

February 2020

Financial Services Royal Commission – Enhancing consumer protections and strengthening regulators

ABOUT US

Super Consumers Australia (Super Consumers), formerly known as the Superannuation Consumers' Centre, is an independent, not-for-profit consumer organisation formed in 2013. Super Consumers was first funded in 2018. We work to advance and protect the interests of low and middle income people in the Australian superannuation system.

During its start up phase Super Consumers has partnered with CHOICE to deliver support services. CHOICE is the leading consumer advocate in Australia, established 60 years ago, it is an independent voice, ensuring consumers get a fair go.

57 Carrington Road Marrickville NSW 2204

Phone 02 9577 3258 | Fax 02 9577 3377 | Email enquiries@superconsumers.com.au |

www.superconsumers.com.au

The Superannuation Consumers' Centre is a not-for-profit company limited by guarantee. ABN 34 163 636 566 ACN 163 636 566

Table of Contents

ABOUT US	1
Table of Contents	2
Introduction	3
Summary of Recommendations	4
Proposed amendments	4
Recommendation 3.1: Trustees of Registrable Superannuation Entities (RSE) should hold no other role or office	4
Exemption for personal advice	5
Recommendations 3.2 and 3.3: Advice fees in superannuation	6
The case for one-off advice	8
Adequate protections for one-off advice	8
Summary position on advice and super	9
Recommendation 3.4: No hawking of superannuation products	9
Recommendations 3.8, 6.3, 6.4 and 6.5: Superannuation regulator roles	11
Further comments	11

Introduction

The super system exists to support people in retirement. The performance of the super system matters deeply for the wealth and wellbeing of Australians.¹ With so much at stake, robust regulation and consumer protections are critical.

Super Consumers welcomes the opportunity to comment on the Government's exposure draft legislation to strengthen consumer protections and regulator roles in response to the recommendations of the Financial Services Royal Commission. Consistent with the purpose of our organisation, this submission focuses on the proposed legislation to enact the recommendations relevant to superannuation.²

The proposed legislation represents an important step towards achieving much needed reform in these areas. In particular, Super Consumers strongly supports the expansion of ASIC's role to include promoting consumer protection and market integrity (Rec 3.8, 6.3, 6.4), and the banning of unsolicited selling ('hawking') of financial products, including superannuation and insurance (Rec 3.4). We have made recommendations aimed at further strengthening both provisions.

The proposed legislation requiring no other duty for trustees of RSEs (Rec 3.1) and dealing with the deduction of advice fees from super (Rec 3.2 and 3.3) is also an improvement on the status quo. However, our support for these provisions is tempered by our ongoing concern about conflicted financial advice practices.

Commissioner Hayne acknowledged the extent of this problem when he recommended a review to look at measures to improve the quality of advice.³ Against this background, Super Consumers has concerns about the exemption for 'personal advice' within the no other duty provision, and does not support the deduction of advice fees from either MySuper or 'choice' super accounts. As we have argued in our separate submission to the Retirement Income Review, the Government needs to consider other advice models to ensure that all Australians can access independent, quality financial advice that puts their best interests first.⁴

¹ Productivity Commission, 2018, *Superannuation: Assessing efficiency and competitiveness*, p3; p5.

² Recommendations 3.1, 3.2, 3.3, 3.4, 3.8, 6.3, 6.4.

³ Recommendation 2.3.

⁴ Super Consumers Australia, 2020, Submission to the Retirement Income Review, p29.

Summary of Recommendations

Recommendation 1: That the Federal Government amend the legislation to prohibit payment deduction for personal advice from superannuation. Failing this, that the Federal Government amend the legislation to require that fees can only be deducted from a choice superannuation account for one-off advice.

Recommendation 2: That the Treasury consider drafting options to clarify that the hawking prohibition covers the unsolicited selling by an RSE of a choice product to a MySuper member.

Recommendation 3: That the Federal Government amend the legislation to ensure the anti-hawking provision adequately protects employers from the unsolicited selling of superannuation products.

Recommendation 4: That the Federal Government amend the legislation to remove the requirement for ASIC to obtain APRA's agreement before taking certain actions affecting RSE licensees.

Proposed amendments

The comments below draw on our knowledge and experience of the key issues that need to be addressed in order to ensure that superannuation operates as an efficient and effective market. This is a bar that industry currently fails to meet, to the detriment of the millions of ordinary Australians who rely on super to fund their retirement.

Recommendation 3.1: Trustees of Registrable Superannuation Entities (RSE) should hold no other role or office

We need stronger protections to minimise the risk of unmanageable conflicts of duties arising from competing duties owed by a trustee of a registrable superannuation fund to beneficiaries and others.

Super Consumers supports the creation of an additional condition on RSE licenses held by a body corporate trustee to prohibit the RSE licensee from having a duty to act in the interests of

another person, except in the course of performing the RSE licensee's duties and exercising the RSE licensee's powers as a trustee of a registrable superannuation fund.

Exemption for personal advice

Super Consumers has concerns, however, about the additional exemption for providing personal advice. We appreciate that an exemption for personal advice already exists in the SIS Act, and that the proposed amendment clarifies that RSE licensees and their representatives are not restricted from providing *comprehensive* personal advice. This includes advice given to or involving a person who is not a beneficiary of a fund (eg. a spouse or relative), or advice paid directly by a fund beneficiary.

We understand that the rationale for maintaining (and clarifying) the personal advice exemption is that 'The provision of these types of personal advice is unlikely to adversely affect beneficiaries of the superannuation fund as a whole'.⁵ However, exempting personal advice presents potential risks for individual members against a background where there is justifiable community distrust of financial advisors.

A 2019 ASIC survey found 49% of people agreed that financial advisers were more interested in making themselves rich than in helping their customers. Perceptions of conflicts in advice were widespread, with 37% agreeing that financial advisers did not generally have the customer's best interests at heart.⁶ Earlier research by Choice in 2016 found that people often felt like they had been kept in the dark by their super fund, with some seeing super funds as biased or self-serving, putting their own interests before their customers.⁷

These perceptions of advice are well founded. ASIC's recent review of the quality of advice provided by superannuation funds found that 51% of advice files reviewed did not comply with the best interests duty and related obligations.⁸ We are concerned that this indicates inherent conflicts of interest in advice given by superannuation funds. The superannuation fund business model is built on growing the size of the fund, and for some, extracting profit from charging percentage based fees on invested capital. Therefore, there is a strong disincentive to give advice which sees this capital move elsewhere, for example to a better performing fund or more suitable investment options outside of superannuation (e.g. paying down a mortgage).

⁵ Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2020 Measures)) Bill 2020: RSE License Condition - No Other Duty (FSRC REC 3.1), Exposure Draft Explanatory Memorandum at 1.31.

⁶ ASIC, 2019, Report REP 627: *Financial advice: What consumers really think*, p32.

⁷ CHOICE, 2016, 'Project Superpower', available at: <https://www.choice.com.au/-/media/b139626583b444aa9e65fae317fcf807.ashx?la=en>

⁸ ASIC, 2019, Report REP 639: *Financial advice by superannuation funds*, p30.

For people to be confident about obtaining personal advice from their super fund, they need to know that the fund will act in their best interests. ASIC's recent review findings shows that consumers can't trust that the advice they will receive will always be in their interests. Given the limited time afforded to the FSRC, it could not address in a detailed way all of the causes of conflicted financial advice. Recognising there was an ongoing problem that was yet to be resolved, Commissioner Hayne recommended a review no later than December 2022 to look at measures to improve the quality of advice. We support this recommendation. As argued in our recent submission to the Retirement Income Review, we see a strong need for a new business model to provide conflict free, affordable and scalable advice and have encouraged the Review to consider this with particular regard to the UK pension advice model.⁹

Recommendations 3.2 and 3.3: Advice fees in superannuation

The proposed legislation amends the *Superannuation Industry (Supervision) Act 1993* to remove a trustee's ability to charge advice fees in relation to MySuper products. It exempts fees for intra fund advice, which must be collectively charged as administrative fees. It also amends the SIS Act to ensure that a trustee can only charge advice fees (other than intra-fund advice fees) to a member where the fee is in accordance with an arrangement that the member has entered into, where the member has consented in writing to being charged the fee, and where the trustee has the written consent or a copy of it.

The amendments are an improvement on the status quo - particularly in relation to consumer protections for Ongoing Fee Arrangements (OFAs). We support the proposed requirements for OFAs to be reviewed annually; for fee recipients to disclose in writing the total fees that will be charged and to set out the services that will be provided during the 12 month period; and for written consent before fees can be deducted from a client's account.

However, in principle we do not support the deduction of advice fees from superannuation accounts. As outlined above in relation to Recommendation 3.1, conflicted financial advice remains a problem that must be addressed for people to confidently rely on advice being in their best interests.

In addition, there is consumer research that indicates there is psychological 'pain' associated with paying for something, and that consumers place a higher value on products that are purchased with a more 'painful' payment method. Payment methods that are less immediate,

⁹ Super Consumers Australia, 2020, Submission to the Retirement Income Review, p29, available at <https://www.superconsumers.com.au/>

like credit cards, are likely to be less painful.¹⁰ This suggests that people may be more likely to value advice if they have to actively pay for it from their own pocket, rather than have fees deducted from their super account.

ASIC's recent report on super funds' communication with members about the Protecting Your Super Package reform includes information which suggests that funds are well aware of this behavioural driver. To this end, ASIC found that some trustees conveyed a sense that paying for insurance premiums out of their super account would have minimal impact on a member's day-to-day financial situation. There was little attempt by some trustees 'to emphasise that even if the payment has little impact on a member's current financial situation, it will have an impact on their retirement savings'. To illustrate this, ASIC offered the following examples of fund communications with members:

'The premiums are all paid by your super account - not your back pocket.'

'Insurance cover through super has no impact on your day-to-day cashflow'.¹¹

If people place a higher value on advice provided by super funds, funds will have to do more to justify the value of the advice they provide - which in turn will help drive greater competition and quality in the super fund market. Demonstrating value to a customer is one of the most basic requirements of operating a business and something to which virtually every other product on the market is subject.

We recommend that people should only be able to pay for one-off or ongoing advice fees from their own bank account. Failing this, we recommend that fees can only be deducted from a choice superannuation account for one-off advice. As pointed out by Counsel Assisting the FSRC, this is likely to 'nudge a consumer to consider more carefully what financial advice she or he wishes to obtain and what she or he is willing to pay for it'. It also eliminates the risk of a consumer's superannuation balance being eroded by ongoing advice.¹²

¹⁰ Shah, A.M., Eisenkraft, N., Bettman, J.R., & Chartrand, T.L., 2015, "Paper or Plastic?" How We Pay Influences Post-Consumer Connections', *Journal of Consumer Research*, 42(5), pp688-708; Ariely, D., & Silva, J., 2002, 'Payment method design: Psychological and economic aspects of payments', Center for e-Business MIT, Paper 196, pp68-73; Prelec, D., & Simester, D, (2001), *Marketing Letters*, 12(1), 5–12. doi:10.1023/a:1008196717017.

¹¹ ASIC, 2020, *REP 655: Review of member communications: Protecting Your Superannuation Package (PYSP) reform*, p8.

¹² Financial Services Royal Commission, 2018, 'Superannuation closing submissions', p204.

We are aware of an industry proposal to allow one-off advice to be paid for from both choice and MySuper products. We maintain that given the ongoing problems with conflicted advice, opening MySuper products to advice will continue to expose people to poor outcomes.

However, there is a chance the FSRC recommendation may create an incentive for funds or advisers to ‘flip’ people out of MySuper products into choice products in order to charge ongoing advice fees. The best interest duty on advisers and funds may prevent this from happening where it would be inappropriate, but it may create serious enforceability issues for the regulator in unpacking the reasons for a switch. With this in mind, we would be open to the industry proposal of one-off advice from both choice and MySuper products, so long as it was supported by appropriate consumer protections.

The case for one-off advice

There is a very poor case for ongoing advice related to most superannuation decisions. There is a better case for one-off advice around key life events, such as someone planning for retirement. Retirement planning is a discrete event around which a good financial adviser should be able to develop a plan to follow over multiple years. Receiving advice on a more frequent basis can be unnecessary and costly.

Adequate protections for one-off advice

Allowing for one-off advice opens up a new risk that it could be subverted and in effect turned into ongoing advice through repeated ‘one-off’ advice. This would defeat the intent of limiting advice to situations when it is actually valuable. It would also unnecessarily expose people to the types of inappropriate advice Commissioner Hayne was attempting to prevent. Before moving to allow one-off advice there need to be adequate protections in place. For example, developing a process to ensure that the advice was genuinely one-off and designed to set people up with a long term, followable plan. Given how late in the process this proposal from industry has come, there hasn’t been time to assess the precise nature that these protections should take.

We are also concerned by the charging models for one-off advice. Percentage based fees remain a blight on the financial services sector. By their nature they reward based on the size of a person’s balance, not on the effort required to deliver advice. Opening up advice charging in superannuation without ensuring that fees bare some relationship to actual costs will cause ongoing harm to people. Adequate protections need to consider what an appropriate charging model is for one-off advice to help people assess value for money.

Summary position on advice and super

To reiterate, we maintain that there is a weak case for charging advice from super due to inherent and ongoing conflicts in the advice sector. Also people tend to undervalue the cost they pay for advice out of superannuation, as it comes from savings they cannot otherwise access until far into the future. These two factors combined lead to poor decision making, bad competitive outcomes and ultimately bad advice being given to people.

However, we acknowledge that poor outcomes may flow from the halfway house solution proposed in the FSCR, which allows for advice from choice, but not MySuper products. As such we are open to further discussion on allowing for a one-off advice model, so long as adequate consumer protections are met. In the absence of this further work or broader reform to the financial advice market, we continue to support the FSRC recommendation.

Recommendation 1: That the Federal Government amend the legislation to prohibit payment deduction for personal advice from superannuation. Failing this, that the Federal Government amend the legislation to require that fees can only be deducted from a choice superannuation account for one-off advice.

Recommendation 3.4: No hawking of superannuation products

Super Consumers is pleased that the Government is taking action to address the harmful practice of the hawking of superannuation (and insurance) products. We endorse the separate submission and recommendations by the Consumer Action Law Centre on the relevant exposure draft materials. In particular, we agree that:

- All forms of digital contact, including email, SMS and in-app offers, must be captured to give effect to the policy intent to make the reform 'technology neutral'.
- The 'reasonable person' standard in the definition of contact should be reconsidered in light of the impact on particularly vulnerable people.
- The requirements of a valid 'request for contact' should be expanded to include that a request be voluntary, unbundled and specific as to purpose (in alignment with evolving consent practices under the Consumer Data Right)
- The exposure draft materials should be amended to clarify that 'tick box' consent practices (including as part of terms and conditions to enter a survey, competition or access a service on a take-it-or-leave it basis) are unsolicited contact in breach of the hawking ban.

- It must be simple to withdraw any request for contact, and information about how to withdraw a request must be provided.
- Meaningful deterrents are needed for breaching the hawking ban.

In addition, Super Consumers is concerned to ensure that there is no potential for MySuper members to be hawked 'choice' products offered by the same RSE. We understand that this is not the policy intention, and encourage Treasury to consider options to clarify the exposure draft accordingly.¹³ We strongly support clarity within the legislation on this point given the available evidence about wide variation in choice fund fees and performance, and the negative consequences for people who end up in an underperforming fund.

Finally, we do not support the exclusion of all employers from the protection of the anti-hawking provision on the basis that businesses 'are capable of assessing the value of a financial product offered in the course of, or because of, unsolicited contact and are less susceptible to pressure selling tactics'.¹⁴ There is a real risk of employers being sold a superannuation product that is not in the best interests of their employees. The Productivity Commission observed that:

*'Employers are not always well placed to navigate this maze and make decisions on behalf of their workers.... While some employers are highly capable and make much effort (sometimes using corporate tenders), many others (especially smaller businesses) put in limited effort or struggle to compare products.'*¹⁵

Given the potential for negative impact on employees, we recommend that the legislation be amended to provide coverage of the anti-hawking provision to businesses.

Recommendation 2: That the Treasury consider drafting options to clarify that the hawking prohibition covers the unsolicited selling by an RSE of a choice product to a MySuper member.

Recommendation 3: That the Federal Government amend the legislation to ensure the anti-hawking provision adequately protects employers from the unsolicited selling of superannuation products.

¹³ Treasury consultation on anti-hawking legislation, Sydney, 11 February 2020.

¹⁴ Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2020 Measures) Bill 2020: Hawking of Financial Products, Explanatory Memorandum at 1.29.

¹⁵ Productivity Commission, 2018, *Superannuation: Assessing Efficiency and Competitiveness*, p24. See also Grattan Institute, 2014, *Super Sting: How to stop Australians paying too much for superannuation*, p15.

Recommendations 3.8, 6.3, 6.4 and 6.5: Superannuation regulator roles

Super Consumers strongly supports extending the AFSL regime to cover a broader range of activities undertaken by APRA regulated super trustees through the proposed creation of a new financial service, 'providing a superannuation trust service'. We also strongly endorse the adjustment of ASIC's role in superannuation to include promoting consumer protection and market integrity.

The proposed amendments to section 6 of the SIS Act provide much needed clarity about the respective responsibilities of APRA and ASIC (and the Commissioner of Taxation). However, the effectiveness of the co-regulation framework will ultimately depend on how it is operationalised by ASIC and APRA. We note and support the cooperative work that is already underway in anticipation of the changed landscape.

One area where we foresee potential for inefficiency is the requirement for ASIC to obtain APRA's agreement before taking certain actions affecting RSE licensees. For example, cancellation of an AFSL, imposition of certain license conditions and the making of certain banning orders.

Clearly, in executing its functions ASIC needs to give appropriate consideration to prudential issues, and we would expect this to occur in the ordinary course of business, supported by the existing Memorandum of Understanding between ASIC and APRA. We do not think there is a need to place any additional legislative requirement on ASIC to obtain APRA's agreement prior to taking certain actions.

Recommendation 4: That the Federal Government amend the legislation to remove the requirement for ASIC to obtain APRA's agreement before taking certain actions affecting RSE licensees.

Further comments

Super Consumers is aware that some parts of industry are likely to use the submission process to object to proposed timeframes for compliance set out in the exposure draft legislation. Industry has been on notice about the reforms recommended by the FSRC for more than a year. Firms acting honestly, fairly and efficiently should be well-placed to achieve compliance



within the specified periods. In light of this, we urge the Government to keep deadlines short to quickly deliver outcomes for consumers.