Submission to the Quality of Advice Review

10 June 2022

About the SMSF Association

The SMSF Association is the peak body representing the self-managed superannuation fund (SMSF) sector which is comprised of over 1.1 million SMSF members and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisers and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial advisers, and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF

Our Beliefs

- We believe that every Australian has the right to a good quality of life in retirement.
- We believe that every Australian has the right to control their own destiny.
- We believe that how well we live in retirement is a function of how well we have managed our super and who has advised us.
- We believe that better outcomes arise when professional advisors and trustees are armed with the best and latest information, especially in the growing and sometimes complex world of SMSFs.
- We believe that insisting on tight controls, accrediting, and educating advisors, and providing accurate and appropriate information to trustees is the best way to ensure that self-managed super funds continue to provide their promised benefits.
- We believe that a healthy SMSF sector contributes strongly to long term capital and national prosperity.
- We are here to improve the quality of advisors, the knowledge of trustees and the credibility and health of a vibrant SMSF community.
- **We are the SMSF Association.**

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Foreword

The SMSF Association welcomes the opportunity to put forward our submission to the Quality of Advice Review. We thank Reviewer Michelle Levy and the Treasury Secretariat for the consideration given to this submission.

The Association has been working closely with a group of 12 industry associations on a range of industry issues. Together we all have a strong history of collaboration, and so it was natural for us to come together in response to the Quality of Advice Review.

The result of these relationships will be other joint submissions which will be submitted under separate cover. We ask that these be considered in addition to this submission.

In this submission, we have sought to address issues relating specifically to our members and the SMSF sector. Broader issues impacting the financial advice sector will be addressed in the joint associations submissions.

Professionals operating in the SMSF sector come from a range of different professions. The multi-disciplinary nature of the sector is reflected in the SMSF Association's membership and include:

- Financial Advisers
- Paraplanners
- Accountants and Tax Agents – licensed and unlicensed
- Actuaries
- ASIC registered SMSF auditors
- Lawyers

These professionals all have an important role to play in the SMSF sector. Each also operates under different sets of professional standards, industry codes of ethics and legislation. Financial advisers and licensed accountants are however, operating in a highly complex and unique environment which is not replicated elsewhere. This complexity limits their ability to apply their professional judgement and to be a professional adviser. This does not align and is not consistent with other professions.

This review provides an opportunity to reflect on where the advice sector is today and align more closely the way that it functions to other professions. *Allow professionals to be professionals.*

Financial advice needs to be relieved of the significant layers of regulatory burden. At its heart need to be the clients and consumers. Advice needs to be in the best interests of clients. This includes the simplification of the financial advice process, how financial advice can be delivered and by whom.

We acknowledge that the Review is limited to making recommendations only around matters included within the terms of reference. Given the complexity of the legislative ecosystem, compliance obligations and continued layers of reform, we would encourage the publication of key findings for matters identified during this review that need further review or reform.

We welcome the opportunity to further discuss our submission with you and to assist with any questions you may have.

Executive Summary

Our submission to the Quality of Advice Review seeks to highlight and address several key issues impacting the SMSF sector. Recognition of the professionalisation of the sector, together with simplification and modernisation of advice services for the sector are crucial and are the overarching themes of our submission.

Key issues and opportunities

- **Recognising the professionalisation of the sector.** Suitably qualified professionals should be able to provide the advice they are qualified to provide. Further, professional advisers should be able to apply their professional judgement in line with other professions.
- **Recognising the variety of industry participants operating within the financial advice sector and the different types of advice services they provide.** Many facets of the current legislative framework are based upon the provision of financial product advice and assume industry participants are providing comprehensive financial advice.
- **Removal of excessive regulatory burden and focus on consumer outcomes.** Significant layers of regulatory burden have been added to the system over time, particularly post Hayne Royal Commission. The policy intent is improved consumer protection. However, the result is a system that focuses on risk management to the detriment of consumer centric advice.
- **Advice should be advice.** The term 'general advice' is misleading and not fit for purpose. There also needs to be recognition of non-product-based advice such as strategic advice, budgeting, and debt management. Terms should clearly indicate to a consumer the type of information they are receiving: 'Factual Information' – 'Product Information' – 'Financial Advice'.
- **Statements of advice have become bloated and unwieldy.** They are no longer a consumer centric document for the provision of financial advice and information. Due to the significant layers of compliance, often the actual advice can be difficult to find.
- **A simplified model for the provision of advice is urgently needed.** Simple advice matters should be able to be addressed and delivered in a manner commensurate with the number of advice issues and the simplicity or complexity of the matters considered. The current advice regime and model is creating friction, adding considerable time and costs to the advice process.
- **Limited or scoped advice is difficult for many advisers to provide.** Risk management has seen many compliance hurdles put in place that either prevent the provision of limited advice or create significant levels of additional administration.
- **Limited licensing for accountants has failed.** A perfect storm of multiple factors has significantly impacted the limited licensing regime. There are a number of issues under the current legislative framework that are creating regulatory burden and uncertainty for accountants (licensed and unlicensed).
- **A comprehensive review of the sophisticated and wholesale investor regime is needed.** The current framework is complex, and use of accountant's certificates has significantly increased. The use of this regime for the sole purpose of minimising the compliance burden for advisers is not appropriate. This raises concerns as to whether its use is appropriate and if clients are being

properly informed and able to provide true informed consent. Focus should therefore be given to alleviating the barriers to providing professional advice.

- **Removing ambiguity regarding the application of the of the design and distribution obligations and target market determinations to SMSFs**. The SMSF Association believes these provisions should not apply to the establishment of an SMSF, when adding a new member to an SMSF, or when commencing a pension in an SMSF.
- **Providing financial advisers access to essential client ATO superannuation reports.** Since the introduction of the concepts of Total Superannuation Balances and Transfer Balance Caps on 1 July 2017 advisers have needed access to crucial ATO client superannuation reports. The introduction of multiple Total Superannuation Balance thresholds and the pension Transfer Balance Caps have added further complexity to the provision of superannuation advice. This is in addition to the management of individual contribution caps, and of different bring forward and unused contribution cap concessions. The indexation of the Transfer Balance Caps on 1 July 2021 has added further to this complexity. The system has shifted from having a single cap to individual caps ranging from $1.6 to $1.7 million.
- **Education plays an important role in delivering quality advice to consumers.** Education and the professionalisation of financial advice were identified in the Hayne Royal Commission as playing a significant role.
- **Professional associations play an important role in lifting both education and professional standards.** Specialist education for professionals providing SMSF advice ensures that advisers are appropriately qualified to provide that advice. Specialist education is also a tool to discourage the spruiking of SMSFs. Associations also provide guidance and ongoing professional development that focuses on education and best practice. These are underpinned by robust disciplinary policies and procedures.

Recommendations

1. **Separation of product from the definition of financial advice.** Not all advice is financial product advice or involves a 'sale'. Advice has many forms and can include strategic advice that does not include a specific product recommendation.
2. **Compliance obligations that apply to financial product advice should be either removed or softened when providing strategic, budgeting or debt managed advice.** This will alleviate a significant level of complexity and allow advice to be provided more effectively and efficiently.
3. **The regulatory framework that applies to the provision of limited aspects of SMSF advice by accountants needs urgent reform.** A consumer centric advice model, for the provision of limited SMSF advice by suitably qualified professionals provides one solution on the accessibility to advice.
4. **A comprehensive review of the sophisticated and wholesale investor regime should be undertaken as a matter of priority.** The Review is significantly restrained given the framing of the terms of reference with regards to this regime. It is challenging to properly consider the operation of this segment without reviewing it in its entirety. Its purpose, obligations of advisers, client consents, appropriateness of the threshold tests and use of accountant's certificates all need examination.

5. **The compliance burden and significant red tape has encouraged some advisers to utilise the wholesale and sophisticated investor regime.** This is of deep concern and should be viewed as a significant red flag. It is a *'canary in the coal mine'* moment for the advice sector. Advisers should not be incentivised to shift clients away from a regime which contains vital consumer protections.

6. **How advice is provided to clients' needs to be commensurate with the level of complexity and the number of issues to be addressed.** Simple, single-issue pieces of advice should be able to be delivered through a simple letter of advice.

7. **Statements of advice need to be statements of advice.** These are currently risk management documents with a significant amount of their content compliance oriented. An advice document should be that.

8. **Provide legislative certainty by removing the establishment of an SMSF, addition of a member to an SMSF and the commencement of a pension in an SMSF from the design and distribution obligations (DDO) and target market determinations (TMD).** It appears that the policy intent was for SMSFs to be excluded. However, the operation of the law is it currently stands is not clear and is ambiguous.

9. **Professionals providing SMSF advice should be required to have completed specialist education.** Education improves the quality of advice and consumer outcomes. An approved course or accreditation must be completed, and appropriate ongoing professional development maintained to retain that certification or accreditation.

10. **Financial advisers need to be granted access to client's ATO superannuation reports as a matter of urgency.** Significant changes to the superannuation law under the *Fair and Sustainable Superannuation Reforms* came into effect from 1 July 2017. These measures introduced significant complexity to the superannuation system and the provision of superannuation advice.

    Some 5 years later, financial advisers are still denied direct access to these crucial reports and information. This information is available to an individual's registered tax agent who, unless they are licensed, cannot provide the respective superannuation advice. Yet the adviser who is authorised to provide superannuation advice cannot directly access this information.

Issues Paper: Section 3 - Framework for Review

Questions for Stakeholders

1. What are the characteristics of quality advice for providers of advice?
2. What are the characteristics of quality advice for consumers?
3. Have previous regulatory changes improved the quality of advice (for example the best interests duty and the safe harbour (see section 4.2))?
4. What are the factors the Review should consider in deciding whether a measure has increased the quality of advice?
5. What is the average cost of providing comprehensive advice to a new client?
6. What are the cost drivers of providing financial advice?
7. How are these costs apportioned across meeting regulatory requirements, time spent with clients, staffing costs (including training), fixed costs (e.g. rent), professional indemnity insurance, software/technology?
8. How much is the cost of meeting the regulatory requirements a result of what the law requires and how much is a result of the processes and requirements of an AFS licensee, superannuation trustee, platform operator or ASIC?
9. Which elements of meeting the regulatory requirements contribute most to costs?
10. Have previous reforms by Government been implemented in a cost-effective way?
11. Could financial technology (fintech) reduce the cost of providing advice?
12. Are there regulatory impediments to adopting technological solutions to assist in providing advice?
13. How should we measure demand for financial advice?
14. In what circumstances do people need financial advice but might not be seeking it?
15. What are the barriers to people who need or want financial advice accessing it?
16. How could advice be more accessible?
17. Are there circumstances in which advice or certain types of advice could be provided other than by a financial adviser and, if so, what?
18. Could financial advisers and consumers benefit from advisers using fintech solutions to assist with compliance and the preparation of advice?
19. What is preventing new entrants into the industry with innovative, digital-first business models?

Terms of Reference

2. The Review will consider how the regulatory framework could better enable the provision of high quality, accessible and affordable financial advice for retail clients. In particular, it will investigate:

    2.1 Opportunities to streamline and simplify regulatory compliance obligations to reduce cost and remove duplication, recognising that the costs of compliance by businesses are ultimately borne by consumers and serve as an impediment to consumers' access to quality advice;

2.2. Where principles-based regulation could replace rules-based regulation to allow the law to better address fundamental harms and reduce the cost of compliance;

2.3. How to simplify documentation and disclosure requirements so that consumers are presented with clear and concise information without unnecessary complexity;

2.4. Whether parts of the regulatory framework have in practice created undesirable unintended consequences and how those consequences might be mitigated or reduced.

4. The Review will include examination of:

4.1. Structural changes and professionalisation of the sector;

4.3. The level of demand for advice and the needs and preferences of consumers;

4.5. Opportunities to reduce compliance costs on industry, while maintaining adequate consumer safeguards

3.1 Quality Financial Advice

There are several key components to the provision of quality advice.

The first is bedded in appropriate education and ongoing professional development. The sector has made significant steps forward on the education pathway as set out under the former Financial Adviser Standards and Ethics Authority ("FASEA"). However, we note that this is a one size fits all model that does not consider the broader ecosystem and the variety of industry participants that reside within that system.

Next, the system of providing advice should recognise the skills of suitably qualified professionals. Professional advisers should be able to provide advice services in a manner that is appropriate to the client's needs, risk and complexity of the advice to be provided. This aspect will be discussed in more detail in the following section – Accessible Financial Advice

Statements of advice (SOAs) issued to clients have become grossly distorted and are not a consumer centric document. Their content has extended well beyond the original policy intent and SOAs have become significantly bloated over time. This has been driven in part by legislation such as the best interest duty obligations, mandatory disclosures, regulatory guidance and ever-increasing compliance requirements set by AFSLs. SOAs have become risk mitigation documents.

The stated motives for the increased disclosures and information, regardless of source, have been improved consumer protection. The result is layer upon layer of complexity and noise. All stakeholders have lost sight of the purpose of a statement of advice. A statement of advice document that is delivered to clients today is unwieldy, impractical, not engaging and the actual advice being sought is often difficult to find.

Ultimately, clients trust their financial advisers and seek their professional judgement, knowledge, and opinion. Access to professional judgement, knowledge, and opinion is why they are seeking advice in the first place. Instead, they are stuck in a system that is overly governed, heavily legislated and controlled by third parties that ultimately control what and how an adviser can advise their client.

The sector is carrying a heavy burden due to its product and sales oriented past. Not all advice involves a financial product. It can include strategic advice and other crucial services that assist clients with cash flow, debt management and budgeting advice.

Standard 5 of the Financial Adviser Code of Ethics requires an adviser to be:

> *Satisfied that the client understands your advice, and the benefits, costs and risks of the financial products that you recommend, and you must have reasonable grounds to be satisfied.*

The statement of advice and current advice process does not aid the adviser in meeting this ethical and professional obligation. Rather it is a significant barrier to complying with this obligation. Advice should be able to be delivered in a way that best suits the client and the nature of the advice being given.

3.2 Affordable Financial Advice

The costs of the current framework are a significant barrier for entry, particularly for small practices and sole traders. This lack of new advisers will continue to reduce the provision of advice to more Australians because the pool of advisers as it stands currently is not able to meet demand. What is worse, the financial advice sector is struggling to grow and attract new entrants. Indeed, the sector has seen significant negative growth for some time and will continue to do so for the foreseeable future.

There are multiple layers of costs that impact financial advisers. Aside from the usual costs of being in business, they also incur a range of industry specific costs.

ASIC Industry Funding Levy

The ASIC levy has been a significantly increasing cost to business. The levy is an industry funded levy and finances the cost of ASIC's regulation of the sector. Like many aspects of the financial advice sector, the method of calculating and charging the levy does not appropriately consider the different industry participants.

Accountants under a limited licence are levied the same charge as a full service comprehensive financial adviser. For accountants, the licensing component of their business is small and not the main source of income. Licensing for this cohort is about ensuring that they comply with the law for the services they provide and to ensure that they can continue to service their SMSF clients.

Further, no distinction is made as to whether an adviser is an employee of a large corporation providing financial services (where the cost of the levy is often absorbed the employer) or an owner/operator in a small business. For those who are self employed or operating in small businesses, the levy cost is a personal one.

As a result, the ASIC levy disproportionately impacts advisers operating in small businesses.

The impact is further magnified when we consider types of costs that are included in the levy itself. For example, the costs for actions against large corporations are ultimately being funded by individual advisers. This includes legal action taken as a result of the findings of the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. These were actions taken against large corporations and financial institutions.

We acknowledge that the ASIC levy was temporarily frozen by the previous Federal Government in August 2021. A review into the cost recovery model methodology was also promised. Some ten (10) months later, no public review or open consultation has been conducted or commenced.

A review of the ASIC levy and ASIC funding model is needed as a matter of urgency.

A fee of $1,500 is charged to each AFSL regardless of size. In addition, a fee is levied for each individual adviser.

The individual adviser fee for the 2021 financial year was wound back, and frozen at the 2018/19 levy rate of $1,142. The estimated fee for 2020/21 was $3,138. A recent history of ASIC financial adviser levies is set out in the table below and highlights the increasing costs from this levy alone:

2017/18	2018/19	2019/20	2020/21
$934	$1,142	$2,426	$3,138*

*Levy calculated before concession applied.

The levy is calculated and charged retrospectively, leaving advisers with an unquantifiable contingent liability. This has been a significant pain point for advisers, adding to the increased costs of being in practice.

Where the regulator's costs of any kind are to be recovered from the sector, there needs to be greater efficiency, commerciality, transparency, and fairness. Further, regular reviews should be undertaken to ensure that the system operates in a fair and equitable manner.

Compensation Scheme of Last Resort

The Bill for the proposed Compensation Scheme of Last Resort ("CSLR") lapsed with the dissolution of the Parliament on 11 April 2022. The proposed scheme sought to impose a further industry funded levy on the sector. It was modelled on the ASIC levy and a significant portion of the costs to the sector would be for the administration of the scheme by ASIC. The costs to be borne by the sector were significant when comparted to the value of actual consumer compensation it would have delivered.

This is another example of a scheme that did not appropriately consider all industry participants and treated everyone the same. Accountants with limited licences would pay the same as a fully authorised, comprehensive financial adviser. Further, those who do the right thing would be left to fund those who have done the wrong thing and are no longer part of the sector.

Problems with the professional indemnity insurance ("PII") market was one of the contributing factors that led to a scheme such as the CSLR being considered.

Professional Indemnity Insurance

Post Hayne Royal Commission, PII has become extremely difficult for AFSLs to obtain and there are the pressures of creeping exclusions and the steep rising cost of premiums. Small businesses have little bargaining power and are limited to the terms offered by insurers.

Most PII is now sought from international markets due to the limited availability of cover in Australia. There is a deep-seated fear that there will come a time where PII will no longer be available. Significant business resources are directed to maintaining relationships with insurers and preparing for lengthy and extensive renewal processes.

Regulatory oversight of PII has been via a light touch approach, with AFSLs left to self-assess what is appropriate cover. Further, there has been little to no ongoing review and monitoring of the PII market, terms, level of cover or costs.

The cost and access to appropriate professional indemnity insurance has become a significant issue for the sector. It is a significant barrier to entry and access to insurance is a permanent business risk.

Under the current AFSL structure, compliant advisers are in effect subsidising the cost of PII for their non-compliant colleagues. This is a concern shared with us by our members during our consultations for this Review.

Whilst a Treasury review of PII was undertaken earlier this year, we understand that this was conducted within an extremely short time frame.

There is an urgent need for a detailed review of professional indemnity insurance.

The review should consider:

- A detailed analysis of the PII market
- How to encourage Australian insurances back to the PII market
- The minimum policy terms, level and type of cover required
- Whether a limited liability scheme could be implemented for financial advice such as that adopted in the accounting sector. Application of such a scheme would be beneficial to those operating under:
    - accountant limited licences
    - limited authorisations
    - those providing strategic advice only and
    - certain small businesses.
- Ongoing regulation, regulatory oversight, and monitoring

Financial Advice Sector - Small Business

A significant number of businesses in the financial advice sector are small businesses.

> *The majority of financial advisory firms are small, with about 78% of advice licensees operating a firm with less than 10 financial advisers, about 90% with less than 50 advisers, and 95% with less than 100 financial advisers. The average number of financial advisers operating under an AFS licence is 34 individuals.*[1]

At the time of the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *"about 30% of the total number of financial advisers on ASIC's Financial*

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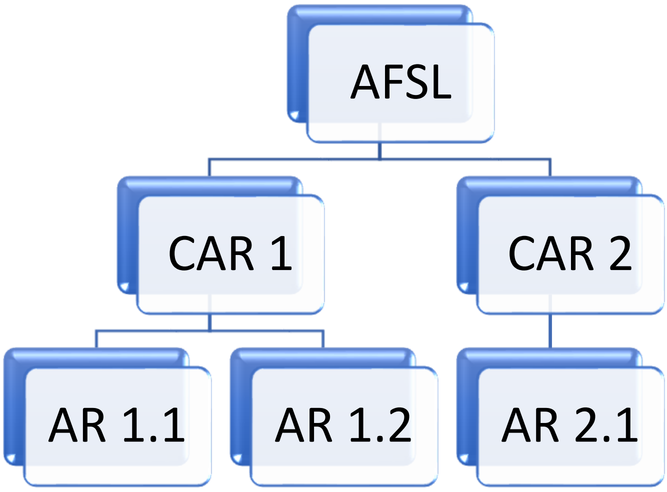
[1] Productivity Commission, Inquiry Report: Competition in the Australian Financial System (August 2018), < https://www.pc.gov.au/inquiries/completed/financial-system/report >.

Advisers Register work for one of the major banks."[2] Since that time the Banks have exited financial advice. The outcome of this is an increase in the representation of financial advisers in small businesses.

The dominance of small business in the sector is often overlooked or misunderstood. When examining the number of advisers authorised under an AFSL, those that are self-licensed are evident as they are accompanied by small adviser numbers. Those that are not self-licensed are lost in the numbers.

Whilst some advisers will be direct employees of an AFSL, what needs to be recognised are those small business operators whose businesses are authorised to operate in the AFSL. These businesses will provide financial services through a corporate authorised representative (CAR) and they themselves are an authorised representative (AR) of the AFSL.



These are a commercial, contractual arrangement whereby the AFSL agrees to license the CAR and AR allowing their business to operate and provide financial advice services. The AFSL may provide a variety of other services. The type and nature of services provided or available varies from AFSL to AFSL.

In exchange for the licensing and services provided, contractual fees are paid by the financial planning business for the firm and for each adviser authorised. In addition to these ongoing fees, the AFSL will also typically take a percentage of the fees earned by the business.

These small businesses need to be considered in addition to those who have chosen to be independent advisers and hold their own AFSL. The cost of applying for and maintaining an AFSL is costly and time consuming and often out of reach of those without significant capital backing and resources.

The financial advice sector operates like no other whereby the professional needs to complete their education and seek an authority to operate via a commercial arrangement. They then need to be registered by that entity with the regulator to be able to provide their professional services. It is convoluted, complex and adds significant costs and barriers to business.

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[2] Royal Commission into Misconduct in the Banking, Superannuation, and Financial Service Industry, 'Some Features of the Australian Financial Planning Industry – Background Paper 6 (Part A), (April 2018), < https://webarchive.nla.gov.au/awa/20190808030436/https://financialservices.royalcommission.gov.au/publications/Pages/default.aspx >

Changing licensees is an expensive and convoluted process. Additional audits may be required, or new statements of advice (prepared at the adviser's 'cost') given to ongoing clients who transfer with the adviser to the new AFSL. In a consumer focussed system, this would simply not be allowed to happen. This is a significant barrier that is preventing many advice businesses from making effective business decisions around the costs to their businesses and the service arrangements they choose to employ. Ultimately, these are additional costs that are borne by the consumer.

3.3 Accessible Financial Advice

Many clients wish to seek advice as bite sized pieces rather than detailed, comprehensive financial advice plans. The need for (and issues on accessing) scoped, limited, or scaled advice will be separately addressed in more detail in a later section of this paper.

Access to scoped advice as well as a scalable advice process and matching documentation is urgently needed. The only way to provide personal financial advice is via a statement of advice process that also involves a full fact find and other compliance activities. Many consumers are unable to receive the advice that they urgently need due to the current complex advice process and multiple layers of compliance complexity.

Simple advice that should be able to be provided in a simplified form (such as a letter of advice), could include a single piece of advice such as:

1. The child of a client is starting their first full time job. What is the best superannuation fund for them to use to receive their employer contributions?
2. A client has surplus funds. Should they contribute to superannuation or pay down their mortgage?

No other profession operates with the layers of compliance and complexity of the financial advice sector. They would not be able to function if they did.

AFSLs have become so compliance focused their processes and procedures have become overly risk averse. This has bloated the financial advice process as well as the statement of advice document presented to clients.

This position is understandable to some degree when we look at the different actions from ASIC as regulator. ASIC issues guidance and recommendations. It is just that, guidance. It is not intended to be applied as the black letter law that it often is in practice. Unfortunately, the interpretation and application of the law and ASIC guidance is not always treated equally across regulatory guidance teams and the compliance teams.

We received feedback from members of sanctions being applied by ASIC because client fee agreements were out by a matter of a few cents. Far from a material breach even if it is replicated 10,000 times over. The anxiety of making a small or minor mistake is extremely high. So too is not strictly complying with ASICs various information sheets, fact sheets and published regulatory guides.

Issues Paper: Section 4.1 – Types of Advice

Questions for Stakeholders

20. Is there a practical difference between financial advice and financial product advice and should they be treated in the same way by the regulatory framework?
21. What types of financial advice should be regulated and to what extent?
22. Should there be different categories of financial advice and financial product advice and if so for what purpose?
23. How should the different categories of advice be labelled?

32. Do you think that limited scope advice can be valuable for consumers?
33. What legislative changes are necessary to facilitate the delivery of limited scope advice?
34. Other than uncertainty about legal obligations, are there other factors that might encourage financial advisers to provide comprehensive advice rather than limited scope advice?

Terms of Reference

3. The Review will include examination of:

    3.1 The legislative framework for financial advice, specifically:

    3.1.7 Key concepts such as 'financial product advice', 'general advice', 'personal advice', as well as how they are used, how they are interpreted by consumers, and whether they could be simplified or more clearly demarcated. The Review should also consider the role and bounds of advice that is scaled, intra-fund or limited in scope;

General advice and personal advice

The use of the term 'financial product advice' is not appropriate and is not representative of many of the advice services that are provided by licensed advisers. In the SMSF sector, many licensed advisers provide strategic advice. Some are full service financial advisers who may provide both strategic and financial product advice. Others may hold a limited licence that expressly prohibits specific product advice, limiting advice to SMSF advice, strategic advice, and class of product advice only.

Significant confusion arises around the use of the term 'general advice'. Consumers will often interpret general advice as advice that considers their personal circumstances. Adding to that confusion is the nuanced differences between the provision of factual information and general advice.

To provide clarity, the term 'general advice' should be removed.

Advice should be advice, whether it is simple, scaled, strategic or comprehensive advice. This should be clear and distinctly separate from the provision of 'factual information' or 'product information'.

Providing clarity around these terms and moving away from solely product-based definitions and frameworks is more representative of the diversity of service providers across the sector. It also provides an opportunity to reshape and simplify the definitions. This benefits both the consumer and the advice sector. Terms should be clear in their meaning and intent, with a client first, outcomes driven approach.

This then paves the way for broader policy reform on how advice can be given or delivered to clients.

Limited Scope Advice

Compliance and cost

Feedback received from members during our various consultations listed compliance costs as the single most important barrier that prevents or restricts advisers from providing scalable, affordable and accessible advice to consumers.

One of the greatest challenges stems from the current compliance framework, which has been developed on the back of a previous era of financial advice. The legislative and compliance framework has not been modernised to reflect the current advice landscape. Significant changes have been seen since the Wallis Inquiry, implementation of the Future of Financial Advice (FOFA)reforms and more recently, the Hayne Royal Commission. We note that significant issues arising from the Royal Commission, in the main, involved large banking and financial institutions.

On the back of this historical framework, further layer upon layer of regulation and complexity has been added. The sector is now collapsing under the weight and burden of over regulation which is prescriptive and punitive.

The current advice process has become bogged down in compliance for compliance's sake. This is driven primarily to avoid litigation rather than to improve advice. Measures such as the best interest duty, designed to improve consumer outcomes, have become grossly distorted. The resulting SOA is significantly bloated with information that is merely noise and of no perceived value by consumers. It is in effect making it very difficult to clearly identify the advice that is being given.

When it comes to scoped or limited advice, advisers are often required to still undertake a full fact-finding process and other procedures, despite the limited engagement. The number of disclaimers or warnings that advisers are expected to include is excessive. Feedback provided by our members suggests that they are at times required to address an issue in an SOA with a client even though the client has made it very clear that they don't require advice about that particular issue. Once again this comes back to litigation and risk management rather than the provision of professional, clear, and appropriate advice.

We agree that clients need to be advised of any short comings or issues arising from the limited advice engagement. However, this can be achieved clearly and concisely in written form and through active engagement, consultation, and discussion with the client. Instead, advisers are being caught in a web of red tape.

The following *In Practice – Case Study*, illustrates how the compliance framework and regulatory guidance on the provision of financial advice can become distorted in practice.

In Practice – Case Study 1

In 2020 and 2021, ASIC provided concessions for the sector, removing the need for an SOA due to impacts of Covid-19. The legislative instruments permitted the use of simplified advice processes in limited circumstances with the use of records of advice (ROA):

- *For Covid-19 superannuation early release amounts; or*
- *Where a client required financial advice due to the impacts of Covid-19*

Despite these SOA concessions being available some members reported that their AFSL were requiring the use of an SOA or actively encouraged the use of an SOA and not use the concession.

Fundamental to the modernisation of the current compliance framework is the need to recognise the professionalisation of the sector.

What is a profession?

A ***profession*** *is a disciplined group of individuals who adhere to ethical standards. This group positions itself as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and is recognised by the public as such. A profession is also prepared to apply this knowledge and exercise these skills in the interest of others.*

A ***professional*** *is a member of a profession. Professionals are governed by codes of ethics, and profess commitment to competence, integrity and morality, altruism, and the promotion of the public good within their expert domain. Professionals are accountable to those served and to society.*

Professionalism *comprises the personally held beliefs about one's own conduct as a professional. It's often linked to the upholding of the principles, laws, ethics and conventions of a profession as a way of practice.*

Professionalisation *is the pattern of how a profession develops, as well as the process of becoming a profession.*[3]

Existing financial advisers will need to have passed the financial adviser examination by 1 January 2022, be appropriately educated by 2026, and are already subject to a code of ethics. We know that there has been a high level of engagement with the various tertiary education providers.

It should be noted that all new entrants are required to have completed the prescribed education and complete a supervised professional year which also includes the passing of the national financial adviser examination.

[3] Professional Standards Councils, 'What is a profession', [online] Accessed 20 May 2022, <https://www.psc.gov.au/what-is-a-profession>

There will be advisers who have chosen not to complete any further education. These individuals will exit the sector progressively between now and the 2026 deadline. Feedback from our member engagement was that the education requirements are being presented as the excuse for exiting the sector, but it is not the real reason. Overwhelming, the reason presented is over regulation and compliance resulting in increasing costs and reducing margins.

The current compliance burden is not helping consumers access or understand advice. During our member consultations, many of our members stated it can take up to 6 weeks to build a statement of advice (SOA) for a client. Consumers are unlikely to read, understand or engage with such a lengthy and complex document. The time to prepare an SOA may be further extended if the AFSL wishes to review or vet the SOA before it is issued to the client. The concept of 'pre-vetting' is applied not only to new advisers but experienced advisers particularly when changing to a new AFSL. It can add weeks in some instances to the delivery of a statement of advice.

The time taken to prepare such a detailed document, coupled with the other costs associated with taking on a new client, means the cost to the consumer can often be uneconomical. Yet, in other situations, consumers can seek advice from a professional accountant or lawyer and obtain advice far more quickly and efficiently on new structures and other legal and/or financial issues.

The system for providing financial advice should be scalable in accordance with the risk involved, number of areas of advice and the complexity or simplicity of the matter. The client's level of financial knowledge and sophistication should also be a factor.

Members advise that when they wish to provide limited advice, such as the commencement of pension, the cost solely for the paraplanning and compliance can comprise a large fraction of the fee that needs to be charged by the adviser. This undermines the economics of the financial advice process.

An improved consumer focussed financial advice framework should recognise that the highest value is in the professional and consumer interaction and the implementation of that advice, and not the compliance documents.

The SMSF Association believes there is merit in exploring how a simplified framework for the provision of financial advice can be delivered. Simple and scoped advice can be readily supported by existing file note and recording systems used by advisers. The SOA results in the duplication of the recording of information already recorded by the adviser in their dealings with the client and the statements and information provided by the client.

The SOA is of substantially greater value for AFSLs and ASIC to the detriment of and little value to consumers. A new high-level consumer document is urgently needed.

Lack of clarity on how to scope

We believe that a key challenge for the advice sector is how to service clients' advice needs that may be limited to a single issue, for example superannuation. This is particularly pertinent for SMSF advisers and SMSF trustees.

The difficulty in supplying limited advice is built from the cumulative impact of the themes outlined in this submission regarding AFSL behaviour, a lack of understanding of ASIC guidance, the compliance requirements, and a pure cost versus revenue equation.

The FASEA guidance and Code of Ethics has also impacted on the provision of limited advice. For example, there is potential contradictory guidance between Standard 6 and ASIC's regulatory guidance (RG) 244.

> *Standard 6: You must take into account the broad effects arising from the client acting on your advice and actively consider the client's broader, long-term interests and likely circumstances.*

Members have raised concerns when they are engaged for SMSF advice that the Code requires consideration of broader requirements and therefore they cannot act in a limited advice scope.

An adviser can very rarely provide advice to individuals purely seeking limited advice once they consider broader long-term impacts, complete a broader fact find and then provide advice through the best interest lens with this information. Even though consumers often request piece by piece advice, an adviser ethically will continue to struggle to demonstrate that a consumer's request for single issue advice is in their broad best interests under the Code without providing more advice than requested.

We acknowledge the consultation process ASIC undertook in 2021 to review its guidance on the provision of scoped or limited advice. As part of its consultation process, ASIC also engaged with FASEA around the application of the code of ethics. This was noted in the release of INFO 267 in December 2021. However, with the winding up of FASEA, issues with FASEA's historical lack of engagement with the sector, and the lack of trust by industry towards FASEA, INFO 267 appears to have had little impact.

The newly legislated and formed *Financial Services and Credit Panel* (FSCP), which is yet to hear any matters referred to it by ASIC, also looms large in the back of the sector's collective mind. We are yet to see how matters will be handled through this process and what precedents may be set. Particularly with regards to the application of the Financial Adviser's Code of Ethics which is yet to be tested in a disciplinary context. The Code has been an area of ongoing concern with regards to its drafting, regulatory overlap and ability to interpret its application differently.

Notably, the issues and inconsistency around consumers' access to affordable and efficient advice continue to occur with respect to retirement and superannuation advice.

A licensed financial adviser can advise in these areas (if authorised to do so), however they must consider a client's total circumstances, rather than just a single issue such as superannuation, and deliver new advice via a complex, long-winded Statement of Advice.

Advisers who can only provide intra-fund advice differ as they can only provide advice on the superannuation fund they're employed by and in which the client seeking the advice is a member of.

Limited licence advisers can only provide advice on certain aspects of superannuation, while professional accountants who are not licensed but have ATO tax and superannuation portal access for their clients can provide certain taxation and exempted guidance on superannuation but cannot provide limited superannuation advice.

We believe a consumer who seeks limited superannuation and retirement advice for example, whether it be from an adviser, licensed accountant or superannuation trustee should receive the same consistent high quality and affordable advice with the same meaningful disclosure.

While ensuring that consumers are still protected, there may be merit in imparting some onus on the consumer when they are requesting limited advice on certain topics such as superannuation which ensures the consumer understands that an adviser is only providing advice on that basis and that fuller comprehensive advice is not required.

Strategic Advice

SMSF and superannuation advice lends itself to 'strategic advice.' The separation of product from advice and consideration of strategic advice needs strong consideration.

Currently, there is increasing interest in the SMSF sector and more broadly about 'strategic advice'. This is because many consumers demand strategic advice rather than advice on specific financial products. Additionally, with comprehensive advice out of reach for many Australians due to the costs, it is clear more are seeking piece by piece strategic guidance.

However, the current framework is built on provision of financial product advice, which not all advisers seek to provide.

Strategic advice could be the foundation for which a consumer focussed framework is built. This could ultimately allow appropriately educated professional advisers to provide strategic advice on areas such as superannuation, retirement and cashflow without specific reference to financial products.

A strategic advice model allowing suitably qualified professionals to practise under a 'no product recommendation' environment would see advisers given increased ability to provide strategic advice without conflicts of interest. It would also address the false perception that financial advice is simply the 'selling of products' and in time would help to address the issue of trust in the sector.

The deconstruction of product and strategic advice could also include a clarification of what personal advice really means. The clarifying of the definitions relating to advice, as discussed previously, will substantially assist here.

Specific consumer focussed documentation could be implemented on the back of strategic advice. When products are required, there would be additional education requirements, compliance obligations and documentation provided to ensure consumers are protected.

It is important to note, that strategic advice should not be seen as a 'lesser' form of advice, as strategy can be complex and valuable and therefore should be viewed as a valuable service.

In Practice - Case Study 2

A consumer seeking advice on whether their superannuation was invested in appropriate asset classes.

The current framework requires an adviser to understand their wage, cash flow and other tangential information which increases the cost to the consumer.

Under a strategic advice model that has a clear framework for the provision of scoped advice, an adviser would be able to look at the reasonable considerations such as age and risk, the client's current asset allocation and provide a strategic opinion for their current superannuation product asset allocation.

__In Practice - Case Study 3__

Another example is a consumer who wanted to withdraw $50,000 out of their $4 million superannuation balance. The adviser wanted to provide a simple short strategic advice document which validated the consumer's rationale but the current framework restricted provision of this advice. The quantum of work involved and the cost of providing the advice under the current framework is disproportionate to the risk and the materiality of the sum involved.

__In Practice - Case Study 4__

The current Financial Advice system is not "Fit For Purpose". When we need it most, the rules aimed at protecting us are a barrier to affordable access!

My husband and I are both retired (74 & 64) with $1m in a Self-Managed Super Fund setup in 1997.

As interest rates have declined, we have increasingly craved access to good personal investment advice to help us maintain income without too much risk of capital loss. But just when we needed it most, the ability to have discussions about investment options disappeared.

Government action to reduce the risk of bad advice for people like us means we now can't access any personalised advice without spending $2000 -$5000 for a Statement of Financial Advice (SOFA). Even with detailed phone calls, good portfolio information, a free initial meeting and a restricted brief (we wanted some fresh ideas about where we could place $120k other than TDs, Bonds & Equities) we could not get any information until a SOFA was produced. In effect, we paid for someone to enter our Excel information into another standard format document. All we really wanted was to pay for an expert's time to talk about options and ideas! We are willing and able to make and own decisions on information available. These paid discussions provide opportunity to build relationships and trust that could lead to a portfolio management arrangement. Rather than protect us, the current system has raised a barrier to gaining affordable access to Financial Advice.

We can't afford to do that. The outcomes are not only negative for us they are negative for the Australian economy and for taxpayers.

With less income and more fear of running out of money, retirees like us will:

- *consume less – less cafes, movies, travel, presents buying, clothing, household goods etc;*
- *risk capital erosion from taking on more risk and generating less income, which will lead to more retirees relying on the pension;*

- *need to rely on government funded aged care places;*
- *experience financial stress which impacts physical and mental health and increases the health care costs of an already high-cost demographic.*

This is part of the broader topic of retirement income management, something else we would happily pay a Financial Advisor to discuss. But not, if we have to spend thousands of dollars for them to enter data into a SOFA before we can gain any input to our personal circumstances.

The current rules prevent people who know us extremely well (e.g. Super Accountant) from openly discussing any ideas or options with us AND to date we haven't been able to find anyone who was prepared to be engaged on an hourly rate and reveal any thoughts/ideas without a SOFA. I guess, why would they when the rules require a SOFA, they get paid for the data capture and there is a risk of litigation without a SOFA.

If retirees can earn better returns, that money goes straight back into the economy – we travel, eat in cafes, go to movies, buy wine, clothes, appliances and presents for our friends and family. We can also afford to donate to charities which must be shrinking and will only continue

On current returns, retirees are more likely to reduce spending, lead more isolated and potentially less healthy and happy lives. That's not good for anyone or Australia.

Improving the ability to provide limited advice and the provision of strategic advice must ensure consumers, like those above, can have meaningful discussions with their adviser.

Consideration should be given to the adoption of a simplified advice framework, documentation, and disclosures for the provision of strategic advice where a financial product is not recommended.

Issues Paper: 4.6 – Accountants providing financial advice

TPB Review Recommendation 7.2, Former Accountants Exemption, Limited AFSL

Questions for Stakeholders

71. Should accountants be able to provide financial advice on superannuation products outside of the existing AFSL regime and without needing to meet the education requirements imposed on other professionals wanting to provide financial advice? If so, why?
72. If an exemption was granted, what range of topics should accountants be able to provide advice on? How can consumers be protected?
73. What effect would allowing accountants to provide this advice have on the number of advisers in the market and the number of consumers receiving financial advice?
74. Is the limited AFS licence working as intended? What changes to the limited licence could be made to make it more accessible to accountants wanting to provide financial advice?
75. Are there other barriers to accountants providing financial advice about SMSFs, apart from the limited AFSL regime?

Terms of Reference

3. The Review will include examination of:

   3.1 The legislative framework for financial advice, specifically:

      3.1.7 The application of the advice framework to certain activities and professions, including consideration of Recommendation 7.2 of the Review of the Tax Practitioners Board.

The Limited Licence Framework has failed

Introduction of the limited licence framework

Prior to the introduction of the AFSL's limited licence regime, an accountants' exemption existed in the *Corporations Regulations 2001*, regulation 7.1.29A. This authorised a recognised accountant to provide advice in relation to the acquisition and disposal of an interest in an SMSF without holding an AFSL. A 'recognised accountant' was defined as an accountant who was a member of one of the major professional accounting bodies, namely *Chartered Accountants Australia and New Zealand* (CAANZ), *CPA Australia* (CPA) or the *Institute of Public Accountants* (IPA).

However, it was determined that all financial advice should be afforded the same level of regulatory protection, irrespective of who delivers the advice. To facilitate this, it was considered necessary to bring financial product advice about acquiring or disposing of an interest in an SMSF within the scope of the AFS licensing regime, regardless of who provides that advice.

Therefore, the accountants' exemption, which was introduced as a temporary measure, was removed to align with the Future of Financial Advice (FOFA) intention to enable consumers to obtain access to more affordable and competent financial advice.

From 1 July 2016, advisers have needed to be licensed or authorised with ASIC either through a full AFSL or limited AFSL to provide SMSF advice services. Accountants who intended to give SMSF financial advice spent considerable time and money reshaping their businesses to meet the new limited licensing regime.

This has involved the duplication of entity structures as a separate entity is required from which licensed advice services are to be provided. It must be clearly separate and distinct from the main accounting practice entity.

This brings with it a duplication of many business costs in addition to the costs of licensing itself. It also creates a significant level of complexity when it comes to providing advice services to clients. This structuring is about limiting the exposure of the AFSL to the activities of the broader accountancy practice. Clients do not understand nor care about a firm's structuring and simply want to obtain the advice they need from their professional adviser.

This creates significant friction when advising clients. It ultimately increases the cost of providing essential services to those clients.

Accountants fear putting a foot wrong and are left feeling like they are stuck in a bizarre pantomime - making sure that they are wearing the right outfit, dancing the right dance to the right tune at the right time.

Accountants were required to comply with the then targeted education standards, under ASIC's RG146 standard in superannuation and SMSFs. They invested in this additional education in good faith in order to become authorised.

Limited licensing was intended to allow advisers to provide a broader range of advice which included 'class of product advice' about the following financial products:

- superannuation
- securities
- simple managed investment schemes
- general insurance products
- life risk insurance products
- bank deposit products

With regards to SMSFs, individuals must have a form of licensing if they recommend or provide a statement of opinion which could reasonably be regarded as having any influence on their client's interest in an SMSF.

This means that if an adviser holds a limited AFS licence, with all available authorisations, they can:

- recommend and establish an SMSF
- make a recommendation in relation to the client's existing superannuation funds (referred to as super switching advice), or when providing advice to clients on contributions or pensions
- advise on an SMSF investment strategy
- advise whether the client should hold insurance cover directly or through a superannuation fund
- advise which simple managed investment scheme (MIS) would be appropriate for and in the best interests of a client, (e.g. cash funds versus equity funds), and

- advise whether shares are an appropriate investment option given a client's relevant circumstances including their tolerance for risk and whether alternative classes of product might be more suitable.

We believe the intention of the limited licence framework is analogous with the provision of limited advice and strategic advice.

However, as we highlight below the limited licence framework has failed to meet its objectives. The first of these reasons is that the lack of ability to scope advice affordably, as outlined above, renders the framework ineffective.

The exemptions and legal obligations from the licence are complex

Non-licensed advisers can provide certain advice regarding SMSFs if it falls under one of the exempt items listed in *Corporations Regulations 2001,* regulation 7.1.29:

- Factual information
- Taxation advice
- Traditional accounting services,
    - eg, preparing financial statements,
- Broad asset allocation advice
- Advice which does not involve a financial service (often referred to as 'execution only services')

ASIC's Information Sheet 216 aims to provide guidance on these categories. It is explained as,

> *Generally, the exemptions will apply if the financial service happens to be an integral part of or incidental to another type of service typically provided by an accountant – that is, you would reasonably need to provide the exempt SMSF financial service in order to carry out your normal accounting practice.*
>
> *The exemptions operate concurrently, so you may rely on different exemptions for different aspects of your practice.*
>
> *However, it is important to be aware of the limits of any exemption you rely on. Even if you rely on an exemption to provide one type of SMSF service, if you also provide financial product advice recommending an SMSF or particular investments through the SMSF at the same time, this advice will trigger the requirement to be covered by an AFS licence. Operating under an exemption does not remove the requirement to be covered by a licence for other types of financial service.*

Interpreting where an exemption lies and where a licence is needed has been a complex task for the SMSF industry. For example, determining how advisers under a taxation exemption may provide advice on the taxation implications of financial products without being covered by an AFS licence is complex and difficult.

This exemption allows accountants who are registered with the TPB to provide financial product advice about their client's interest in an SMSF or a financial product they hold through their SMSF, as long as this advice is merely incidental to the tax advice they are providing and not a separate recommendation on the merits of the financial product itself.

However, the lines between taxation advice and financial advice can quickly become blurred when you consider the following examples:

- Taxation planning advice which includes a recommendation to claim a deduction for superannuation contributions.
- Provision of complex restructuring and taxation advice for the small business capital gains tax concessions. The advice would include a recommendation to make superannuation contributions under the retirement or 15 year exemption; or
- Taxation planning advice on commencing a pension in an SMSF where a capital gain will be incurred on the sale of a fund asset.

Advisers who are covered by an AFS licence, including a limited AFS licence, cannot rely on the exemptions. Advisers who are not covered by any AFS licence can provide advice under an exemption, such as broad asset allocation advice, with limited documentation. However, advisers who have become licensed to provide compliant advice cannot provide the same advice as an unlicensed adviser without having to undertake extensive fact finding, providing various disclosures, and producing complex and costly statements and records of advice.

This is another failure of the limited licence regime which treats advisers providing the same advice differently. Indeed, anecdotal evidence suggests that there are many advisers who, obtained a limited AFS licence because they thought this might be a wise business decision, have already or are now cancelling their licence because of the complexity, cost, and uncertainty of the current system.

FASEA ignored the limited licence

FASEA educational standards failed to appropriately recognise or account for the limited licence advice regime, particularly for accountants with a licence providing SMSF advice. Rather, all industry participants have been treated the same as a fully authorised, comprehensive financial adviser. Further, it also assumes that all advice is financial product advice.

The relevant experience and education needed for accountants giving advice under a limited licence was not adequately considered under the existing pathways framework. The adviser pathways force advisers who only provide SMSF advice to spend considerable time and money studying subjects that are not relevant to the advice and services they provide. This means that many advisers with a limited licence face costly and irrelevant study to continue providing specific and specialised SMSF advice, which is the only area of advice they are legally able to provide.

In essence, the limited licence regime was a legislated part of the regulatory framework that was fundamentally ignored by FASEA. This has now made the limited licence regime cumbersome and much less relevant. It is not fit for purpose in the current environment.

Whilst the accountants' limited licence is imperfect, the sustained and increasing exit of accountants from this space will see a further reduction in consumers ability to access limited advice.

The education that accountants and other advice providers with a limited licence must undertake, should more directly reflect the work they conduct on a day-to-day basis.

Abject Failure of the Limited Licensing Regime

> *The poor take up of limited licensing by accountants and AFSLs rapid exit from the limited licensing regime is by and large due to the cost and lack of profitability*

The limited licence regime has also not had anywhere near the expected take up in the accounting industry. In 2018-19, ASIC only approved 4 limited AFS licences, compared with 800 full AFS licences.

Going back to 2015-16 highlights a poor history of take up from the beginning when 228 limited AFS licences were approved, followed by 512 in 2016-17 and 23 in 2017-18.

The Government's intention at the time was for the limited AFSL framework to see 10,000 accountants[4] become licensed to provide a much broader range of financial advice than they were previously able to provide.

As of 26 May 2022, only 889 advisers remain in the limited licencing regime, down from 1,608 as at 1 July 2021. In that same period, 152 limited licenses have been cancelled and no new licenses registered. Just 256 limited licenses remain.[5]

Accountants have either ceased providing SMSF advice, became an authorised representative of an AFSL, or obtained a full AFS licence. When we consider the low take up rates and now the rapid exit from accountants limited licensing, it means that by and large, the accounting sector is operating without a licence. For many this will not be an issue given the nature of their client base and services provided. It is, however, a cause for concern with regards to the provision of appropriate SMSF advice.

We are anecdotally aware of many advisers currently leaving or choosing not to enter the limited licence regime going forward. Not only is this because they find the framework complex with scoping difficult to achieve, but those limited licenced advisers who saw the benefits in the intent of the framework are now being forced out by AFSLs who do not see it as a profitable venture.

Execution only advice occurring

The fallout from the poor take-up of the complex and costly limited licence regime means that a portion of advisers are acting on the reliance of 'execution only' services. 'Execution only' services from an unlicensed accountant provides client documentation that simply states that they, the accountant, are merely executing their client's actions on the direction of the client.

However, an 'execution only' service can be easily manipulated when there is a trusted relationship between an unlicensed adviser and a client. An adviser can provide advice to set up an SMSF but direct the client to indicate that the decision to set up the SMSF was the client's own directive to the accountant and that accountant provided no advice.

Encouraging their clients to seek execution only services could be used to avoid the documentation required under a licence. This is an activity or behaviour that we do not endorse and is not in a client's best interest.

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[4] The Treasury, Media Releases, 'New form of licence expands access to financial advice', 23 June 2012 [Online], Accessed 26 May 2022, <http://ministers.treasury.gov.au/ministers/bill-shorten-2010/media-releases/new-form-licence-expands-access-financial-advice>

[5] Source: Wealth Data [online], 'Financial Adviser Movements - Dashboard 3: View Adviser movement Business Models (Peer Groups)', 26 May 2022 [Online] Accessed 30 May 2022, < https://wealthdata.com.au/adviser-movement-fast-facts-members >

This approach is generally much cheaper than being licensed and undertaking extensive due diligence, providing AFS related disclosures, and creating costly and lengthy statement of advice documentation. Without essential and fundamental advice this may also lead to adverse consumer outcomes.

This is the unintended consequence of a failed limited licence and advice framework. It is also a source of frustration for those who have done the right thing and embraced licensing.

Regime not fit for purpose

The overarching problem of the limited licence regime is that it prevents SMSF trustees from obtaining basic SMSF advice they require in a convenient and affordable manner.

SMSF trustees who wish to seek basic SMSF advice are either required to spend significant money seeking financial advice from a licensed adviser or must act without advice. The advice process also means that there are protracted time frames in licensed accountants being able to deliver that advice.

This means there are important unmet SMSF advice needs in the market.

In Practice - Case Study 5

If an SMSF trustee wants to seek advice regarding the establishment of a pension from their accountant, unlicensed accountants are unable to provide this simple advice.

Licensed advisers are able to provide this simple advice, but it involves costly documentation disproportionate to the advice the trustee seeks.

The cost of implementing such advice is also considerably higher than most clients are prepared to pay. Therefore, trustees either are not able to access the advice or often do not see the value of the advice given the cost involved.

Once an adviser chooses to be licensed, they are then restricted from wearing their traditional accountant 'hat' when trying to provide services they ordinarily provide without being licensed. The framework has restricted individuals from providing simple SMSF services and added unnecessary complexity to simple tasks.

When meeting with clients they need to clearly articulate the purpose for the meeting and under which 'hat' that advice is being provided. As soon as a meeting on taxation matters crosses into financial advice, it is nigh on impossible to separate in what capacity they are operating. Clients do not understand this level of complexity. They just want to be having the conversations they need with their trusted, professional adviser.

There are also unwarranted restrictions on winding up SMSFs that reduce consumer protection. If an individual seeks advice from an unlicensed accountant regarding their SMSF, and they clearly have an inappropriate balance, such as below $50,000 without the capability to increase the balance, the accountant, including the fund's approved auditor, is unable to advise the client that an SMSF is not likely to be in their best interests.

In addition, advisers find it too expensive to be licensed to provide simple SMSF services, which is the main need of SMSF trustees.

Scenarios such as this have prompted the Australian Tax Office[6] (ATO) to acknowledge there is a need in the market to service the gap between full financial advice and smaller matters which has been caused by the licensing regime since the removal of the accountants' exemption.

It is important to recognise the majority of accountants and SMSF advisers do not want to provide financial product advice, but they do want to help their clients set up pensions, advise on making contributions to their SMSF (beyond mere tax advice), wind up an SMSF when an SMSF is no longer appropriate for the client, and refer their clients to a fully licensed adviser for investment and financial product advice when needed.

It is clear, that the current framework is restricting the SMSF industry and the professionals who dedicate their time to provide specialist SMSF advice.

The limited licence framework has failed and hence should be removed and transitioned to a new consumer-centric framework. This may be in the form of a 'strategic advice' offering.

SMSF and superannuation advice is strongly correlated with the provision of 'strategic' advice.

In fact, the limited licence framework was built upon this premise. That is, advice is usually centred around making contributions or starting a pension in 'superannuation'.

Please also refer to the joint submission on accountants' advice from the Chartered Accountants Australia and New Zealand (CAANZ), the Institute of Public Accountants (IPA) and the SMSF Association.

[6] Accountants Daily, 'ATO Assistant Commissioner Dana Fleming at the Accounting Business Expo in Sydney', March 2019, [Online] < https://www.accountantsdaily.com.au/smsf/12782-ato-points-to-market-gap-after-accountants-exemption-ditched >

Issues Paper: 4.7 – Consent Arrangements for Wholesale Client and Sophisticated Investor Classification

Questions for Stakeholders

76. Should there be a requirement for a client to agree with the adviser in writing to being classified as a wholesale client?
77. Are any changes necessary to the regulatory framework to ensure consumers understand the consequences of being a sophisticated investor or wholesale client?
78. Should there be a requirement for a client to be informed by the adviser if they are being classified as a wholesale client and be given an explanation that this means the protections for retail clients will not apply?

Terms of Reference

3. The Review will include examination of:

   3.2. Whether consent arrangements for sophisticated investors and wholesale clients are working effectively for the purposes of financial advice;

6. The Review will not make recommendations on:

   6.3. Changes to the definitions of 'retail client', 'wholesale client', and 'sophisticated investor', including the income and asset thresholds;

We note that the terms of reference will only make recommendations with respect to the consent arrangements and effectiveness of the wholesale and sophisticated investor regime. However, we would argue that it is problematic to try to consider how the function and consent arrangements are operating appropriately without broader consideration of the regime, including terms, definitions, and thresholds.

The net assets tests of $2.5 million ($10 million for superannuation entities) and income test of $250,000 have not been subject to indexation and have not been revised since their introduction some twenty years ago.

Increases in the value of residential housing and salary and wage earnings in that time now sees a significantly higher number of individuals qualifying under this regime.

The framework for the wholesale and sophisticated investor regime needs urgent review and reform.

The current framework is complex and requires a comprehensive review of the relevant sections of the *Corporations Act 2001* and associated regulations.

There are some segments of the market that apply the overall provisions appropriately and as intended. However, we also hold concerns that the current complexity and increasing compliance obligations have triggered a surge and significant increase in the use of the wholesale investor regime. This also raises concerns as to whether its use is appropriate and if clients are being properly informed and able to provide true informed consent.

We have concerns about the appropriateness of the threshold test or income test as a measure to classify an individual as a sophisticated investor. The level of a person's wealth is not an indicator of their financial literacy, sophistication, or skill.

The alleviation of the barriers to providing professional advice should be addressed as a priority.

In doing so, it will allow professionals to be professionals and see the adoption of practical advice delivery framework. We prefer to see an overhaul on how advice can be given and by whom and limit exclusions which remove vital consumer protections.

The *Australian Law Reform Commission's* (ALRC) Interim Report for the *'Review of the Legislative Framework for Corporations and Financial Services Regulation'* (Review) noted that how the rules apply in the context of a self-managed superannuation fund are unclear. Appropriate guidance is severely lacking. Indeed, there are differing legal opinions on the operation of these rules where an SMSF is involved. Some of these issues include:

- Legislated $10 million net asset test for superannuation entities does not exclude SMSFs
- Application of the $2.5 million net asset test to SMSFs is based on an ASIC Media Release 14-191MR (August 2014). This has not been tested in Court.
- An SMSF is a special purpose trust. However, the application of the 'trust' and 'trustee' rules do not consider:
    - Preservation of superannuation benefits
    - Separate member interests
    - An individual is not presently entitled to a share of their assets of the SMSF until they vest. Vesting would usually occur for a member's benefit when the individual trustee meets a condition of release
    - Concept of control of an SMSF
    - Rules apply differently where the SMSF has individual trustees or corporate trustees
    - Special purpose SMSF trustee companies are prohibited from holding assets, accounts, investments, or trading in their own right
    - Appropriateness of use the value of an SMSF interest in the assets test for an individual

- Appropriateness of using the value of an individual's assets for the assets test for an SMSF.
- Without consumer protections, losses incurred in the superannuation environment can be difficult to replace due to the inherent limitation applied through individual, annual contribution caps.

The use of accountants' certificates does not align with the core principles that apply to the provision of financial advice. An unlicensed accountant is unable to provide financial advice and is unable to provide any advice in relation to the proposed investment in a specific product. However, an adviser can rely upon a certificate from an unlicensed account to classify a client as a sophisticated investor and therefore a wholesale investor, removing significant consumer protections in the process.

Issues may also arise for accountants who are also licensed and approached by a client (to whom they do not provide financial services) to complete an accountant's certificate.

As we have noted already there are significant challenges for this cohort in separating tax and accounting advice or services from licensed services. The concessions afforded to unlicensed accountants under the *Corporations Regulations 2001* do not extend to an accountant that is licensed.

Of concern is any potential litigation risk that may arise if a certificate is given in the capacity of the qualified accountant, but they do not apply their licensing obligations in making further enquiries or counselling the client.

Licensed or unlicensed, accountants are being placed in an untenable position. They must comply with the law and at the same time meet their professional and ethical obligations under APES 110.

We have observed a significant increase in enquiries from members regarding the use of accountants' certificates. Particularly since the commencement of the design and distribution (DDO) and target market determination (TMD) obligations came into effect in October 2021.

It would appear the use of these certificates is the preferred option of many licensees due to the perceived shifting of risk away from the licensee and adviser. Advisers should be responsible for the advice and services they provide to their clients.

We are concerned that clients do not fully understand the ramifications of being classed as a wholesale investor. The removal of clients from the safety next of important consumer protections is not something that should be taken lightly.

The use of the term 'sophisticated investor' is often misunderstood and viewed as being in addition to the wholesale investor regime rather than being a component of it.

The current policy settings are not appropriate. These provisions need to be revisited as part of a broader policy review.

Full and open consultation with industry is essential to ensure that the right policy settings are struck.

Issues Paper: 5.1 – ASIC

Questions for Stakeholders

81. Have ASIC's recent actions in response to consultation (CP 332), including the new financial advice hub webpage and example SOAs and ROAs, assisted licensees and advisers to provide good quality and affordable advice?

83. What further actions could ASIC, licensees or professional associations take to improve the quality, accessibility or affordability of financial advice?

Terms of Reference

3. The Review will include examination of:

    3.3. Actions undertaken by ASIC, including regulatory guidance and class orders.

ASIC CP 332

Firstly, we commend ASIC for embarking on CP 332. This was an ambitious and significant project for ASIC. It should be noted that a significant amount of time and resources were also committed by industry stakeholders in preparing and putting forward their submissions.

From the SMSF Association's perspective, numerous member engagement activities were undertaken. This included surveys, a series of member round tables and more. This was necessary to gather essential data and information and to ensure that we appropriately ventilated the concerns held and issues experienced by our members.

It was disappointing that given the importance of this project and the level of commitment from stakeholders, that the feedback from this project was limited to a single page infographic.

We note that ASIC is providing the resources from this project to this Review. We trust that the full and detailed submissions are included in those resources.

Role of ASIC

AFSLs are risk averse due to potential ASIC penalties. We also understand that ASIC seeks to encourage affordable and efficient advice and is concerned that their guidance is not being effectively implemented by industry.

ASIC's compliance and enforcement role intimidate the sector. This is despite the fact both advisers and ASIC seek to achieve the same goal. That is, to ensure consumers receive compliant and affordable advice. This is not helped when ASIC adopts a strict, black letter law approach.

This is a product of the disconnect that exists between the regulator and stakeholders.

Through various engagement activities we have undertaken, it appears that ASIC guidance is not widely read, referenced or understood by advisers. Many advisers rely on the guidance they receive from their AFSLs. In fact, there is a significant blurring of the lines between what is ASIC regulatory guidance and AFSL policies and procedures.

However, as indicated previously, AFSLs provide an extra layer of compliance that may not be necessary or goes well beyond the guidance issued by ASIC. As a result, advisers must comply with the AFSL policies and procedures regardless of ASIC's guidance.

We believe this is an unfortunate outcome as much of the guidance, and many of the examples in RG 244, are quite useful and reasonable.

More broadly however, many ASIC regulatory guides are a mere replication or extracts from the legislative and explanatory materials into an ASIC template. They are often quite lengthy and legalistic, making them difficult to consume in an easily understandable manner. No further interpretation, guidance, or information is supplied.

The ATO's ongoing consultative relationship with the SMSF and tax industry provides a good working case study. The ATO's approach has strengthened their compliance regime due to their willingness to consult openly with industry. This has helped to achieve improved compliance and efficiency for SMSF investors and professionals.

The role the ATO plays in supporting stakeholders is worthy of deeper examination and exploration.

The ATO provides a range of different guidance products and services. Some examples are set out below:

- A suite of public rulings including:
    - Taxation Rulings
    - SMSF Rulings
    - Law Companion Rulings
    - Practical Compliance Guidance
    - Determinations
    - Taxpayer Alerts
    - Interpretive Decisions
    - Factsheets
- Ability to apply for a private binding ruling or SMSF specific advice
- Professional to Professional Support (Super P2P) service for SMSF auditors (ATO QC 45577)
- Online services for business (OSB)
- ATO Online Community – Q&A facility

The ATO Commissioner provides a certain level of protection for those who comply with a ruling which has been issued and will in certain circumstances apply a level of 'discretion' when taking enforcement action.

Preamble – ATO Tax Rulings

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you - provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

Preamble – ATO SMSF Rulings

The fact that you acted in accordance with this ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion as to what action to take in response to a breach of that law. The Commissioner may, having regard to all the circumstances, decide that it is appropriate to take no action in response to the breach.

There is need for more ongoing and active engagement between ASIC and stakeholders.

Active industry engagement and broader guidance and support of the sector need not prejudice or taint the compliance and enforcement activities of ASIC. Rather, such engagement would provide greater opportunities for information gathering, identifications of issues or concerns, and ensures that ASIC's stakeholders are better understood. Strengthened industry engagement would allow for more real time analysis of issues and an opportunity to provide clarification when needed. Enhanced support of the financial advice profession would also strengthen the consumer protection remit of ASIC.

Issues Paper: 5.2 – Advice Licensees

Questions for Stakeholders

84. What steps have licensees taken to improve the quality, accessibility and affordability of advice? How have these steps affected the quality, accessibility and affordability of advice?

82. Has licensee supervision and monitoring of advisers improved since the Financial Services Royal Commission?

Terms of Reference

4. The Review will include examination of:

   3.4. The role of financial services entities and professional associations.

Licensees are creating a significant extra layer of compliance and cost

A key issue for SMSF Association members is the impact AFSLs have on the provision of advice.

The compliance functions of many AFSL businesses have significantly grown over time. Risk management has become a significant focal point, resulting in increasing layers of compliance and red tape rather than the provision of advice with a consumer focus. The level of compliance and oversight, in some instances, is leading to the paralysis of the financial advice process.

Some members expressed concerns around the perceived conflict between AFSL revenue and compliance. Most AFSLs will receive a percentage of the fees charged by the adviser to the client in addition to their contractual fees. The more complex and expensive advice becomes, the greater revenue generated for the AFSL. This is in stark contrast to the ban on conflicted remuneration for financial advisers.

We believe that increased revenue is an unlikely driver for increased compliance activities. However, it highlights the level of frustration experienced by advisers and the barriers to being able to provide professional advice services to their clients.

AFSLs hold a strong, risk averse attitude due to the potential consequences they face from ASIC from a breach of regulation. In response, AFSLs have created additional, burdensome layers of compliance to mitigate their risk.

As noted in the previous section, many AFSLs will apply ASIC guidance as black letter law. In response we see an increase in compliance requirements imposed on financial advisers.

One relevant example is the reactions by AFSLs to ASIC's media release 19-277MR on 11 October 2019, which resulted in the release of ASIC factsheet *Self-managed super funds: Are they for you?* and the reissue of Information Sheet INFO 206 - *Advice on self-managed superannuation funds: Disclosure of costs.*

> *It explains…the need for advice on the cost-effectiveness of an SMSF – on average, SMSFs with balances below $500,000 have lower returns after expenses and tax than funds regulated by Australian Prudential Regulation Authority (APRA)*[7]

Information contained in both the factsheet and information sheet were not accurate, nor representative of the facts. They were underpinned by inappropriate data that was applied to draw incorrect conclusions. The factsheet has since been labelled as expired but is still published despite issues with the content therein. The INFO sheet continues to be published.

We have been working with ASIC in relation to this guidance, sharing the SMSF Association's comprehensive research on the costs of operating an SMSF and SMSF investment returns. We look forward to continuing that work with ASIC, and the shaping of more appropriate guidance.

From an AFSL perspective, some AFSLs chose to adopt the ASIC guidance as black letter principles and prohibited the provision of SMSF advice unless all the requirements of the ASIC guidance were met.

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[7] ASIC, 'INFO 206 - Advice on self-managed superannuation funds: Disclosure of costs', October 2019, [Online] Accessed 30 May 2022, < https://asic.gov.au/regulatory-resources/financial-services/giving-financial-product-advice/advice-on-self-managed-superannuation-funds-disclosure-of-costs/ >

Alternatively, they placed significant barriers to the provision of SMSF advice, adding additional compliance documents, checklists, and procedures.

The SMSF Association agrees that SMSFs are not suitable for everyone. Great care is needed to ensure that it is appropriate in an individual client's circumstances. However, we believe that the actions of some AFLSs were a significant overreach in their response which could have discouraged or prevented advisers recommending SMSFs even though those advisers considered that it would be in their client's best interest to do so.

In Practice - Case Study 6

Members have reported several issues arising in practice because of AFSL compliance policies. These were adopted in response to the ASIC SMSF advice guidance. In particular, where a client did not hold $500,000 in existing superannuation savings.

Advisers reported being denied the opportunity to consider a client's specific circumstances, use their professional judgement and apply the best interest's duties applicable under both the Corporations Act 2001 and the Financial Planners and Advisers Code of Ethics.

Either, the SMSF advice was prohibited outright, or significant barriers were added through additional layers of compliance. This may have included a requirement to formally apply for AFSL approval once all the additional steps had been completed.

SMSF advice was rendered extremely difficult to provide, no longer timely nor cost effective.

This was despite the fact that an SMSF may have been in the client's best interest.

Compliance needs to be a balancing act between protecting the consumer and acting in their best interests. It should not be a barrier to providing appropriate advice. Professional advisers should be able to exercise their professional judgement.

This issue continues to be a significant pain point for many of our members.

Member feedback has also shown that self-licensed advisers and advisers with links to small AFSLs had less friction with the role an AFSL plays. Broadly, these advisers found they were able to provide the advice consumers requested in a more affordable and efficient fashion.

This was most prevalent with advisers who provide SMSF specific advice. These advisers found their licensee understood SMSFs and were comfortable with providing SMSF advice that did not have excessive compliance requirements.

In contrast, larger AFSLs were very restrictive in the provision of advice. Some members stated their AFSL did not have a great understanding of SMSF advice or did not focus on it at all. In these cases, ASIC guidance becomes 'law' and can make the provision of SMSF advice, including limited SMSF advice very restrictive.

Large AFLSs were also reducing the offerings they provided with regards to SMSF and limited advice. This is because this type of advice may not be profitable when the required compliance and risk is taken into account. When this occurs, AFSLs can remove limited licence advisers from their books and advisers are then unable to provide advice. They must begin looking for a new licensee, and that is assuming they can find one. This is not conducive to affordable and efficient consumer advice. It is also a significant business risk for advisers.

Expanding the ability for advisers to be self-licensed or more responsible for the advice they provide should be a consideration for a future advice framework.

This may lead AFSLs to become 'service' providers in line with other professions. With the regulation of financial advice requiring individual registration and oversight, AFSLs may only be maintained to provide regulatory oversight of financial products and provide conduct monitoring and IT services to advisers, with advisers being 'self-licensed'.

AFLSs each have their own, different interpretations of legislation, regulation, and guidance. This can result in a consumer receiving varying advice on what is required and allowed to be provided by their adviser when they seek advice. This can also be a pain point when advisers change licensee.

Issues Paper: 5.3 – Professional Industry Associations

Questions for Stakeholders

32. What steps have professional associations taken to improve the quality, accessibility and affordability of advice? How have these steps affected the quality, accessibility and affordability of advice?

83. What further actions could ASIC, licensees or professional associations take to improve the quality, accessibility or affordability of financial advice?

Terms of Reference

3. The Review will include examination of:

    3.4. The role of financial services entities and professional associations.

Education, Accreditation and Professionalism

The SMSF Association has been a long-term advocate for increasing the standard of advice provided to SMSF trustees by raising the education standards of SMSF advisers. Two of the core components of the Association's mission are professionalism and integrity. This is underpinned by our core beliefs which includes education and accreditation for advisers operating in the SMSF sector.

The need to ensure SMSF advice providers are appropriately educated is now supported by both the Australian Securities and Investment Commission (ASIC) and the Productivity Commission. ASIC's Report 575 which outlined the results of ASIC's review of SMSF advice indicated:

"a need to increase the education and training requirements for advice providers who provide personal advice on SMSFs."[8]

Recommendation 12 of the Productivity Commission inquiry into *Superannuation: Accessing, Efficiency and Competitiveness* recommended that the Australian Government should require specialist training for persons providing advice to set up an SMSF.

The 2018 Productivity Commission report into the efficiency and competitiveness of the superannuation industry noted:

"Steps are in train to lift the qualification requirements of financial planners, and this should be extended to require specialist training for those advising on SMSFs." [9]

The SMSF Association strongly supports both these recommendations made by ASIC and the Productivity Commission and recommends that the Government act on them as soon as possible.

Of note are Commissioner Hayne's comments in his final report published on 4 February 2019:

…prevention of poor advice begins with education and training. Those who know why steps are prescribed are more likely to follow them than those who know only that the relevant manual says, 'do it'.

I believe that, as they come into effect, the new education requirements will improve the quality of advice that is given, and improve the way that financial advisers manage the conflicts of interest with which they are faced. [10]

Why is the quality of SMSF advice important?

The quality of financial advice provided to SMSF members is crucial to the integrity and performance of the sector. SMSFs are complex structures that are not for everyone and accordingly SMSF members and potential SMSF members seek advice to understand the myriad legislative and regulatory conditions to determine if an SMSF is appropriate for their circumstances.

[8] ASIC, Report 575 'SMSFs: Improving the quality of advice and member experiences', June 2018, < https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-575-smsfs-improving-the-quality-of-advice-and-member-experiences/ >

[9] Productivity Commission, Inquiry Report – 'Superannuation: Accessing Efficiency and Competitiveness', No 91, December 2018, Page 39, < https://www.pc.gov.au/inquiries/completed/superannuation/assessment/report>

[10] Commonwealth of Australia, 2019, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Final Report (4 February 2019); Volume one, section 3.2.1

Our research shows that 63% of SMSFs were established on the suggestion of an advisor and 81% of SMSFs utilise some form of adviser, highlighting that the quality of advice can materially affect the retirement savings of the majority of SMSF members[11]. Furthermore, as the Productivity Commission reported, evidence suggests that clients who form favourable views of advisers tend to maintain those views even when the quality of the advice does not justify their decision.

Research commissioned by the SMSF Association also emphasised the numerous and diverse areas on which SMSFs seek advice. Compliance is the area members require the most help with, closely followed by tax. If members and trustees do not understand their obligations and the time required to manage an SMSF, this can not only result in severe penalties and sanctions, but a lack of effective engagement and management causing significant financial detriment. [12] [13]

When focusing on the areas which trustees value the most, it is investment advice which is most valued. The SMSFA believes that investment advice, which refers to investment strategy and asset allocation, rather than product or fund selection, is extremely important to the outcomes of members in SMSFs. Advisers have a key role to play in offering strategic holistic investment advice across a member's SMSF and individual assets to provide diversified portfolios, the benefits of which are well known. It is no surprise that advised client portfolios are much more diversified across asset classes than those of unadvised trustees. [14]

We also believe that raising the standards of SMSF advice would assist in removing unscrupulous operators from the sector, especially those targeting SMSFs with geared property investments. This can be achieved by raising education standards for SMSF advice to a genuine specialist level. This would act as a deterrent for these operators viewing the SMSF sector as a target market for inappropriate advice and investments.

How to improve SMSF advice

The SMSF Association believes that advisers who provide advice to individuals about SMSFs should have specific SMSF education and qualifications that underpin their advice. SMSFs are now a major part of the advice framework making up almost one-third of all superannuation fund assets. They are complex vehicles that need to be accompanied by high quality and specialised advice. Especially given they are only appropriate for certain types of individuals.

This notion was also reflected in ASIC's Report 575. Noting the need to raise the level of education and a specific SMSF qualification for advice providers wishing to provide SMSF advice.

The Financial Adviser Standards and Ethics Authority (FASEA) was established as the new education standards-setting body. It determined the current education and training requirements that will be required for advisers to give advice under a 'new' financial advice profession. The SMSF Association strongly supported FASEA's efforts to raise financial adviser education standards to a bachelor degree or equivalent standard.

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[11] Commonwealth Bank and SMSF Association (2017), *'The SMSF Report'*

[12] Ibid

[13] Russell Investments and SPAA[13] (2014), *'Intimate with self managed superannuation – An annual study of self managed superannuation funds'*

[14] Russell Investments and SPAA[14] (2014), *'Intimate with self managed superannuation – An annual study of self managed superannuation funds'*

However, FASEA determined that a financial adviser only needs to study a general subject in broad superannuation to provide SMSF financial advice and potentially focus on SMSF issues through their continuing professional development obligations. We believe that the approach they chose to adopt ignored the importance of SMSF advice and its distinctive nature compared to general superannuation advice. Further, it did not contemplate the range or variety of industry participants, not all of whom are full service or comprehensive financial advice or service provides.

We acknowledge that FASEA has ceased with the education standards role now residing with the Minister and Treasury. With this transition it has been necessary to grandfather and continue the standards set by FASEA. This was both practical and necessary. We do however strongly encourage that the issues raised are given urgent consideration to ensure that appropriate, quality advice is provided by suitably qualified specialists.

We also note in FASEA's Financial Planners & Advisers Code of Ethics guide, which was published in 2019, the guide provides the following question and answer:

> ***Question**:*
> *"As an Adviser, I have basic knowledge in SMSFs that I learnt when undertaking an approved Graduate Diploma. My client has requested specialist SMSF advice involving a number of complex issues I have not previously encountered. Should I provide advice to the client?*
>
> ***Answer:***
> *In this circumstance, it would be appropriate for the adviser to seek the assistance of another adviser with specialist SMSF skills before giving advice or to refer the client to another adviser with the necessary competency. If the adviser wished to give this type of advice in the future, they should undertake additional **specialist SMSF study and training** before they do so."* [15]

To illustrate the difference in education standards, we have set out a table showing the difference in curriculum between a specialist SMSF qualification and a general financial planning superannuation course.

[Continued overleaf]

[15] FASEA Standards Authority, 'Financial Planners & Advisers Code of Ethics 2019 Guide,' Page 33, October 2020, < https://webarchive.nla.gov.au/awa/20211213082413/https://www.fasea.gov.au/code-of-ethics-guidance/ >

The following is a comparison in learning outcomes between a broader financial planning post-graduate qualification and an SMSF focussed qualification:

Graduate Diploma of Financial Planning	**Graduate Certificate in Self-Managed Super Funds**
• Analyse superannuation structures and strategies for various client situations. • Explain the taxation implications of superannuation strategies for contribution, withdrawal and insurance at the fund level. • Analyse superannuation retirement income stream strategies according to their benefits, tax implications and social security treatment as they relate to different client situations. • Formulate strategies to maximise superannuation benefits and clients' entitlements to social security benefits and aged care. • Discuss the advantages and disadvantages of equity release schemes as a source of retirement income. • Design superannuation strategies in respect of divorce, bankruptcy and death benefits. • Develop a compliant statement of advice (SOA).	• Evaluate the suitability of an SMSF based on the individual circumstances presented • Assess and apply best practice methodology to the operation of an SMSF • Integrate regulatory and legislative requirements into SMSF advice functions • Explain how the different SMSF-related occupations can contribute to the optimal operation of an SMSF. • Evaluate the application of behavioural finance to the interaction and engagement with SMSF trustees. • Explain factors resulting in measurable, systemic biases in investment decisions including difference between collective and individual decision-making processes. • Analyse impact of behaviour biases on SMSF fund investment strategies • Develop a methodology for mentoring and guiding SMSF Trustees. • Distinguish SMSF strategic financial advice from comprehensive SMSF financial advice. • Identify a range of contemporary SMSF strategies and describe their strategic purpose. • Model a range of strategies to achieve fund/trustee objectives • Explain to trustees the identified strategy, the associated benefits, risks and restrictions and how it supports the SMSF strategic objective. • Outline the requirements for SMSF Auditor Registration • Illustrate the application of the Auditing Standards and the SIS compliance issues that may arise in auditing an SMSF. • Complete an SMSF audit that is compliant with both Australian Auditing Standards and SIS Regulations • Create the required Australian Taxation Office reports and Fund reports • Explain the legal regulations that apply to SMSFs. • Identify and describe the special taxation rules applicable to superannuation contributions, superannuation funds and superannuation benefits • Apply their SMSF strategy knowledge and skills and the treatment of regulation and tax to a series of complex SMSF case studies. • Identify a compliant trust deed, including all compulsory statutory provisions and those provisions that cannot or should not be included. • Explain the common triggers for SMSF Trust Deed review and amendment • Compare and contrast a range of publicly available SMSF trust deeds to determine suitability for use.

Completion of the SMSF Association's specialist accreditation course is necessary to attain our SMSF Specialist Adviser (SSA®) designation. It has been available as a Graduate Certificate in Self Managed Superannuation through the University of Adelaide and Kaplan Professional. As of the beginning of this year, our specialist course is now available as an elective to candidates enrolled in the Master of Financial Planning at both Deakin University and Kaplan Professional.

Meeting the standards required for an AQF 9 post graduate qualification with a tertiary education provider was essential in achieving our mission to lead the professionalism, integrity, and sustainability of the SMSF sector. This also aligns to the SMSF Association's core beliefs.

Over the life of the Association, specialist education, accreditation, and professionalism have been essential components of our long-term strategies and purpose. We see these as the core requirements to continue to lift the education standards for professionals providing advice to SMSF trustees. As Commissioner Hayne noted, education leads to better quality advice to consumers.

Further information on our SMSF Specialist Adviser (SSA) designation and accreditation program can be found on the SMSF Association website:

https://www.smsfassociation.com/specialisation/become-an-smsf-specialist#

https://www.smsfassociation.com/master-financial-planning

https://www.smsfassociation.com/specialisation/graduate-certificate-in-smsfs

Quality of Advice Outcomes

The quality of financial advice provided to SMSF members is crucial to the integrity and performance of the sector. This is particularly important given that SMSFs are a specialised retirement savings vehicle and are distinctly different to large superannuation funds. A broad high-level education approach does not give an adviser enough insight to reach a threshold where they can comprehensively advise on the complex aspects of SMSFs.

This is especially pertinent when SMSF trustees, due to the self-directed nature and complexity of SMSFs, can be susceptible to poor financial advice with potentially significant detrimental outcomes.

We therefore encourage the Review to recommend introduction of a requirement to increase financial adviser knowledge standards relating to specific and complex SMSF legislation and discourage advisers who have not undertaken specialist SMSF training from providing SMSF related financial advice.

Professional Standards

The SMSF Association is a self-regulating professional association whose members voluntarily agree to be bound by various professional, technical, and ethical standards. Those that fail to meet the standards required may be required to complete recognised CPD or education within a specified time frame, or have their membership suspended or cancelled.

Our policies include:

- Established Code of Conduct, underpinned by:
    - Complaints process
    - Professional Standards Committee to hear and review matters

    - Established disciplinary processes, and procedures
- Continuing professional development (CPD) policy
- Member Quality Review Program (QRP)

This is vital in preserving the value and integrity of membership, and in particular specialist members who can display their specialist designation. For consumers this is of vital importance as accreditation is a component of building trust through the demonstration of their skills, education, and as a recognised professional.

The Association also maintains a public register which includes:

- Number and nature of complaints received
- Actions taken by the Association
- Publication of current determinations and sanctions
- Where appropriate, the member's name is published

The SMSF Association has an obligation to consider complaints against members for misconduct strictly within the terms of its Constitution and the Code. It is important to note that this process is not a legal process, but rather an internal process to determine whether a member has breached any of the major principles contained in the Code and the impact such conduct may have on their continued membership.

Further details can be found on the SMSF Association website:
https://www.smsfassociation.com/membership/member-conduct-discipline

Industry Research

Throughout its history, the SMSF Association has led the way for research on the SMSF sector. The role of thought leaders as well as providing research that can help deliver better advice outcomes is a responsibility that is taken seriously.

Quality research informs and educates our members and other stakeholders on various aspects of SMSFs, the SMSF sector and SMSF advice. The publication of quality data, and sectoral information sees the Association taking a leading role to help shape the sector and the provision of appropriate, quality and professional advice.

Examples of some our research projects are appended to this submission. Please refer to the table of Appendices for further details.

Terms of Reference: 4.6

Design and Distribution Obligations/Target Market Determinations

Terms of Reference

4. The Review will include examination of:

    4.6. Other key regulatory developments, including the Consumer Data Right, the Retirement Income Covenant and the Design and Distribution Obligations as they apply directly to financial advice.

Significant ambiguities reside in the current legislation and regulations regarding the application of the design and distribution obligations ("DDO") and target market determinations ("TMD") to SMSFs.

During the public consultation in 2018, ASIC noted that the proposed legislation, unless amended, would be unlikely to apply to SMSFs as *"the initial distribution of interests in SMSFs may not be captured by the revised exposure draft legislation"*[16].

The SMSF Association consistently raised concerns on the ambiguities arising around the establishment of SMSFs and other related dealings.

Given the original drafting of the Bill, and the fact the Senate Economics Legislation Committee made no mention of the need for SMSFs to be included, it is our belief that the DDO/TMD regime was not intended to apply to the establishment of an SMSF and financial dealings with regards to an SMSF.

The legislation and regulations are not sufficiently clear to clarify this intent.

Other parties noted during the various consultations that, in the context of the DDO and TMD legislation, an SMSF was a shell that needs to be considered distinctly differently to the financial products it acquires.

> *"There is one important financial product where there is a greater level of uncertainty about the applicability of the Design and Distribution Obligations legislation, and we would have liked to have seen this uncertainty addressed through this regulation. Self Managed Superannuation Funds (SMSF) are classified as a financial product, however they are different from other financial products in a number of ways.*
>
> *We believe that there are grounds for treating SMSFs differently, including the fact that they are more of a service than a product and are typically used to house other products that will be caught under the Design and Distributions Obligations legislation. In addition, the product provider is technically the trustees of the*

[16] ASIC, 2018, *Design and distribution obligations and product intervention power: Revised exposure draft legislation – Submission by the Australian Securities and Investments Commission,* Paragraph 75

SMSF, who are also the members of the fund. Thus, the benefit of this legislation is less apparent in the case of SMSFs."[17]

Treasury in their evidence to the Senate Economics Legislation Committee inquiry into the Bill, noted the need to exclude SMSFs from the regime:

"it would be inappropriate to include SMSFs because the design and distribution obligations require the issuer to determine a class of consumers, whereas a person designs an SMSF and in effect is 'selling it to themselves'".[18]

The financial products acquired by and held in the SMSF are subject to the DDO and TMD requirements. This is entirely appropriate and aligns with the policy intent of these measures.

Now that these provisions have been operative for more than eight months (having commenced on 5 October 2021), conflicting views have emerged on whether the provisions apply to SMSFs and, if they do, how they should be applied in an SMSF context. It has been described as "a lawyer's picnic".

Proposed solution: Exclude SMSF establishments, addition of new members and commencement of pensions in an SMSF from the DDO/TMD requirements

The DDO applies to issuers and distributors of financial products that are available for acquisition by issue or by regulated sale in Australia.

A product distributor is required to take reasonable steps that will, or are reasonably likely to, result in distribution of a financial product being consistent with the product's TMD.

Financial advisers are expected to consider a product's TMD when providing advice and meeting their best interest duty.

Each SMSF is unique to its members. The members and trustees are one and the same. As such they will each have very different investment objectives, risk profiles, preferences, and needs.

An SMSF is a private fund and does not offer membership to the public at large. Therefore, the requirement to have a publicly available TMD as required under the legislation does not align to the principles or function of an SMSF.

SMSFs meet the definition of a financial product. However, when we look at how it resides within the DDO/TMD framework, it is a structure in which to house financial products. Those financial products will need to comply with the DDO/TMD regime obligations.

There are no consumer or public benefits to be gained by extending the DDO/TMD provisions specifically to the SMSF structure itself. Rather, including SMSFs will add unnecessary complexity and cost burdens for no benefit. The logic that applies to commercial product issuers does not apply in an SMSF context as the SMSF structure is not being offered to the public at large.

[17] AFA, 2019, *AFA Submission – Corporations Amendment (Design and Distribution Obligations) Regulations 2019*

[18] Ms Kate O'Rourke, Principal Adviser, Consumer and Corporations Policy Division, The Treasury, Committee Hansard, 1 November 2018, p. 35

More concerning, the current ambiguities are camouflaging potential contingent liabilities that may arise for both financial advisers and licensees, were a different interpretation of the law to be applied in the future. This may occur due to action of a regulator, litigation, or formal complaint with AFCA.

ASICs regulatory guide RG 274 *Product design and distribution obligations* is silent on SMSFs and the issues surrounding SMSFs. There is no clear, practical, interpretive guidance from the regulator and no clear exemption in the current legislation and regulations.

The legislation is silent on the express inclusion or exclusion of SMSFs from the DDO/TMD regime.

The operation of the existing legislation, including the pre-existing product disclosures statement (PDS) provisions, do not provide a sufficiently clear framework to assist with the interpretation and application of the DDO/TMD provisions to SMSFs.

Under Sub-section 1012D(2A) of the *Corporations Act 2001*, a product disclosures statement (PDS) does not have to be given to a new member of an SMSF where the trustee believes on reasonable grounds that the member has received, or knows they have access to, all the information that a PDS would be required to contain. Therefore, SMSFs and their trustees or firms advising SMSFs require disclosure but are exempted under reasonable grounds.

This exemption may not be able to reasonably be relied upon in in the context of the DDO/TMD when we consider other situations that regularly arise in an SMSF context:

1. A member requests the payment of a pension from the SMSF trustee. A PDS is required to be issued by the Fund.
2. The trustee voluntarily executes a PDS on establishment or addition of a new member, although not required to do so. By default, a PDS will be included as part of the standard document package provided. It is then up to the trustee to determine whether they require or use the PDS provided.

It is not uncommon for the PDS to automatically be included in the documents adopted or executed by the trustees and members. If a PDS was not required, would the SMSF be captured under the DDO/TMD provisions for the mere fact a PDS has been prepared, executed and/or adopted?

The SMSF structure itself addresses a range of issues that form part of the operative intent of the DDO/TMD regime.

Under the existing legislative framework that applies to SMSFs, the trustees have obligations imposed by way of trustee covenants under SISA s.52B. Of particular relevance to the application and operation of the DDO/TMD regime is the covenant in SISA s.52B(2)(f) and SISR 4.09 that require the SMSF trustees to *formulate, review regularly and give effect to an investment strategy.*

The trustees must ensure that the investment strategy is documented, monitored, complied with, and maintained by the SMSF trustees. The investment strategy must have regard to whole of the circumstances of the fund, including, but not limited to:

*a) the **risk** involved in making, holding and realising, and the **likely return** from, the entity's investments, having regard to its **objectives** and expected **cash flow requirements**;*

b) *the **composition** of the entity's investments as a whole, including the extent to which they are diverse or involve exposure of the entity to risks from inadequate **diversification**;*

c) *the **liquidity** of the entity's investments, having regard to its **expected cash flow** requirements;*

d) *the ability of the entity to discharge its existing and prospective **liabilities**;*

e) *whether the trustees of the fund should hold a contract of insurance that provides **insurance cover for one or more members** of the fund.*

In addition to the above and the trustee's fiduciary duty, the legislation also requires the trustees to consider the 'best financial interests' of all fund members.

The trustees of the SMSF are directly responsible for the operation of the fund, including ongoing fund compliance, formulating investment strategies, and making investment decisions. Indeed, they may engage various professionals and services to assist them in fulfilling their duties and obligations. However, this does not alleviate or remove the core trustee duties and obligations.

SMSF trustees are not required to be licensed financial advisers, product manufacturers, issuers, or providers. Further, they do not engage in retail product distribution. Although they may engage these services and acquire financial products from an appropriately licensed provider.

The trustee's duties and obligations ensure that the needs of individual members are appropriately considered, documented, and actioned. These all align with the policy objective of the DDO/TMD obligations. Noting that the DDO/TMD obligations would still apply to financial products acquired by the Fund.

The requirement for a TMD to be publicly available does not align with SMSFs which are a private, closely held fund, as the members and trustees are one in the same.

Since 1 July 2021, SMSFs are permitted a maximum of 6 members. We understand that the number of SMSFs using these updated measures are low. Prior to this legislative amendment, membership was limited to a maximum of 4 members. A significant majority of funds have two members. We do not expect this to significantly change.

ATO data[19] extracted on 14 July 2021 shows the distribution of SMSFs based on the number of members:

Number of members	2019–20
1	23.7%
2	69.2%
3	3.4%
4	3.6%
Total	100%

[19] ATO, 2021, *Self-managed super fund quarterly statistical report – September 2021,* QC 67380, Table 4: Membership Size

If SMSFs are to be included in the DDO obligations, this could include unreasonable design parameters and restricted distribution obligations for trustees dealing with themselves or entities which deal with SMSFs.

Given the current legislative uncertainty, and the apparent intent to exclude SMSFs, we believe it is appropriate for the legislation and regulations to be amended to specifically exclude SMSFs from the DDO/TMD regime with regards to:

1. Establishment of an SMSF
2. Admission of new members to an SMSF
3. Commencement of a pension in an SMSF

This will align the legislation to the policy intent, reduce red tape and compliance costs for the SMSF sector and provide important clarity for financial advisers, document providers and SMSF trustees.

Other Issues - Red Tape Reduction

Adviser Access to Client ATO Superannuation Data

Complexity arises for advisers when seeking to access critical data relating to their client’s superannuation interests. Key tests and thresholds apply across all superannuation clients whether they are in accumulation phase or in retirement. Knowledge of the clients’ available caps for contributions and for pension commencements are vital to the advice process.

Prior to the introduction of the single disciplinary body concept under the *Better Advice Act 2021,* financial advisers were required to be registered as Tax Financial Advisers with the Tax Practitioners Board. Despite this registration, they were unable to access crucial client information held by the Australian Taxation Office.

Examples of problems experienced by financial advisers in practice are set out below:

Total Superannuation Balance (TSB)

Since 1 July 2017, an individual’s Total Super Balance (“TSB”) has been used to determine an individual’s ability to access certain superannuation concessions. The SMSF Association has been supportive of this method as an effective way to target appropriate cohorts of superannuation members.

However, the introduction of multiple TSB thresholds is unnecessarily adding to the complexity of the superannuation system. This has made it increasingly difficult for individuals to understand the superannuation system and their options.

Currently, the following different TSB thresholds apply:

TSB Threshold	Applicable Measure
$300,000	Work-test exemption contributions
$500,000	Catch-up concessional contributions
$1,000,000	Quarterly transfer balance cap reporting for SMSFs
$1.48m, $1.59m, $1.7m	Bring forward non-concessional contribution caps
$1.7m	Non-concessional, spousal contributions, and co-contributions
$1.6m	Disregarded small fund asset rule

In addition to the number of thresholds, confusion, complexity and added costs arise because some of these thresholds are indexed and some are not, and those that are indexed are subject to different methods of indexation.

The number of thresholds that apply have not only made it more difficult for superannuation members to understand and use the superannuation system, it has also made it more difficult for their advisers and superannuation fund administrators. It increases the professional services fees paid by superannuation members as they need specialised advice to understand the different layers of thresholds that may apply to them and when they apply.

Furthermore, when inadvertent errors are made by superannuation fund members and/or their advisers, it can result in breaches of the contribution caps which are often difficult, time consuming and expensive to resolve.

Access to a client's available contribution caps and TSB reported by the ATO is vital and essential information for advisers. Without it they are unable to provide accurate, appropriate, professional advice that is in the client's best interests.

Transfer Balance Cap (TBC)

With the indexation of the general transfer balance cap (TBC) on 1 July 2021, individuals are now subject to a personal TBC. The value of an individual cap will depend on an individual's circumstances and will range from $1.6 million to $1.7 million, rather than one single cap for all individuals. This is causing significant complexity and is compounded by the lack of access for financial advisers and SMSF administrators to the ATO reports needed to obtain an individual's TBC.

Initially the general TBC was $1.6 million, rising to $1.7 million on 1 July 2021.

A member's personal TBC will equal the general TBC in the year they first have a retirement phase income stream counted against their transfer balance account.

However, post 1 July 2021, a member 's personal TBC may differ from the general TBC due to proportional indexation. Under proportional indexation, the unused portion of the member's personal TBC (based on the highest percentage usage of their TBC) will be indexed in line with the indexation of the general TBC.

This is an overly complex situation which over time will result in most individuals with a retirement phase income stream having a personal TBC which is different to the general TBC maximum. This distortion will continue to grow in complexity as future indexation of the TBC is applied.

Individuals who haven't used their cap will have a maximum TBC of $1.7 million, individuals who have used a portion of their cap (based on their highest percentage usage) will fall somewhere between $1.6 million and $1.7 million and individuals who have used all their cap will remain at $1.6 million.

Due to the complex nature of proportional indexation, it is inevitable that mistakes will be made leading to inadvertent breaches of the TBC.

The table below, published by the ATO, clearly illustrates the complexities associated with proportional indexation. The indexation which is applied to a member's TBC is dependent on the member's highest ever transfer balance which in-turn determines the amount of indexation (between nil and $100,000) that is applied to their TBC. The information in this table is generic and does not determine an individual's exact TBC. It however highlights the significant variability resulting from individual TBCs.

Proportional indexation of your transfer balance cap[20]

If your highest transfer balance was between	Your unused cap percentage will be between	Your personal TBC will increase between	Your personal TBC after indexation will be between
$0.00 and $159,999.99	100% and 91%	$100,000 and $91,000	$1,700,000 and $1,691,000
$160,000 and $319,999.99	90% and 81%	$90,000 and $81,000	$1,690,000 and $1,681,000
$320,000 and $479,999.99	80% and 71%	$80,000 and $71,000	$1,680,000 and $1,671,000
$480,000 and $639,999.99	70% and 61%	$70,000 and $61,000	$1,670,000 and $1,661,000
$640,000 and $799,999.99	60% and 51%	$60,000 and $51,000	$1,660,000 and $1,651,000
$800,000 and $959,999.99	50% and 41%	$50,000 and $41,000	$1,650,000 and $1,641,000
$960,000 and $1,119,999.99	40% and 31%	$40,000 and $31,000	$1,640,000 and $1,631,000
$1,120,000 and $1,279,999.99	30% and 21%	$30,000 and $21,000	$1,630,000 and $1,621,000
$1,280,000 and $1,439,999.99	20% and 11%	$20,000 and $11,000	$1,620,000 and $1,611,000
$1,440,000 and $1,599,99.99	10% and 1%	$10,000 and $1,000	$1,610,000 and $1,601,000
$1,600,000 or more	0%	nil	$1,600,000

Business and Regulatory Case

The need for access to timely and accurate data is fundamental to ensuring that members comply with their TBC. This highlights the need for Government to ensure that access to this data is not limited and can be accessed by all authorised advisers in an efficient way.

The only way to manage this issue is to liaise with the tax agent for the individual and request the required reports. This is not always possible, takes time, and advisers don't always receive with right information.

[20] Australian Taxation Office, 2021, *Indexation of the general transfer balance cap,* (10 February 2021) QC 60627

One alternative is for the client to access the information via their MyGov account. This is often impractical as the client may not have or want a MyGov account. Some individuals are unable to obtain a MyGov account. This creates friction, as there is an expectation the adviser can access or obtain this vital information.

Advisers can be authorised to act for a client with Centrelink to manage their affairs with that agency. This includes updating personal information and attendance to any financial reporting as required. Yet, they are denied report only access to critical superannuation information for clients.

To be clear, advisers seek access to client's superannuation reports only. They are not seeking the authority to lodge forms or update a taxpayer's personal details with the ATO. This is a tax agent service and limited to those who are registered tax agents with the Tax Practitioners Board.

There are concerns that the shifting away of advisers from the TPB and into ASIC for their tax registration will create further barriers to resolving this issue.

Providing financial advisers access to clients ATO superannuation reports needs to be an urgent policy priority.

This red tape is creating a significant barrier to the provision of timely and cost-effective advice.

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[21] In 2015 the SMSF Professionals Association of Australia (SPAA) changed its name to the SMSF Association