minimum conditions, do not require an Australian financial services licence with an advice authorisation and, if already licensed, do not need to meet the advice conduct and disclosure requirements in Part 7.7 of the [Corporations Act].⁴⁸

6.68 As a response to some of the problems identified by ASIC's review of online calculators, the conditions attached to ASIC's relief include:

- it cannot advertise or promote financial products or be connected to promotional material for a product;
- the default assumptions must be reasonable;
- the user must be able to alter the default assumptions except where statutorily fixed;
- a statement on the calculator's limitations and an explanation of why the assumptions are reasonable must be included;
- an explanation that the results should not be relied on for making a decision about a financial product and that professional financial advice should be sought before doing so; and
- results should be expressed in today's dollars, or with an explanation of the lesser real value of future dollars.⁴⁹

6.69 Given the criticisms of the regulatory approach to calculators aired during the inquiry, whether or not this exemption is satisfactory in the context of an existing member/fund relationship is uncertain.

Avoiding advice in the accountant/client relationship

6.70 Accountants were also of the opinion that the regulatory framework for advice placed them in precarious situations when assisting their clients. This concern is particularly relevant where accountants are providing broad structural advice that incorporates some consideration of superannuation structures, as opposed to advice on choosing products.

6.71 Indeed, CPA Australia suggested that the current arrangements were too focussed on the product selling aspect of superannuation advice:

48 ASIC, *Press release IR 05-32*, 'ASIC provides relief and guidance for providers of superannuation calculators', 22 June 2005.

49 ASIC, *[PS 167] Licensing: Discretionary powers*, January 2007. [PS 167.50 – 167.83] of the policy statement fully outlines the conditions that apply to this regulatory relief.

It is essential to recognise the difference between product advice and structural and strategic advice in the area of superannuation. The impact of the current definitions is that it is impossible to provide straightforward information regarding the operation of superannuation outside the systems that have been set up for selling financial products.

...

In providing appropriate and necessary consumer protection with respect to financial products, current legislation means that strategic advice relevant to the structure of superannuation is confused with recommendations as to entering or exiting a particular superannuation fund.⁵⁰

6.72 It also complained that tax advisers were restricted from providing advice on the taxation implications of superannuation:

...there will be tax advisers who are actually breaching the FSRA licensing requirements because they will be talking about the tax-effectiveness of superannuation. Anything that you say that could be seen as an inducement or that could be used by an individual to make a decision regarding how they may or may not spend their money is caught by the licensing requirements. So we are in a situation where you cannot, as a tax adviser even, talk about superannuation being tax effective in terms of deductibility issues et cetera.⁵¹

6.73 The consequence, according to CPA Australia, is the absence of complete structural financial advice from one source:

...some structural advice is in FSR and some structural advice is out and from the consumer's perspective, they can come to an accountant and get some advice about structural issues but they cannot get complete structural advice. And if they go to the planners, they can get investment advice but they cannot necessarily get the structural advice that goes with the other side of it.

We have created a problem where a consumer who is after structural advice as to, 'What are all my options?' actually cannot get it from any one source. What I have found with my clients is that a lot of them want to get someone who can sit back and say, 'From an independent perspective, forget about investments or anything along those lines. These are the options that are available to you and these are the structural issues that you need to think about in terms of what needs to be factored into what is going to be right or wrong for you'.⁵²

6.74 With respect to providing advice on self managed superannuation funds, the committee discusses the regulatory exemption for accountants in Chapter 8.

50 CPA Australia, *Submission 65*, p. 4.

51 Ms Noelle Kelleher, CPA Australia, *Committee Hansard*, 25 October 2006, Melbourne, p. 45.

52 Ms Noelle Kelleher, CPA Australia, *Committee Hansard*, 25 October 2006, Melbourne, p. 40.

Suggested regulatory changes

6.75 In suggesting regulatory changes to address the problems identified above, the central theme of the evidence was the importance of achieving proportionality between protection and accessibility. In other words, the benefits of consumer protection via financial services reform should not be outweighed by any consequential impediment to the provision of affordable, accessible and beneficial financial advice. If the consumer interest is the principal intent of FSR, then such a deficiency in cost/benefit terms is contrary to the purpose of the reforms.

6.76 For example, REST Superannuation submitted that:

...the protection of the consumer is a very important aspect to this. But if the protection of the consumer leads to the inaccessibility to the service, then I am not sure that we have the balance right. You can protect the consumer as much as you like, but if they cannot get access to the service as a result then I think that is a suboptimal position for the consumer.⁵³

6.77 FPA also told the committee that the benefits to consumers of the current disclosure regime were being outweighed by the costs associated with compliance. It stated that the benchmark for FSR should be a net benefit to consumers: 'while consumer protection will always be a key objective of financial services regulation, any obligation must always pass a cost/benefit analysis'.⁵⁴

6.78 A number of organisations emphasised the need for the Corporations Act disclosure requirements to bear a more appropriate relationship to the circumstances in which advice is provided. In essence this approach supported the current disclosure regime where substantial, comprehensive, or product switching advice is provided, yet advocated tailoring the regulations to enable less onerous disclosure where the circumstances do not warrant the same vigorous approach to consumer protection.

6.79 In this vein ABA told the committee:

The ABA considers that the scope of 'general advice' is too broad – there needs to be some proportionality for advice and greater recognition of the value of the provision of information on some financial products as improving the financial understanding of Australians. ...

The ABA considers that where a client sits down and goes through a detailed financial plan with an adviser, taking into consideration the long-term investment needs and circumstances of the client, then clearly the advice regime should apply. However, we believe that the law should better accommodate the provision of information on some financial products, even where a consumer may provide some basic personal information.⁵⁵

53 Mr Damian Hill, CEO, REST, *Committee Hansard*, 24 October 2006, Sydney, p. 64.

54 FPA, *Submission 38*, p. 12.

55 ABA, *Submission 88*, p. 12.

6.80 From this perspective, many proposals focussed on identifying potential legislative distinctions between the different scenarios in which fund members interact with superannuation advice (or information) providers. Suggestions to facilitate the cost effective provision of advice on superannuation are discussed below.

The sales/advice distinction

6.81 One of the most frequent suggestions for appropriately circumventing SoA requirements was to distinguish between advice that recommends the sale of a product and advice or information that does not. For instance, ASFA argued that any redefinition of advice needed to target 'genuine consumer protection issues' such as where advice to switch funds or invest discretionary money is given.⁵⁶ In evidence it suggested that:

...any communication aimed at explaining internal features of the fund should be permissible without such communications being considered advice. I think that is probably where we would like to see the line drawn in terms of funds being able to communicate with existing members about investment choices or insurance features in particular, without that tripping them into the advice space.⁵⁷

6.82 Mr Geoff Fry of AON Financial Planning and Protection Ltd commented that '...where you don't make a recommendation or mention a specific product it should be general advice'.⁵⁸

6.83 SuperRatings also supported separating advice on the basis of whether a product shift is involved or not:

...we should have that sort of advice segmented away from product changes so that, if you are trying to go from product A to product B, it is a separate requirement that the planner must show is in the members best interests. If the planner is simply trying to say, 'You should be salary sacrificing as opposed to paying after-tax dollars into your super fund,' why do you need a 20- or 30-page statement of advice?⁵⁹

6.84 It suggested '...drawing a line between intra-fund advice, or whatever you want to call it, and actual switching as two separate parts of legislation may work'.⁶⁰

56 ASFA, *Submission 68*, p. 18.

57 Dr Bradley Pragnell, Principal Policy Adviser, ASFA, *Committee Hansard*, 24 October 2006, Sydney, p. 21.

58 Mr Geoff Fry, AON Financial Planning and Protection Ltd, *Submission 17*, p. 2

59 Mr Jeff Bresnahan, Managing Director, SuperRatings, *Committee Hansard*, 7 March 2007, Sydney, p. 13.

60 Mr Jeff Bresnahan, Managing Director, SuperRatings, *Committee Hansard*, 7 March 2007, Sydney, p. 13.

6.85 UniSuper was another fund that expressed the view that different disclosure rules are required for advice that relates to intra-fund issues, as opposed to switching advice:

We think there are transactional things that members do within a fund. They are about moving an investment choice within their fund, putting in fewer contributions, deciding to make co-contributions and potentially splitting their contributions with their spouse—which are very different from someone deciding whether or not they are going to move from one superannuation fund to another. One is about the information and what is available to them within the fund. The other is deciding between two distinct products. So the advice required for those two distinct products does require full advice.⁶¹

6.86 The Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 was introduced into the parliament on 24 May 2007 and passed on 21 June 2007.⁶² It included a measure to:

...exempt financial services licensees from providing a Statement of Advice in the circumstance where they provide personal advice where that advice does not recommend a product and the adviser does not receive any remuneration for providing that advice.⁶³

6.87 Instead, advice of this kind will be required to be documented in a Record of Advice and made available to the client on request.⁶⁴

6.88 The committee also notes that in December 2005, a number of refinements to FSR came in to force. These included amending the existing regime to allow:

- an exemption from providing an SoA where there is an ongoing adviser/client relationship and 'there are no significant changes in the client's personal circumstances or the basis of the advice since the last [SoA] was given'; and
- certain general advice to be given without it constituting a financial service and therefore requiring an AFS licence. This includes instances where the advice is not personal advice and not about a particular financial product and there is no benefit gained by providing the advice. It also includes situations where the

61 Ms Ann Byrne, CEO, UniSuper, *Committee Hansard*, 5 March 2007, Melbourne, p. 15.

62 See the committee's report on the bill, *Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 and related bills*, June 2007.

63 Explanatory Memorandum, Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007, p. 20.

64 Explanatory Memorandum, Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007, p. 20.

advice is not personal advice and where it relates to advice given by issuers on their own products.⁶⁵

6.89 Commenting on the latter amendment ASFA wrote that while the change is welcome, it is also limited in its effect:

The FSR refinement (regulation 7.1.33H) enabling product issuers to discuss features of their own product without the need for a licence is of some assistance. However, the concession does not extend to general education about superannuation, for instance explanation of salary sacrifice. Further, many superannuation fund trustees now hold AFSLs and are not able to use this exemption.

There remain other difficulties with the concession, as it is often the administrator, not the trustee, who is discussing the fund's features. Though should be given to extending the regulation 7.1.33H concession to those authorised to act on behalf of the trustee as well.⁶⁶

Making a recommendation or identifying options

6.90 The Corporate Superannuation Association proposed that a distinction between making a recommendation and merely laying out options to clients be utilised.⁶⁷ The ACTU, however, warned that such a distinction would not lead to greater clarity in a practical environment:

...drawing a line between advice and a recommendation may well mean that you find yourself with the same grey area where it is difficult for people to draw a line in a practical environment, when they are in the workplace providing information about a particular fund or perhaps at a call centre answering the calls that come in about a particular fund. It sounds attractive but until you saw the regime I am not sure whether it would work or not.⁶⁸

Advice to broad categories or individuals

6.91 From the perspective of superannuation funds, concern over providing targeted information to different categories of membership has hindered their ability to provide members with more relevant information on superannuation. REST called for a mechanism by which advice to broad demographic categories could avoid triggering the personal advice disclosure requirements:

65 For specific details and conditions see Treasury, *Explanatory Information*, 'Refinements to Financial Services Regulation: Draft Corporations Amendment Regulations', October 2005, p. 5 and pp. 20-21.

66 ASFA, *Submission 68*, p. 18.

67 Corporate Superannuation Association, *Committee Hansard*, 5 March 2007, Melbourne, p. 32 and p. 38.

68 Ms Catharine Bowtell, Industrial Officer, ACTU, *Committee Hansard*, 5 March 2007, Melbourne, p. 45.

...if we know that they are a young person, are we taking their personal circumstances into account in changing the communications that we give to them? If there is some mechanism by which we are allowed—and any fund can do this for whatever demographics are appropriate—to target a group and treat them on a group basis and change the communications mechanism, whether it is the content or the delivery style, without falling foul of the personal advice regime, for the vast majority of people who would not ordinarily get advice that is a path to a better solution.⁶⁹

6.92 UniSuper, however, suggested that using cameos may not always be suitable:

...if you characterise someone as a particular person—as you mentioned, a 55-year-old single woman—they could require totally different pieces of advice. It would depend on whether they worked full time or part time, what their salary level is, what their expectations are about the rest of their working life, whether they had been married—a whole range of things. Just because someone has a couple of particular characteristics it does not at all mean that they do not need particular advice. Our submission is that you should be able to take those circumstances into account for transactional issues to allow people to be able to make those decisions themselves.⁷⁰

Threshold for disclosure

6.93 Mercer suggested a legislative amendment 'to provide more flexibility in the processes around providing advice in circumstances, for example where the amount involved is below a specified limit or of a minor nature'.⁷¹ In a similar vein, UniSuper suggested that a statement of advice should be required for full retirement planning advice, but not for single transactional issues.⁷²

6.94 HOSTPLUS indicated that:

A narrowing of the definition of personal advice would go some way towards allowing us and our existing staff and existing resources to provide that limited advice that is probably necessary for our members.

... a transaction based approach, is probably one that we ought to be considering if somebody wants some basic advice on salary sacrifice, rather than our having to get them to have a chat to a financial planner. We think we have the capacity and we think our staff have the skill set to provide that advice, but they are not licensed to do so.⁷³

6.95 The committee notes that the Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 includes a measure to grant relief from the requirement

69 Mr Damian Hill, CEO, REST, *Committee Hansard*, 24 October 2006, Sydney, p. 66.

70 Ms Ann Byrne, CEO, UniSuper, *Committee Hansard*, 5 March 2007, Melbourne, p. 26.

71 Mercer, *Submission 71*, p. 9.

72 Ms Ann Byrne, CEO, UniSuper, *Committee Hansard*, 5 March 2007, Melbourne, p. 14.

73 Mr David Elia, CEO, HOSTPLUS, *Committee Hansard*, 6 March 2007, Melbourne, pp. 58-59.

to provide a Statement of Advice with respect to advice on investments below \$15,000. For superannuation advice, the exemption is limited to advice that recommends consolidating of investments or making additional contributions. The advice will be required to be documented in a Record of Advice, including charges and pecuniary interests relevant to the client as stipulated in section 947D of the Corporations Act.⁷⁴

Tax deductible advice

6.96 Mercer suggested making the costs of financial planning advice tax deductible.⁷⁵ The ABA also made this recommendation:

The ABA recommends that disincentives for accessing financial advice should be removed through providing a tax rebate or deduction for those who seek professional financial advice in relation to superannuation and retirement income products. This approach would acknowledge through public policy the enduring importance of the service of financial advice.⁷⁶

ASIC response

6.97 ASIC told the committee that in some cases the concern over the advice provisions is 'exaggerated'. It stated:

It is possible under the current regime that we administer to provide information of a strictly factual kind. But we are well aware that in some circumstances the environment in which information is provided is also an environment in which advice is being sought or recommendations are being made. It is that shift from the mere passage of information to engaging with the particular needs of a particular person that attracts the personal advice regime.⁷⁷

6.98 It further commented that re-working the boundaries may be of little benefit:

...there are many problems of perception out there. It is not clear that drawing the line in another place would solve those problems. In the regulatory business, there are always arguments about which things sit on which side of the line.⁷⁸

6.99 ASIC also emphasised that its enforcement activity was mostly targeted at where bad advice had been given:

74 Explanatory Memorandum, Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007, p. 21.

75 Mercer, *Submission 71*, p. 10.

76 ABA, *Submission 88*, p. 15.

77 Mr Malcolm Rodgers, Executive Director Regulation, ASIC, *Committee Hansard*, 20 November 2006, Canberra, p. 57.

78 Mr Malcolm Rodgers, Executive Director Regulation, ASIC, *Committee Hansard*, 20 November 2006, Canberra, p. 63.

...while there is a fair bit of anxiety in some parts of the industry about this, our own interventions on advice have not terribly often drawn on that fine distinction because our compliance and occasional enforcement interventions have focused on where, in our view, manifestly bad advice has been given. I think that suggests, at least to us, that the problem that we have been concentrating on—which is the real quality of advice in circumstances where a consumer or a group of consumers is actually going to rely on that advice for making important decisions—have not pushed the envelope as far as the distinction. I agree that quite a lot turns on it and that there is still a fair bit of industry uncertainty, but as a matter of regulatory practice we have not pushed hard on the line issue.⁷⁹

6.100 Choice cautioned against any loosening of the disclosure requirements at the expense of consumer protection:

Some of the considerations under FSR like monetary limits on the statement of advice are attempting to find ways to expand ... advice, but we should not do it at the cost of consumer protection. A paper trail, whether it is a statement of advice or some light version of a statement of advice, is essential for consumer external dispute resolution schemes and for ASIC determining a reasonable basis of advice.⁸⁰

Committee view

6.101 The committee agrees with the general tenor of evidence indicating that FSR disclosure requirements have limited the affordability and availability of straightforward advice on superannuation. It believes that while the consumer protection objectives driving the reforms are appropriate, the overall effect of FSR limiting access to superannuation advice has exceeded any consequential benefit to consumers.

6.102 The committee is aware of the importance of consumer protection in a competitive financial services market, especially since the introduction of Super Choice and the potential for financial planners to exercise greater influence in the marketplace. However consumers are not protected by professional advice being rendered unobtainable at a reasonable cost. From the evidence gathered during this inquiry it is clear that consumers' access to superannuation advice is being hindered in circumstances where consumer protection ought not to be a major concern. This was aptly described to the committee as 'vanilla' advice; guidance the FSR regime should not have been intended to target in the interest of consumer protection. In short, reforms to protect consumers have captured too many advice situations to the detriment of accessibility.

79 Mr Malcolm Rodgers, Executive Director Regulation, ASIC, *Committee Hansard*, 20 November 2006, Canberra, p. 63.

80 Dr Nick Coates, Senior Policy Officer Superannuation and Financial Services, Choice, *Committee Hansard*, 7 March 2007, Sydney, p. 30.

Triggering disclosure through 'personal advice'

6.103 The most pressing regulatory issue in the realm of superannuation advice is that too many client/adviser communications necessitate the preparation of costly disclosure documents that provide little protective value to the consumer, and may be disregarded anyway because of their complexity and length. Unfortunately, while this problem with the current disclosure regime is readily identifiable, addressing it is a difficult task. ASIC commented that a reworking of the legislative boundaries of what constitutes different categories of advice may not necessarily solve these regulatory shortcomings. Instead, drawing the line indicating where categories of advice start and finish in a different place may simply shift the uncertainty elsewhere. ASIC also pointed out that its enforcement activity had been targeted at poor quality advice, rather than instances of non-compliance with SoA requirements. This suggests that advisers need not be overly cautious when assessing whether or not their communications with a client warrants providing an SoA.

6.104 However when confronted with the choice of being guided by a principles-based approach such as this from the regulator or the black letter law of the Corporations Act, licensees will inevitably err on the side of caution and meet the disclosure requirements in situations where they feel the legislation may require it. Accordingly, the circumstances in which the need to provide an SoA is triggered by legislation should be amended.

6.105 The committee therefore supports the government's proposed measure to exempt advisers from providing an SoA where personal advice is provided that does not involve recommending a product or remuneration for the advice. Although this exemption may not entirely alleviate the problem of disproportionate disclosure requirements applying to 'vanilla' superannuation advice, the committee is of the opinion that its effects should be assessed before other legislative measures are considered.

6.106 The proposal to introduce a threshold for disclosure on a superannuation investment of less than \$15,000, where the advice recommends consolidating investments or making additional contributions, is also supported by the committee.

Facilitating information from non-licensed entities

6.107 The committee also recognises the concerns that superannuation funds have over the limits imposed on them by FSR. From their perspective, 'financial product advice' as currently defined in the Corporations Act could potentially capture instances that funds legitimately claim are related to providing informative or educational material. Therefore, in addition to the problem of costly disclosure requirements being triggered, funds have expressed concern that useful superannuation-related information may not be provided at all by funds without an AFS licence.

6.108 The committee reiterates that ASIC's evidence suggested that its priorities did not lie with enforcing these provisions to their limits. ASIC also assured the

committee that factual information may be provided without requiring a licence. However the committee again notes that superannuation funds seeking to comply with the Corporations Act will naturally adopt a conservative approach to the legal risks associated with communicating with their members. Accordingly, two specific areas of uncertainty within the industry ought to be dealt with through further regulatory guidance:

- the ability of funds to provide targeted information to different categories of their membership; and
- the provision of benefit projections.

6.109 On the first matter, the committee is of the view that superannuation funds should be able to provide material that is relevant to their members. At present, funds appear to be uncertain as to whether providing targeted information to their membership constitutes personal advice. The committee does not believe that funds should have to provide exactly the same information to every member in order to avoid being deemed to have provided personal advice. For example, they ought to be allowed to communicate different information to their younger members than they do to near-retirees. Given some uncertainty within the industry, whether or not communications of a targeted nature would constitute 'personal advice' under the Corporations Act is a matter that should be clarified by ASIC.

Recommendation 17

6.110 The committee recommends that ASIC provides guidance to superannuation funds on the provision of targeted communication to separate categories of fund members, so called limited advice, without triggering the need for a statement of advice.

6.111 The committee also believes that the issue of online superannuation benefit calculators requires further consultation and clarification. Even though ASIC has provided regulatory relief for non-licensees to provide generic online calculators, the committee still heard strong criticism on ASIC's regulatory approach to this tool. The difficulty here stems from the fact that the effect of a future superannuation benefit projection can range from being either highly beneficial or extremely detrimental. While an accurate projection can be very useful to assist with deciding on suitable contribution levels, an inaccurate one may cause superannuation fund members to leave themselves without the retirement income they had planned for.

6.112 ASIC's concerns over online calculators are shared by the committee. Regulations pertaining to benefit projections must ensure they are not used as promotional tools for superannuation product providers as this will inevitably lead to the promotion of unreasonable expectations amongst consumers. Further, the committee also questions whether consumers in general possess the requisite financial literacy to use the tool and interpret its results in an appropriate way.

6.113 However the committee is of the opinion that further efforts are required to facilitate superannuation funds' ability to offer its existing members this facility. Having a grasp of the relationship between current contribution levels and future retirement income is an important element of superannuation-related financial decisions. Superannuation funds are an appropriate entity to provide this information. However the evidence during this inquiry suggested that funds view providing benefit projections within the parameters set by the regulator as unfeasible. While the committee is not convinced that ASIC's restrictions applying to online calculators are unreasonable, any stalemate between the industry and the regulator is unhelpful to fund members seeking guidance on their retirement income planning. The committee therefore suggests that this matter be subject to further consultation between the superannuation industry and ASIC, followed by the provision of further regulatory guidance that reflects a suitable compromise.

Recommendation 18

6.114 The committee recommends that ASIC consult further with superannuation funds on the provision of online calculators. Following this process ASIC should provide additional regulatory relief that will better enable funds, without undermining consumer protection imperatives, to use the generic calculator exemption to provide benefit projections for their members.

Regulating accountants

6.115 Situations in which accountants are asked for advice on superannuation are also causing difficulty. Accountants often have long and established relationships with their clients; therefore explaining that certain advice on superannuation must be provided by a separate financial professional can be problematic. This is especially the case where superannuation advice is sought in the context of a broader discussion of a person's overall taxation arrangements.

6.116 The committee recognises the difficulties in resolving this problem. During the course of an accountant/client discussion on retirement planning the line where structural financial advice creeps into the realm of financial product advice is unclear. Any advice from an accountant to favour superannuation over other investments for tax minimisation purposes appears to fall within the scope of section 766B of the Corporations Act. On the face of it, such advice seems reasonable for an accountant to provide, as long as specific financial products are recommended.

6.117 Despite this, the committee is not of the view that accountants should be exempt from holding an AFS licence when providing financial product advice. If accountants wish to provide such advice, they should obtain a licence to do so, as many already do. However the grey areas that clearly exist at present warrant some attention from the regulator. The committee is of the opinion that accountants ought to be able to offer advice on the tax effectiveness of diverting discretionary monies into superannuation without requiring an AFS licence. Therefore, the committee suggests that ASIC should provide accountants with regulatory relief when recommending to

clients that they alter their superannuation contribution levels or consolidate superannuation investments into an existing fund.

Recommendation 19

6.118 The committee recommends that ASIC should provide accountants with relief from holding an AFS licence in circumstances where they advise clients to alter their superannuation contribution levels or consolidate their superannuation investments into an existing fund.

Comprehensible disclosure material

6.119 The committee has previously concentrated on whether disclosure material ought to be provided at all in certain circumstances. However, another important aspect of ensuring that consumers can readily access information and advice on superannuation is the readability of disclosure material when it is provided. Unfortunately, it was widely acknowledged through the inquiry that product disclosure statements (PDS) are often not suitable for general consumption. This is the focus of the committee's discussion in the following section.

Confusing material and the conflicting purposes of disclosure

6.120 Although they may be legally compliant, PDS' that are long, complex, difficult to compare and have key information lacking prominence, do not serve the purpose of communicating effectively with consumers. The public is overwhelmingly put off by such material and anecdotal evidence conveyed to the committee suggested that they ordinarily do not read it. For instance, Superannuation Complaints Tribunal representatives indicated that 'it is just too much to be expected of [consumers] to read that sort of detail'.⁸¹ Equisuper commented:

It is a useful discipline for the organisation to go through of course, but a member's benefit is another thing. Certainly, anecdotally we would be very surprised if many members read all the way through a PDS or even a financial services guide.⁸²

6.121 The Institute of Chartered Accountants in Australia (ICAA) wrote:

For the product manufacturers the FSR requirements have led to Product Disclosure Statements that, while providing and disclosing the mandated information for the consumer, creates complexity and detail that are beyond most consumers' understanding. PDSs have become risk management tools – as a result consumers are unable to effectively and easily understand the product offering.⁸³

81 Mr Graham McDonald, Chairperson, Superannuation Complaints Tribunal, *Committee Hansard*, 5 March 2007, Melbourne, p. 11.

82 Mr Robin Burns, CEO, Equisuper, *Committee Hansard*, 25 October 2006, Melbourne, p. 112.

83 ICAA, *Submission 43*, pp. 3-4.

6.122 ASIC admitted that many product disclosure statements are inaccessible:

...product disclosure statements are not working as effectively as we would like as consumer communication documents. I think I need to say that there are plenty of examples of good product disclosure statements—and by good I mean written with the consumer in mind, complying with the law, not being unnecessarily lengthy and focusing on the quality of the communication between product issuer and consumer. But it is also true, and we have said this on a number of occasions, that we too, along with industry and consumers, are concerned that there are too many documents which are too long, too confusing and not doing the job of communicating as well as they might.⁸⁴

6.123 Some organisations submitted that concern over legal liability was outweighing any motivation to provide consumers with readable material. In the context of advisers meeting their disclosure requirements to their clients, ICAA:

FSR has seen the regulation of advice take a "black letter law" approach which results in advisors adopting a checklist mentality to ensuring that everything is covered, rather than to adopt a more preferable consumer-focused approach.⁸⁵

6.124 IFF stated that:

...most issuers err on the side of caution to avoid liability and include more rather than less information to mitigate a reasonable level of risk. This encourages more than usual lengthy and unreadable documents that are of little use or protection for the consumer. It also adds to costs, which are passed on to the member. It ignores the core problem faced by all trustees, which is the fact that members either do not read written disclosure material, or if they do read it they are not sufficiently financially literate to understand the information they have been given.⁸⁶

What constitutes consumer-friendly disclosure?

6.125 As demonstrated in the examples above, the committee received plenty of feedback on what constitutes poor disclosure material from a consumer perspective. However, it is more difficult to ascertain what would actually constitute consumer-friendly disclosure material. For instance, what information are consumers generally capable of understanding? Is the material too complex to be approachable anyway? How much are they prepared to read? Would they be any more likely to read five pages than ten, or twenty? What information is relevant to them? Are certain formats more effective than others?

84 Mr Malcolm Rodgers, Executive Director Regulation, ASIC, *Committee Hansard*, 20 November 2006, Canberra, pp. 57-58.

85 ICAA, *Submission 43*, p. 6.

86 IFF, *Submission 73*, p. 38.

6.126 ICAA agreed that it would be 'prudent' to research the needs of consumers in this area, but warned that financial illiteracy could affect the usefulness of such research:

One of the challenges as to any research is for the consumer to know what they are actually looking for in the first place. I think that, even if you research this and ask them what they are after as to superannuation in a PDS, a lot of consumers would not actually know the information they need to be able to make an informed decision. I think that is probably one of the challenges that we actually have. When, with the complexity of superannuation and some other general investments, we say, 'Can you understand this?' the response is, 'I'm not sure why I need to understand this. What is the information that is actually in there?' I think that is part of the challenge that the industry has.⁸⁷

6.127 Treasury indicated that it has not conducted research in this area as it is the responsibility of the industry. Officers also suggested that the research may not be useful:

Say you produced results on one or two formats. As soon as you put them out and said, 'This is a standardised format,' the type of feedback that you would be getting—and it is the sort of feedback that ASIC has got when it has tried to put out guidance on fairly standardised documents—would be: 'Well, that doesn't fit these circumstances and that does not fit those circumstances, so that is not really helpful to the industry.' After all, their job is to try to communicate with consumers. It is in their interests to produce a document that is readable and friendly.⁸⁸

6.128 In response to a question on notice, Treasury confirmed that no publicly available research had been undertaken in this area. It emphasised the responsibility of product issuers to respond to the needs of their clients within the requirements of the law:

Treasury does not have any specific information concerning the results of consumer testing on the readability of product disclosure statements. Feedback from industry and the Australian Securities and Investments Commission (ASIC) suggests that there has been no research at an industry level concerning what proportion of individuals can or cannot read disclosure documents generally.

While Treasury has been informed that individual financial service providers do test different versions of their disclosure documents on consumers, the results of these tests are confidential and limited to the documents of that particular firm. ASIC has not tested the readability of

87 Mr Hugh Elvy, Manager Financial Planning and Superannuation, ICAA, *Committee Hansard*, 7 March 2007, Sydney, p. 21.

88 Mr David Love, Manager Investment Protection Unit, Corporations and Financial Services Division, Treasury, *Committee Hansard*, 20 November 2006, Canberra, p. 13.

product disclosure statements on consumers, but encourages the industry to undertake this activity.

Ultimately, product issuers are responsible for ensuring that their disclosure documents are presented in a clear, concise and effective manner in accordance with the legislative requirement. Where disclosure documents are not presented in this way, the effect may be that the particular product is less attractive to consumers relative to other products, which is contrary to the commercial interest of product providers.

6.129 ASIC suggested to the committee that, over time, the different objectives of PDS' could be appropriately resolved through consultation:

...we have signalled our willingness to engage with the issuers of documents to try to get to a point where we communicate to industry what it is that would improve that as well as about the regime that we administer. There are three purposes served by an ordinary product disclosure statement. One is to actually market a product. One is to comply with the disclosure laws that we administer. The third, and I do not want to be disparaging about this, is to manage the liability of the issuer. In that environment, where there are three potentially conflicting objectives in mind, I think it is not unnatural that it has taken a time to get a degree of comfort on the part of industry and on the part of the regulator about what is required. I am not sure that one can legislate or change the legislative settings anymore than has been done, and I am reasonably confident that, going forward, a good, focused, three-way discussion between the regulator, industry and consumers will lead us towards better disclosure documents.⁸⁹

6.130 Despite a lack of objective, empirical guidance in this area, two basic requirements to improve disclosure material in PDS' have been identified. These are brevity and comparability.

Short-form PDS

6.131 In December 2005 the government allowed financial product issuers to supply a short-form PDS to satisfy the requirements of the Corporations Act. This contains a summary of the information required in the PDS. However, product providers still need to prepare an 'ordinary' PDS and make it available to retail clients on request. The short version is an optional extra.⁹⁰

6.132 A short-form PDS is a preferable means by which to communicate with clients. However from a legal perspective there is little incentive for issuers to provide clients with a short form PDS given the potential for an increased risk of non-compliance with disclosure regulations.

89 Mr Malcolm Rodgers, Executive Director Regulation, ASIC, *Committee Hansard*, 20 November 2006, Canberra, p. 58.

90 Treasury, *Information Package*, 'Refinements to Financial Services Regulation', p. 4.

6.133 From a resources perspective, there is also little incentive to produce a short-form document when the longer version is required anyway. On this basis, Mercer Human Resource Consulting queried the likelihood of trustees making use of this initiative:

...any Trustee who elected to prepare and distribute a short-form PDS, would also have to go through the cost and time commitment to develop and maintain a long-form PDS.⁹¹

6.134 By ASIC's admission few issuers have taken the opportunity to offer their clients the abbreviated version:

...there has been a relatively slow take-up of the short-form prospectus provisions. However, that is also connected with refinements that are coming up in relation to allowing for incorporation by reference of information within prospectuses. Industry has indicated that it also needs incorporation by reference to make the short-form prospectus measures work more effectively.

6.135 Industry Funds Forum wrote: 'IFF submits the short form PDS option has failed to resolve [the] issues. The fact that only one short form PDS has been issued speaks for itself'.⁹²

6.136 Unisuper implied that adopting a risk-averse attitude to short-form PDS' was not in the consumer's best interest:

...anxieties about the legal risk inevitably come to bear, so I suppose there is a bit of a reluctance to be the first mover in that area. By and large I think we would be quite happy to put our toe in the water on things like that, and in the advice area as well. If there is some ambiguity why not exploit it in the interests of the consumer rather than erring on the defensive all the time...⁹³

6.137 IFF emphasised that prominence of key information, rather than document length, was the most important consideration:

We would prefer a more consumer-friendly FSR regime. That does not necessarily indicate, as some of the submissions to the inquiry would have it, that the disclosures currently provided should be stripped away and, to put it baldly, that people have a much reduced amount of paper to read. We would argue that the objective should be that important information should be prominently and comprehensively displayed to members rather than start from a proposition that we should get this down onto half a page of paper.⁹⁴

91 Mercer, *Submission 71*, p. 20.

92 IFF, *Submission 73*, p. 38.

93 Mr Paul Murphy, Executive Manager Marketing and Business Development, Unisuper, *Committee Hansard*, 5 March 2007, Melbourne, p. 20.

94 Mr Ian Silk, Convenor, IFF, *Committee Hansard*, 25 October 2006, Melbourne, p. 122.

6.138 Industry Super Network warned that extra regulation in this area may not be beneficial:

Any apprehension and concern about the volume of material has to be balanced against any apprehension and concern about what any new regulation might do. It has not necessarily been the case that the situation has improved when a new regulation replaces an old regulation nor can there be a presumption that that would be the case. It is a very complicated area and it is difficult to regulate adequately. Any re-regulation needs to proceed from very pure motives and a very clear insight as to the national interest and interests of individual consumers.⁹⁵

Standardisation

6.139 Since 1 July 2005, in accordance with *Corporations Amendment Regulations 2005 (No.1)*, PDS' for superannuation products have been required to include a standardised fees and costs template.⁹⁶ Previously, information on fees could be presented as issuers deemed appropriate, making comparisons difficult. This measure was intended to address that problem.

6.140 Despite the change, the committee heard evidence that it is still difficult to make fee comparisons between superannuation product providers. ICAA commented that:

...the issue of how fees are templated and provided needs to be addressed more. It is almost impossible, basically, for the average consumer to look through three or four PDSs and understand what the fees are.⁹⁷

6.141 Aside from fees, the government has not mandated that other information needs to be presented in a standardised fashion within the PDS. ASIC told the committee that extending mandated standard forms of disclosure would not necessarily improve readability:

...historically, there have been some problems with the consumer-effective mandated content or lengths ... the assumption on which we are proceeding is that it is better if these things emerge over time. For example, the old prospectus regime had a mandated series of disclosures, and it was not always obvious that complying with those mandates was in the interests of

95 Mr Gary Weaven, Spokesperson, Industry Super Network, *Committee Hansard*, 6 March 2007, Melbourne, p. 19.

96 ASIC, *Information release 05-19*, 'ASIC provides answers on some fees and costs questions', 10 May 2005.

97 Mr Hugh Elvy, Manager Financial Planning and Superannuation, ICAA, *Committee Hansard*, 7 March 2007, Sydney, p. 20.

good or accurate communication. I do not think we see a case at this stage for changing that fundamental setting.⁹⁸

6.142 It also contended that comparability was not always practicable:

The objective of comparability is not evenly achieved across the spectrum. In some cases it is quite difficult for that to occur. We really need to be talking about similar product types being offered to consumers whose objectives are similar ... [W]e have asked ourselves whether there is a case for a more standardised disclosure of risk, but that is something you would not want to close down by standardisation because it is very particular to the individual product and the individual issuer.

Similarly, the other leg of what we say is important here is for people to understand in a clear way what they are buying and, given the variety of products on the market, that is difficult to standardise. It would seem better that we drive disclosure towards clear and effective communication of what people are being offered, how much they are being asked to pay for it and what risks are associated with it than to try and standardise those things in a way that works in fees. It is unclear whether that would work as well outside the fee area.⁹⁹

Committee view

6.143 Consumers would benefit greatly from shorter, more comprehensible and more comparable product disclosure statements. While the objective of more consumer-friendly disclosure is not subject to disagreement, the means by which it may be achieved are. Short-form PDS' have not worked because there is little or no incentive for product issuers to supply one. Further, lengthy documents are only problematic where their length itself makes the key information they contain difficult to find. Achieving comparability through mandated standardisation also has its deficiencies, as ASIC pointed out. Finding a one-size-fits-all model that could be practically used by product issuers offering a diverse array of financial products could potentially create more problems than it solves.

6.144 The committee is of the view that the readability of PDS' could be improved by ensuring that important information is prominently displayed, in summary form, at the front of the document. This would enable those seeking to make a comparison between products to do so without needing to endure rifling through the entire document. The committee strongly encourages superannuation product issuers to improve their PDS' in this fashion.

98 Mr Malcolm Rodgers, Executive Director Regulation, ASIC, *Committee Hansard*, 20 November 2006, Canberra, p. 58. See also evidence from Treasury, *Committee Hansard*, 20 November 2006, Canberra, p. 12.

99 Mr Malcolm Rodgers, Executive Director Regulation, ASIC, *Committee Hansard*, 20 November 2006, Canberra, pp. 58-59.

6.145 If this cannot be achieved by the industry of its own volition then it should be mandated by government. In doing so, it would be advisable for Treasury or ASIC to have undertaken market research on the readability of PDS' to ascertain the most consumer-friendly way to present such material in a standardised format. Such research should be conducted as soon as possible.

Recommendation 20

6.146 The committee recommends that the government conduct market research on the readability of superannuation product disclosure statements with the goal to introduce simple, standard, readable documentation.

