

25 February 2022

The Hon. Justice S C Derrington
President
Financial Services Legislation
Australian Law Reform Commission
PO Box 12953
George Street Post Shop
Queensland 4003

Email: financial.services@alrc.gov.au

Dear Justice Derrington,

Re: Australian Law Reform Commissions Review of the Legislative Framework for Corporations and Financial Services Regulation - Interim Report A.

The Financial Planning Association of Australia¹ (FPA) welcomes the opportunity to provide this response to the Australian Law Reform Commission's (ALRC) Review of the Legislative Framework for Corporations and Financial Services Regulation in response to Interim Report A (the interim report) which was tabled by the Attorney-General, Senator the Hon. Michaelia Cash on 30 November 2021.

The FPA supports and has been calling for a similar review in the legal framework for financial services regulation since the introduction of the Corporations Act in 2001. The regulation of financial advice as a financial product has never sat well with the professional financial planning services provided by FPA members. While financial planners use the financial products otherwise regulated under financial services law, financial planners themselves provide a professional service, assisting their clients understand and articulate their goals and objectives, recommend strategies in the form of

¹ The Financial Planning Association (FPA) is a professional body with more than 12,000 individual members and affiliates of whom around 10,500 are practising financial planners and 5,207 are CFP professionals. Since 1992, the FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of the Future of Financial Advice reforms.
- The FPA was the first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- We built a curriculum with 18 Australian Universities for degrees in financial planning through the Financial Planning Education Council (FPEC) which we established in 2011. Since 1 July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- When the Financial Adviser Standards and Ethics Authority (FASEA) was established, the FPEC 'gifted' this financial planning curriculum and accreditation framework to FASEA to assist the Standards Body with its work.
- We are recognised as a professional body by the Tax Practitioners Board.



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a financial plan so their clients can live their best lives, and importantly keep them on track to achieving them as life throws up a variety of challenges and opportunities.

This disconnect (between being regulated a product but providing a personal service) has been made all the more difficult due to financial planners being required to comply with four laws regulated by eight regulators and a variety of oversight and complaints bodies including AFSLs, professional associations, two ombudsman services and the courts.

For this reason, the FPA welcomes the Commission's work to identify and provide practical solutions to improve the operation and structure of the Corporations Act 2001 and associations subordinate regulations and legislative instruments to simplify and support the professional services provided by the financial planning profession for the benefit of Australian consumers.

The FPA would welcome the opportunity to discuss with the Commission the issues raised in our submission. Please contact me or Ben Marshan (Head of Policy) on [REDACTED] if you have any questions.

Yours sincerely

Sarah Abood

Chief Executive Officer

Financial Planning Association of Australia



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FPA SUBMISSION
REVIEW OF THE LEGISLATIVE FRAMEWORK
FOR CORPORATIONS AND FINANCIAL
SERVICES REGULATION - INTERIM REPORT A

Australian Law Reform Commission

25 February 2022



Introduction

This submission is made by the Financial Planning Association of Australia ('the FPA') and addresses questions posed in the Australian Law Reform Commissions (ALRC or Commission) Review of the Legislative Framework for Corporations and Financial Services Regulation - Interim Report A.

This submission is based on the following understanding of what financial advice is and why it is fundamentally important to consumers and the national economy.

What is financial advice?

Financial advice is about helping people set goals and devise a plan to prepare them for the future, manage their financial affairs, protection against risks and give them confidence about their financial security.

Financial planners² work with clients to identify and consider:

1. Each client's circumstances including their needs, goals and priorities.
2. The values, attitudes, expectations and financial experiences of their client, particularly in relation to risk tolerance and financial risk.
3. Their client's ability, both financial and in relation to their level of comfort, to tolerate loss of capital and income.
4. Their client's financial planning needs across the short term, medium term and long term.
5. Non-monetary matters that may affect their client's financial needs and goals.

Based on this information, a financial planner will develop a financial plan with appropriate strategies that their client is comfortable with, to help them work towards their life goals.

A financial planner's responsibilities are to make clear recommendations, outline the risks involved and communicate any possible strengths or weaknesses in the plan. The level of investment risk will be stated in the financial plan and should reflect the risks the client is comfortable with taking.

For those receiving long term financial planning (ongoing advice), the financial planner will keep clients updated with changes that could influence their investments or financial plan, such as market downturns; ongoing legislative change; provide regular reviews of the financial plan; and regularly evaluate client's needs, financial goals and strategies.

Consumer benefits of quality financial advice

Quality financial advice is important for consumers as it can:

- a) Reduce financial and social exclusion for consumers and help them navigate the financial marketplace and learn how to better manage their finances.
- b) Deliver significant consumer benefits including changes in savings behaviour, setting proper budgets, following a plan for paying off debt, and organising finances and build and protecting wealth.
- c) Change people's behaviour and habits of managing their financial affairs by teaching them sensible and simple practices that can be used in their everyday lives to prepare for their future financial needs.

² FPA uses the term financial planner throughout our submission, this protected term is interchangeable with the term financial adviser as per S923C.



- d) Help improve the financial capability of consumers, enabling them to make informed judgements and effective decisions about the use and management of money throughout their lives, including an ability to articulate and prioritise their financial goals.
- e) Help consumers with debt management and reduction, budgeting, cash flow management, a savings plan, superannuation, tax planning, home loan repayments, insurance, investments, and estate planning as well as planning for retirement and aged care.

A service of national public importance

Research shows there are clear societal benefits of quality financial advice which demonstrate that it is in the national public interest to ensure the professionalisation of the following services continues:

- a) Reduced debt - increases disposable income for more productive purposes.
- b) Building wealth - higher rates of return on investments over long periods and minimise the need for people to rely on social security.
- c) Insurance protection – protection against financial loss and minimises the need for people to rely on social security.
- d) Higher levels of savings (both investments and retirement savings)– reduces reliance on government benefits during and after retirement.
- e) Financial capability - encourages a financially literate and conscientious society that make better long-term decisions.

The Financial Planners Challenge

The FPA would highlight to the Commission that to provide financial advice services to consumers, financial planners are required to comply with four laws regulated by eight regulators, additional oversight from Australian Financial Services Licensees and professional associations (such as the FPA) and additional consumer complaint mechanisms through two ombudsman services and the courts.

The legislation includes:

- Corporations Act 2001
- Tax Agent Services Act 2009
- Anti-Money Laundering and Counter-Terrorism Financing Act 2006
- Privacy Act 1988

The regulators include:

- Australian Securities and Investment Commission (ASIC)
- Tax Practitioners Board (TPB)
- Office of the Australian Information Commissioner (OAIC)
- Australian Transaction Reports Analysis Centre (AUSTRAC)
- Australian Prudential Regulatory Authority (APRA)
- Australian Taxation Office (ATO)
- Australian Competition and Consumer Commission (ACCC)
- (until 31 December 2021) Financial Adviser Standards and Ethics Authority (FASEA)

The ombudsman include:

- Australian Financial Complaints Authority (AFCA)
- Australian Small Business and Family Enterprise Ombudsman (ASBFEO).



This regulatory complexity where one piece of personal financial advice is regulated by 8 regulators, all administering Acts and regulatory requirements using different language and imposing different compliance requirements on financial planners and licensees has significantly contributed to the issues identified by the Royal Commissioner and the complexity in financial advice provision identified by the ALRC. As noted, in addition, the same piece of advice will have oversight and interpretation by the Courts, the Australian Financial Complaints Authority (AFCA), Australian financial service licensees and professional bodies such as the FPA.

This is also prior to considering the technical aspects of financial advice covering aspects of superannuation, insurance, investing, estate planning, social security, aged care etc. which also require a detailed knowledge of legal and regulatory rules of these products and regimes.

This creates a significant risk that the regulatory and compliance requirements under one Act and Regulator may differ to those of others, leaving financial planners at risk of breaching one regulation in order to meet the requirements of another set of regulatory requirements. Financial planners must interpret how each different set of regulatory requirements for each different Regulator differ from other regulators to ensure they do not inadvertently breach requirements. This has a significant impact on costs and efficiencies, particularly on small licensees who do not usually have the in-house expertise or economies of scale to meet the regulatory demands.

Even small differences in requirements, significantly drives up process and compliance costs for businesses, ultimately impacting on the cost of providing advice to consumers and the sustainability and competitiveness of each business, and the risk of adverse consumer outcomes. Given the constant regulatory changes administered by each of these (now) seven regulators, businesses have become paranoid about the plethora of regulatory requirements making them less inclined to invest capital or be innovative.

It also makes it more challenging for consumers to comprehend, trust and engage with the financial system, and understand their rights and the consumer protection mechanisms available to them.

The plethora of regulatory requirements from all the Regulators, professional bodies, and licensees, and the lack of stability in the financial advice regulatory environment, are overwhelming particularly for providers of financial advice who must understand and adhere to all the requirements.

It is recognised that genuine multiplicity of regulators may offer regulatory benefits for consumers and the regulated population as it can reduce the chances of a single approach to the administration of the laws, each of which serve a specific purpose in Australian society. It is also recognised that the laws administered by each of these eight regulators applies to a significantly broader regulated population than just financial advice providers.

While it isn't the role of the ALRC to consider the extra complexity and cost associated with having multiple regulators, compared with the pros and cons of a monopolistic regulator for financial advice, the FPA remains concerned that any recommendations and implementation in relation to financial advice provision will fix only one piece of the puzzle. We suggest the Commission draw on data from comparable foreign jurisdictions and compare consumer outcomes in jurisdictions with a monopolistic regulator with jurisdictions with competing regulators, to assess whether the benefits offered by a multi-regulator approach outweigh the extra complexity and cost associated with having eight regulators overseeing each piece of financial advice. We would further encourage the Commission to share this information with the Quality of Advice Review to enable the vision of simplifying financial services provision - in this case specifically professional financial advice - the Commission has envisioned in this interim report for the financial services industry.

Executive Summary

The FPA is pleased to make a submission to the Australian Law Reform Commission's (ALRC) Review of the Legislative Framework for Corporations and Financial Services Regulation in response to Interim Report A (the interim report) which was tabled by the Attorney-General, Senator the Hon. Michaelia Cash on 30 November 2021.

Our submission deals with chapters of the interim report which relate directly or indirectly to the provision of financial advice and which are pertinent to the financial planning profession.

The body of legislation and regulation which establish a framework for financial services and corporations to operation in Australia, has been developed in a piecemeal fashion over decades. Often these laws and regulations have been implemented for specific purposes to address circumstances that have occurred, and therefore operate with very specific functions. However, as this approach has occurred numerous times per year, over a number of years and decades, it has developed a patchwork of legal requirements, bureaucracy and red tape. As the financial services industry has developed, laws have been changed and the roles of regulators have been expanded, contracted and swapped in response, however, this gradual legislative and regulatory creep has created complexity, duplication and inefficiency. It has led to an overly complicated legal and regulatory environment which is increasingly becoming unworkable and unnecessarily driving up the cost of service provision, particularly in the financial planning profession.

As an example of the ever-growing and burdensome complexity that exists within the landscape of a practitioner in this space, financial planners must comply with no less than four pieces of legislation and be regulated by eight different bodies. Whilst the establishment of a Single Disciplinary Body for the profession has resulted in making this function easier to navigate, planners are still subject to further authorisation, supervision and monitoring by an Australian Financial Services Licensee (AFSL) and any obligations imposed by voluntary membership of a professional association.

Therefore, when taking into account the requirements of section 912A of the *Corporations Act 2001 (Cth)* which states:

'General obligations

1. *A financial services licensee must:*
 - a. *do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly.'*

And *Financial Planners and Advisers Code of Ethics 2019 Standard 1* which all financial planners must comply with this Code under section 921E of the *Corporations Act 2001 (Cth)* which states:

'You must act in accordance with all applicable laws, including this Code, and not try to avoid or circumvent their intent.'

It becomes difficult to comprehend how an AFSL and practitioners can comply with the onerous and time-consuming steps developed over a number of years to provide financial advice to a consumer, without being in direct conflict with these overarching obligations.

The existing, onerous and complex process cannot be done efficiently and cost effectively, which has seen the average cost (not what is charged to the consumer which is of course higher) to produce a comprehensive financial plan for a client rise to over \$5,000. The process of providing advice can likely only be done fairly for an individual of means rather than the community as a whole – due to the ever-growing cost of providing advice resulting from the *totality* of the increasing requirements to do so. This is just one example of the fundamental contradictions that have developed between what

financial planners have been asked to observe by legislation and the regulators on one hand, and the community's desire for accessible, affordable and professional financial advice on the other.

As such, the FPA believes that given this experience, certain provisions of the law and regulations are either:

- in desperate need of clarification,
- are redundant,
- or the architecture, form and substance of the laws and regulations as a whole must now be evaluated to determine whether it in fact can be expected to deliver the intended outcomes.

This is why the FPA welcomes the work of the ALRC in this area as a first step to untangling the web of interconnected and conflicting regulatory and legislative obligations facing the profession, so the legal requirements for practitioners can be simplified and made understandable.

To this point, the FPA developed a Policy Platform – Affordable Advice, Sustainable Profession (see **Appendix 1: FPA Policy Platform: Affordable Advice, Sustainable Profession** for summary of relevant recommendations) in 2020 to address a number of the legal and regulatory obligations which could be amended for the benefit of Australian financial advice consumers and the protection of the population more broadly. These include (in summary):

- 2.1 – General advice - The law should be changed to rename the term 'general advice' to 'product information' and 'strategy information', which better reflects the definition and is less misleading to consumers.
- 2.2 – Restricted and like terms - the use of the terms 'financial planner', 'financial adviser' and like terms (including 'financial coach', 'financial mentor' and 'financial guru') should be reviewed to determine if restrictions on the use of these terms are effectively protecting consumers from unqualified financial advice.
- 2.3 – Sophisticated investor - The law should be changed to revise the test for a 'sophisticated investor' by increasing the dollar- value threshold to an appropriate and contemporary level, providing a method for indexation and introducing a financial capability measure.
- 3.2 – Separation of product and advice - The law should be changed to separate the regulation of financial products from the regulation of financial advice.
- 3.3 – The future of licensees - The law should be changed to focus the AFSL system on the regulation of financial products and remove the requirement for an AFSL to cover the provision of financial advice.

Finally, the FPA believes that any proposals made by the ALRC should have consideration for the effects such changes would have to the availability, affordability, accessibility and the market conditions of professional indemnity (PI) insurance schemes for financial planners. It is imperative that these factors are taken into account in the formulation of any alterations to Australian corporation and financial services legislation and regulation, to ensure the ongoing sustainability and affordability of financial advice and adequate protections for consumers.

The FPA therefore makes the following recommendations to the ALRC for the conduct of its ongoing review.



Chapter 3 - Empirical Data

Question A1: What additional data should the Australian Law Reform Commission generate, obtain, and analyse to understand:

- a. legislative complexity and potential legislative simplification;
- b. the regulation of corporations and financial services in Australia; and
- c. the structure and operation of financial markets and services in Australia?

We commend the ALRC for the provision of numerous examples of legislative complexity contained within Interim Report A, along with useful data which highlights to stakeholders and decision makers the bulk of the current challenges faced by practitioners and consumers within the current corporations and financial services legislative framework. The data the ALRC has presented provides a compelling case for significant reform right across the areas of corporations and financial services law.

The FPA believes the ALRC has utilised a wide variety of data sources in its compilation of proposals and questions contained with Interim Report A. We would remind the ALRC that there is significant regulatory interpretation of the Corporations Act contained in ASIC Regulatory Guides, but also by other regulators such as APRA, ATO, AUSTRAC, TPB, ACCC etc.

In so far as the profession of financial planning is concerned, we believe it would be of use to the ALRC to have regard to Financial Planners and Advisers Codes of Ethics, for example the FPA Code of Professional Practice, but not only those produced by the FPA, but other peak bodies and how such obligations interrelate with the current and proposed corporations and financial services legislative framework.

In addition, it is worth considering the Corporations Act licensing regime for the provision of financial advice which has resulted in AFS Licensees also interpreting the law and acting as 'shadow regulators', placing an additional layer of rules on financial planners authorised under their licence. Due to the requirement for licensees to hold professional indemnity insurance under s912B of the Corporations Act, PI insurers often place restrictions and demands on financial planners.

To this point, it may be beneficial for the ALRC to consider the actual operation of laws as they impact consumers. For example, FPA members have indicated that just the provision of a piece of advice (not including the implementation of product solutions which can add months to finalise) can take on average 26 hours of direct time (spread over weeks to months depending on the client and the advice being provided) to complete and involves between 50 and 100 separate steps to be completed to mitigate legal and regulatory risk for the financial planner. This is the real cost to consumers of the current framework.

As highlighted in the Interim Report, there are 208 ASIC Regulatory Guides in force, resulting in more than 7,500 pages of additional regulatory guidance plus 200 Information Sheets (para. 3.161; 8.125), not to mention other Reports and Media Releases issued by ASIC. It is essential these are included in the data, as these are key documents for the financial planning industry, and as stated elsewhere in this response, often appear to introduce new requirements for licensees and financial planners.

In summary, the FPA believes the ALRC has generated, obtained and analysed significant quality data sources in the performance on its inquiry, noting the above additions.

Chapter 4 - When to Define

Question A2: Would application of the following definitional principles reduce complexity in corporations and financial services legislation?

When to define (Chapter 4):

- a. In determining whether and how to define words or phrases, the overarching consideration should be whether the definition would enhance readability and facilitate comprehension of the legislation.
- b. To the extent practicable, words and phrases with an ordinary meaning should not be defined.
- c. Words and phrases should be defined if the definition significantly reduces the need to repeat text.
- d. Definitions should be used primarily to specify the meaning of words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes.

Consistency of definitions (Chapter 5):

- e. Each word and phrase should be used with the same meaning throughout an Act, and throughout all delegated legislation made under that Act.
- f. Relational definitions should be used sparingly.
- g. To the extent practicable, key defined terms should have a consistent meaning across all Commonwealth corporations and financial services legislation.

Design of definitions (Chapter 6):

- h. Interconnected definitions should be used sparingly.
- i. Defined terms should correspond intuitively with the substance of the definition.
- j. It should be clear whether a word or phrase is defined, and where the definition can be found.

The FPA strongly believes that the complexity and verbosity of the current corporations and financial services legislation is unnecessary and often results in superfluous or contradictory language and requirements, which lay practitioners are often called upon to interpret in the course of the provision of their services.

The FPA believes that so far as is practicable, legislation should be written in plain language, which avoids convolution and emphasises simplicity for the reader in its construct. The merits of such an approach would enable legislation to incrementally approach a more 'user-friendly' status which would allow practitioners and consumers to readily understand the laws' intent and the obligations which stem from it.

Due to the breadth of the activities and resulting regulatory obligations of financial services, legislation is often lengthy, with an extensive jurisdiction intended to anticipate a multitude of circumstances, services, products and actions. The outcome of this approach has been a patchwork of legislative amendments, which over time have resulted in confusing, if not conflicting, interpretations and requirements. As noted in our introduction, a single piece of advice must consider regulatory interpretation by 8 separate regulators. While direct registration (with TPB) and regulation (FASEA) have been removed by Government, financial planners are still required to comply with their legal interpretations or rules at this point.



Therefore, the FPA agrees with the proposed definitional principles put forward by the ALRC with the paramount aim of reducing complexity in corporations and financial services legislation. However, it is vital that the language used allows professionals and consumers (not just lawyers and compliance specialists) to understand the law. We are particularly in agreement with the principles to:

- *enhance the readability of the legislation to ensure practitioners can adequately interpret, comprehend and implement their legal requirements,*
- *ensure consistent meaning of key terms across corporations and financial services legislation, and*
- *provide clarity on definitions that may be provided for words and phrases and where such definitions can be located in the legislation.*

The FPA recommends 'principles' in relation to 'when to define' - *Definitions should be used primarily to specify the meaning of words or phrases, and should not be used to impose obligations, tailor the application of particular provisions, or for other substantive purposes* – be expanded to specifically include a requirement that definitions not be used to provide exemptions to the application of particular provisions in the legislation.

Chapter 9 - Disclosure

Proposal A7: Sections 1011B and 1013A(3) of the Corporations Act 2001 (Cth) should be amended to replace 'responsible person' with 'preparer'.

We agree with the ALRC recommendation to use the word 'preparer' as it is more reflective of the purpose of Part 7.9. However, we note the different usage of various terminology, such as "responsible person" and "regulated persons" between various Parts in the Act, which we recommend be reviewed in light of the principles identified in Chapter 6 of the Review.

We note that this proposal relates to the preparation of product information, the FPA reinforces that a piece of financial advice (and all other financial advice disclosure) must be prepared by the financial planner, not the licensee.

Proposal A8: The obligation to provide financial product disclosure in Part 7.9 of the Corporations Act 2001 (Cth) should be reframed to incorporate an outcomes-based standard of disclosure.

The FPA broadly supports a shift in focus in relation to financial product disclosure from a prescription-based standard of disclosure to an outcomes-based standard of disclosure.

Since the commencement of the FSR it has been shown that the current legal obligations in relation to disclosure do not provide protection for consumers. Disclosure is the provision of information. It therefore relies on the information to be provided to consumers in a manner that is understandable for each consumer to increase the chance of consumers reading, digesting, and assessing the information prior to making a decision and acting on the information. The current system falls down as, in the main, disclosure documents are not easy for consumers to read or understand, and this discourages consumers from reading them. Financial products and contracts are complex and complicated. It can be extremely difficult for a consumer to understand and assess the product contract and information.

The interests of consumers would also be best served with a greater focus on consumer protection through understanding rather than attention on compliance with disclosure requirements. Consumer protection would be improved by the introduction of a positive obligation on the product issuer and distribution channel to ensure the consumer understands the information they have received and the product they are purchasing and requires the consumer to provide informed consent for the purchase to proceed. This positive obligation should include reference to the Cooling-off period for return of a financial product under s1019B of the Corporations Act 2001.

We are also concerned that the focus on harsh penalties for some disclosure provisions have just perpetuated a tick-a-box approach to compliance and deliver no consumer benefit. The experience of the last 10 years shows that if the penalty for breaching consumer disclosure laws is too high, industry diverts resources to compliance and the resulting disclosure documents become even more unreadable and lengthy. It is common practice for product manufacturers to just put "something" in place to show they are attempting to comply with a disclosure obligation rather than to ensure that disclosure is "clear, concise and effective" for the benefit of consumers. For certain product types, this is the clear strategy.

Consumers would be better served by understandable disclosure, and where this isn't possible, professional quality advice in the client's interest should be sought, rather than reams of incomprehensible disclosure. The current outcome of disclosure obligations aims to address every possible technical risk of breaching the law and does not serve the consumer need for readable advice documentation. Put another way, the legal requirements around disclosure have resulted in the legal drafting of lengthy documents that are cumbersome and difficult for consumers to



understand, and particularly difficult for consumers to assess how the information relates to their personal circumstances.

Therefore, the current disclosure regime does not adequately serve the interest of consumers sufficiently to allow customers to make fully informed choices.

To a certain extent, the design and distribution obligations (DDO), in particular the introduction of a new disclosure document, the target market determination, was designed to ensure that products are targeted at the right people; and a product intervention power for ASIC when there is a risk of significant consumer detriment.

While the target market determinations are in theory a positive step forward, their implementation has again been complex and legalistic. In reality, they are impossible for consumers to understand due to poor design, complex structure and the use of legalistic language and jargon. Additionally, while some products are complex and present a significant risk to consumers, these risks are often not appropriately represented or understood under the requirements in the DDO regime due to the tick a box implementation.

The interests of consumers would also be best served with a greater focus on consumer protection rather than attention on compliance with disclosure requirements. For this reason, the FPA supports the ALRCs proposal that consumer protection would be improved by the introduction of a positive obligation on the product issuer and non-advised distribution channel to ensure the consumer understands the information they have received and the product they are purchasing and requires the consumer to provide informed consent for the purchase to proceed. This positive obligation should include reference to the Cooling-off period for return of a financial product under s1019B of the Corporations Act 2001.*

*It is important to note that financial planners already have positive obligations to ensure their clients understand the advice they provide and any associated product information, and the client must provide informed consent for the advice to proceed, including any product arrangements under the *Financial Planner and Advisers Code of Ethics*. Any positive obligation placed on product issuers and their distribution channels should not include relevant providers (financial planners).

The DDO framework is intended to provide certainty to consumers of the products they are considering (via Target Market Determinations) and protection. The intent of the TMD is to document the intended objectives and risks of the product for a certain set of consumer circumstances, and to hold the issuer to account should the product not meet those document expectations. Feedback has been provided to ASIC regarding the quality and consistency of the Target Market Determinations, which needs to be addressed.

We also note the proposed Compensation Scheme of Last Resort provides limited compensation to victims of misconduct from an advice provider, but it does not extend to consumers impacted by product issuer misconduct. This is a failing of the proposed scheme.

Ultimately the current disclosure regimes fail to support consumers as adult learners of information. Adult learners have four main internal learning systems with a learning style preference which support their ability to understand and process information. Current disclosure is generally only targeted to one style of information understanding (incidentally the least common in the general population).

Adult Learning Styles

A Visual Person - The largest percentage of the population are visual. Visual people memorise things by seeing pictures and they understand things better and faster when they can picture it in their minds. Visual consumers may have trouble remembering long verbal instructions because



their minds may wander. Visual consumers care about how things look and they will care about how information is presented to them.

An Auditory Person - An auditory person learns easily with verbal instructions and may be able to repeat things back word-for-word. They learn best by listening to voice or audio and they respond well to the tone of voice or words used. Auditory consumers may prefer conversations and phone calls over text or written instruction.

A Kinesthetic Person - A kinesthetic person can be more emotive and respond better to the feelings they get from the information they are absorbing. They memorise things by walking through it or doing it in practice. They like to get a sense of how things work, have strong intuition and make decisions with their gut feeling. They may be more practical thinkers and generally prefer physical demonstration of information.

An Auditory Digital Person - An auditory digital person prefers working with information and data. They remember information by following steps, systems and processes. They can be analytical, introverted, and logically driven. Auditory digital consumers respond well to the traditional written step-by-step instruction or well-engineered style of disclosure.

From this perspective, disclosure should be defined broadly so that it can be provided in a “technology” neutral manner and using a variety of forms including: audio; video; interactive tools; icons; colour; imagery; infographics; quiz or interactive feedback; and graphs.

For example, video has exploded in popularity as a preferred method of learning and gathering information. Videos are highly visual and the amount of information that can be taken in far exceeds any other medium. Videos can communicate both verbal and non-verbal tone, visual, emotional and rich content which engages people and increases their ability to understand the content. According to Forbes in 2017, 95% of viewers are more likely to remember a call to action after watching a video, compared to 10% when reading it in text format. Not only is a video a powerful tool for teaching, but it's also very easy to consume. With the busy lifestyle that many adults are becoming accustomed to, they might not have the time or patience to read long advice or product descriptions or dig deep into written content. Videos provide them with an easy and comfortable way to digest and retain information while feeling more connected to the person delivering the message.

The FPA recommends the government should work with industry stakeholders to improve the take-up and effectiveness of electronic methods of disclosure, consent and transactions, including through standardised processes and forms and, where appropriate, by requiring industry participants to provide electronic options for clients.

Financial Advice Disclosure

The FPA is also concerned about the duplication and regulation in relation disclosure documents specifically for the financial planning profession, such as Financial Services Guides (FSG), Statements of Advice (SOA) and Records of Advice (ROA), Ongoing Fee Agreements (OFA), Fee Disclosure Statements (FDS), and fee collection consent obligations (in two different formats) which duplicate many of the same disclosure obligations, but with different format requirements which has been shown to significantly add to consumer confusion rather than clear disclosure and consent.

The Quality of Advice Review offers the opportunity to review and significantly simplify the personal financial advice disclosure regime to ensure it focuses on improving consumer understanding and outcomes.



Chapter 10 - Exclusions, Exemptions, and Notional Amendments

Proposal A9: The following existing powers in the Corporations Act 2001 (Cth) should be removed:

- a. powers to grant exemptions from obligations in Chapter 7 of the Act by regulation or other legislative instrument; and
- b. powers to omit, modify, or vary ('notionally amend') provisions of Chapter 7 of the Act by regulation or other legislative instrument.

On one hand, the financial services industry is incredibly broad and complex. Financial products can range from very simple savings accounts to highly structured and complicated derivative and synthetic products. As highlighted in Interim Report A, it also covers not only the manufacture and issuing of financial products, but also the provision of professional services such as financial planning. It is therefore incredibly complicated to create a single set of laws which cover every type of product and service without the ability to modify or vary specific parts of the law which may or may not be relevant to the provision financial services or issuing of products where a single legislative framework is trying to cover the whole industry.

On the other hand, as pointed out by the ALRC's review of the Corporations Act, exclusions, exemptions and notional amendments have added significantly to the complexity of the Act. They make complying with the Act very rules and tick a box based due to the complexity they add to the process.

The FPA therefore supports the Commissions concept of consolidated rules books (as proposed at Question A11) for particular sectors which are updated as a single instrument. This will significantly reduce the complexity of understand the legal obligations of a particular financial service, especially in the case of the financial planning profession.

Proposal A10: The Corporations Act 2001 (Cth) should be amended to provide for a sole power to create exclusions and grant exemptions from Chapter 7 of the Act in a consolidated legislative instrument.

Question A11: In order to implement Proposals A9 and A10:

- a. Should the Corporations Act 2001 (Cth) be amended to insert a power to make thematically consolidated legislative instruments in the form of 'rules'?
- b. Should any such power be granted to the Australian Securities and Investments Commission?

Proposal A12: As an interim measure, the Australian Securities and Investments Commission, the Department of the Treasury (Cth), and the Office of Parliamentary Counsel (Cth) should develop a mechanism to improve the visibility and accessibility of notional amendments to the Corporations Act 2001 (Cth) made by delegated legislation.

Proposals A10, A11 and A12 will be responded to below.

We acknowledge the complexities associated with making exemptions and notional amendments, further challenged by multiple parties having powers to initiate these. We agree that confusion and inconsistency sometimes results in the Minister and ASIC exercising power over the same subject matter.



The ability for non-lawyers to be able to access all the required components to interpret a particular section of the Act is becoming increasingly difficult, creating further risk, reliance and application issues.

The FPA recommends removing the exclusions and exemptions from the Act itself to promote flexibility, navigation and understandability. We endorse the proposed concept of a single legislative instrument, being fed through from other source legislative instruments as an alternative.

Consolidated rule books for each sector, particularly for the financial planning profession, would enhance the navigation of the legal requirements and provide a positive legal structure to simplify the regulatory requirements for providing financial advice.

The move to consolidated rules for the Anti-Money Laundering and Counter Terrorism Financing Act (AML/CTF Act) provides a strong case study for this concept. It is worth noting that AUSTRAC complemented this change by significantly improving and simplifying the content, language, navigation and interconnectivity of the information its website about the AML/CTF obligations in the law and Rules Compilation.

The FPA is extremely supportive of navigation tools and assistance, but caution on the importance of maintenance and currency of whatever schematical aids are used.

The Act and all associated ancillary references are extremely difficult to navigate, as acknowledged throughout the Interim Report and aids such as linkages to relevant legislative instruments, 'footnote' style references, summary table of all relevant linkages etc should be considered.

The FPA supports the benefits of the concept of 'rules compilation', however, we question whether these need to be a separate level in the proposed hierarchical structure and the merits of separately referring to them as 'rules' if contained in a legislative instrument.

We are also concerned about the volume of current regulatory guidance provided by ASIC and the interaction and consistency of the Regulator's Information Sheets and Regulatory Guides, etc with the legislation.

The basis for the inclusion of rules, possibly via thematic legislative instruments, appears to serve multiple key purposes including removing content from the Corporations Act to simplify it, keeping like information together on a thematic basis, allowing for more responsive updates and helping promote a principles based revised Corporations Act. We acknowledge the hierarchical approach and understand there will be further opportunity to explore these concepts in Interim Report B. It is unclear as to why a separate term, such as 'rules' needs to be referenced if these would be included in legislative instruments.

We are concerned with the current volume and extent of 'guidance' that financial planners and associated industry professionals already must rely on in order to provide appropriate, compliant advice. The financial advice industry relies heavily on Regulatory Guides (RG), Media Releases (MR) and Information sheets (INFO) for guidance on how ASIC interprets the law. This is in addition to other items such as Reports and Consultation Papers.

As an example, ASIC states "Regulatory guides give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law



- describing the principles underlying ASIC's approach
- giving practical guidance (for example, describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).³

The inclusion of rules, as contained in Proposal A11, in addition to the Act itself and associated legislative instruments (as proposed above) may create another level of reference in order for the financial advice industry to be able to understand how the law should be applied in addition to the RGs and other items mentioned above.

Not only are many of these documents voluminous and lengthy, cross referencing between the guides and the regularity of updated and new guides adds to the burden of needing to keep abreast of additional rules and guidance. Further, in its various guidance, ASIC sometimes enters a grey area between "clarifying" how the law should operate and extending/tightening or even introducing new guidance or rules through the RGs. Also, they can contain inconsistent definitions contained in the primary law.

The Commonwealth may pass laws as it seems fit. ASIC then publish guidance for the financial services industry to explain how it will interpret those laws. A financial services licensee must comply with all of the laws, including ASIC Regulatory Guidance.

Section 912A of the Corporations Act 2001 states:

General obligations

(1) A financial services licensee must:

- a. *do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly*

Difficulties arise when there is significant amount of legislation and regulations which have built up over a number of years, and substantially, successive new obligations a licensee must observe *directly conflict* with this general obligation which was enacted well before the successive amendments.

Legislation, and regulations are often lengthy and complex to accommodate a range of scenarios, products and services.

It is entirely at the discretion of the legislature and the regulator to require a financial planner to comply with very onerous and time-consuming steps to provide financial advice to a consumer. However, an onerous and complex process cannot be done **efficiently** and cheaply. The process of providing advice can also likely only be done **fairly** to an individual but not the community as a whole as the higher cost of providing advice, given the *totality* of the requirements to do so, now excludes many.

Therefore, there is a fundamental contradiction in what each licensee has been asked to do by the legislature and the Regulator.

We acknowledge that ASIC is currently working on improving these challenges in the financial planning profession with the introduction of the Financial Advice Hub⁴, aiming to make it easier to find relevant information, however, this doesn't change the significant number of Regulatory Guides or address any of the above issues.

³ <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/>

⁴ <https://asic.gov.au/regulatory-resources/financial-services/financial-advice/>



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The FPA believes certain provisions of the law and regulations, having now been tested, are now in need of clarification or are redundant and the architecture, form and substance of the laws and regulations as a whole must now be evaluated to determine whether it in fact can be expected to deliver the intended outcomes. Consolidation of laws and regulations in rules books will serve to assess the appropriateness of laws for a particular financial service – such as the financial planning profession - or product sector.

In light of the above, clear authority and mandates are needed for timings and consultation to minimize the challenges of key decisions being overturned not long after coming in force (as has happened several times over the past 10 years in the financial planning profession) and the industry being kept in the dark and left with minimal time to prepare for new obligations or given unreasonable and limited consultation opportunity. These challenges have led to the voluminous change over the last 24 months as the Royal Commission recommendations were implemented and, on some occasions, significant investment had been made by industry participants based on rules that were only to be backflipped not long after implementation. Recent examples include moving goal posts on the Design and Distribution obligations and Breach and Incident reporting rules. These challenges are draining on resources and costs, only disadvantaging consumers with the cost and accessibility of advice.

On the other hand, a recent example of the benefit of the regulator being able to take rapid action in relation to modification or relief powers has been demonstrated during COVID-19 outbreaks and subsequent lockdowns. ASIC was able to quickly apply regulatory relief to assist the financial planning profession, this providing financial planners the ability to assist consumers more efficiently and cost effectively in a time of immense confusion, stress, and financial hardship. This was able to be achieved in periods where Parliament was unable to sit and demonstrate an example of where 'rules books' may not have been able to be amended quickly enough.

For this reason, we believe it is important not to confuse policy creation with regulatory relief in the above matters.

The FPA's support for ASIC having delegated authority for rule make power should be to allow the Regulator to provide relief when necessary, not create additional compliance obligations.



Chapter 11 - Definition of 'Financial Product Advice'

Proposal A13: The *Corporations Act 2001* (Cth) should be amended to:

- a. remove the definition of 'financial product advice' in s 766B;

The FPA supports the removal of the definition of 'financial product advice' in s766B.

- b. substitute the current use of that term with the phrase 'general advice and personal advice' or 'general advice or personal advice' as applicable; and

The FPA supports the substitution of the term 'financial product advice' with 'personal advice'.

- c. incorporate relevant elements of the current definition of 'financial product advice' into the definitions of 'general advice' and 'personal advice'.

See discussion below

Proposal A14: Section 766A(1) of the *Corporations Act 2001* (Cth) should be amended by removing from the definition of 'financial service' the term 'financial product advice' and substituting 'general advice'.

The FPA supports the removal from the definition of 'financial service' the term 'financial product advice'.

Proposal A15: Section 766B of the *Corporations Act 2001* (Cth) should be amended to replace the term 'general advice' with a term that corresponds intuitively with the substance of the definition.

As discussed in detail below, the FPA supports a clear separation of financial advice and product regulation, and the replacement of the term 'general advice' with the term 'financial product information and promotion' or 'financial product sales material'.

General Advice Definition

The FPA has long been concerned about the definition of 'financial product advice' - as well as the framing of general advice – and how this definition affects disclosure and outcomes for consumers. We have stated our concerns through various independent and Government inquiries over the years.

While changing the name of 'general advice' is a positive step, the FPA suggests this is not just about the label but also the defining of general advice and personal advice in the *Corporations Act*, the current general advice warning, and the regulatory exemptions available to product issuers in the *Corporations Regulations*. Hence, proposals A13, A14 and A15 will be considered jointly, as these issues must be addressed holistically.

We are currently observing an increasing prevalence in the industry of general advice only business models which appear to be designed so that certain time-consuming and costly regulatory obligations required when providing personal advice do not have to be complied with.

In addition, calling information 'general advice' in disclosure documents provided by product issuers is likely to mislead consumers.

In our submission to the Financial System Inquiry's interim report, we provided extensive commentary on the role that financial advice ought to play in a reframed financial services system. We addressed the issue of 'general advice' in particular, and stated that:

"Framing 'general advice' as advice plays into the behavioural aspects of financial decision-making by giving the impression that the 'advice' has a reasonable basis or is appropriate for the client, and thereby exposes retail clients to decisions made under uncertainty about the regulatory framework for that advice."

Furthermore, in our submission to Senate Legislation Economics Committee inquiry on the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, we stated that:

"Under the current definitions of personal advice and general advice it is very easy for financial planners and other AFSL representatives, such as call centre operators, to inadvertently overstep the mark into personal advice. However, regardless of the legal boundaries of personal and general advice definitions, it is the consumers' interpretation of the advice that ultimately determines whether they are being provided general product facts or information that relates to their own circumstances. Anecdotal evidence shows that it is common for individuals to interpret general advice as personal advice because it is relevant to their circumstances at the time it is provided. This is where incentives to sell products can mislead consumers."

While we draw from the experiences of our members as well as our observations of the financial services sector, we also take note of ASIC's Report 384 – Regulating Complex Products. In that report, ASIC stated that:

"Our research has indicated that marketing information plays a particularly strong role in product distribution and may influence investors' decision making more than other product disclosure. In particular, when investors approach product issuers or other intermediaries responsible for selling products directly, rather than going through advisers, the information contained or implied in product issuers' marketing information is often the first, and may be the only, information that investors use to decide whether or not to invest in that product."⁵

Commissioner Hayne seemingly shares the FPA's concerns about general advice as indicated in his summation of case study evidence presented at the Royal Commission into misconduct in the banking, superannuation and financial services industry:

"It may readily be accepted that the line between personal advice and general advice may not always be marked clearly or easily. But one important feature of the distinction drawn by the Corporations Act between personal advice and general advice is whether the advice has been prepared without 'taking account of the client's objectives, financial situation or needs'. Personal advice is given where the adviser has considered one or more of the person's objectives, financial situation and needs, or a reasonable person might expect the

⁵ ASIC, 'Report 384 – Regulating Complex Products' (January 2014), at [46]



provider to have considered one or more of those matters. The central purpose of the general advice warning that staff members were supposed to offer was to mark a boundary between what had been said and done and what was about to be said so that personal advice was not given. More precisely it was to convey to the customer that whatever you, the customer, have just told me, the staff member, is entirely irrelevant to me and will wholly be ignored by me when I tell you what I am about to say. But why would the customer believe that? Why would the customer think that, having learned about at least some aspects of the customer's objectives, financial situation or needs, the staff member would go on to tell the customer about a product that was not suitable to whatever objectives, situation or needs had been revealed?"⁶

We have stated our concerns through various independent and Government inquiries making recommendations to redefine general advice through:

- The FPA White Paper on the Future Profession and Ten Point Plan
- The FPA Policy Platform: Affordable Advice, Sustainable Profession
- The Treasury consultation on the exposure draft of the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014
- The Senate Economics Legislation Committee inquiry into the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014
- The Financial System Inquiry Interim Report and Final Report
- The Treasury consultation on the Financial System Inquiry Final Report
- The Parliamentary Joint Committee on Corporations and Financial Services inquiry into proposals to lift the professional, ethical and education standards in the financial services industry
- The Senate Economics Reference Committee's inquiry into the Scrutiny of Financial Advice
- Productivity Commission Inquiry into Competition in the Australian Financial Services
- Royal Commission into misconduct in the banking, superannuation and financial services industry
- ASIC Consultation on General advice: Alternative labels for consumer testing

Disappointingly, there remain several outstanding recommendations from these enquiries to revise the definition and name of general advice. These include:

- The Financial System Inquiry Final Report recommendation 40 to "[r]ename 'general advice' and require advisers and mortgage brokers to disclose ownership structures."

⁶ Royal Commission into misconduct in the banking, superannuation and financial services industry, Final Report Volume 2, page 95, 4 February 2019



- The Final Report of the Parliamentary Joint Committee on Corporations and Financial Services inquiry into proposals to lift the professional, ethical and education standards in the financial services industry:
 - Recommendation 1: *“The Committee recommends that the term ‘general advice’ in the Corporations Act 2001 be replaced with the term ‘product sales information’ to better reflect the nature of that information.”*
 - Recommendation 2: *“The Committee recommends that the term ‘personal advice’ in the Corporations Act 2001 be replaced with ‘financial advice’ to better reflect the nature of that advice.”*
- Productivity Commission’s Inquiry into Competition in the Australian Financial System. recommendation 10.2 to *“[r]ename general advice to improve consumer understanding”*. Specifically, the Productivity Commission recommended:
 - *“General advice, as defined in the Corporations Act 2001 (Cth), is a misleading term and should be renamed. Any replacement must ensure that the term ‘advice’ can only be used in association with ‘personal advice’ — that is, advice that takes into consideration personal circumstances. Consumer testing of alternative terminology is required to ensure that misinterpretation and excessive reliance on this type of information is minimised. Including time for consumer testing and a transition period to enable industry training and adjustment, a new term should be in effect by mid-2020.”*

We believe that there is widespread support for a change in the definition and name of general advice, as well as a change in the architecture of financial services law to clearly distinguish between;

- services provided in the client’s best interests by a financial planner, and
- information provided by a product issuer or their agent.

The FPA welcomed the 2019 consumer testing undertaken by the Regulator and urged ASIC to keep in mind Commissioner Hayne’s summation of ‘general advice’ and the ‘general advice warning’ throughout this project – *“why would a consumer believe the warning?”*.

A multi-faceted approach to determining an alternative general advice label

A perfect replacement label and definition for ‘general advice’ is difficult to establish. In our submission to the Financial System Inquiry Interim Report, we made the following observations:

“A major obstacle to effective separation of financial advice and product information is the wide variety of conduct that is presently described by ‘general advice’. It is difficult to imagine a uniform set of regulations which can effectively regulate all forms of information about financial products within every single context these discussions or communications may arise. Part of the problem is revealed in the choice between describing general advice as ‘product information’ or ‘sales information’. Both of these terms are inadequate to describe and apply to the context of each instance where financial product information that is not a recommendation based on personal circumstances is provided.”

However, we recognised that better clarity in the guidance regarding ‘general advice’ in the regulations would only be part of the overall change that is required to protect consumers, enable better comprehension and promote better outcomes. We also wrote that:

“For the purposes of protecting consumers from misrepresentations about the suitability of product information for their circumstances (whether those misrepresentations are overt or contextual), a clear separation between financial advice and product information is required. In the long term, providing meaningful regulatory categories for different forms of financial product information is a very difficult but necessary project. These categories are required to appropriately and effectively regulate different communication channels through which consumers access information about financial products.”

It is important to remember that under the current legislative framework there is factual information, ‘general advice’ and ‘personal advice’. ‘General advice’ is factual information or opinion which includes a qualitative judgement about a financial product or a class of financial product that was intended to influence (or could have reasonably been regarded to have intended to influence).

This makes ‘general advice’ confusing for consumers as it is not just a label but is a multi-faceted scenario dependent on a number of factors including:

- The ‘advice’ provided – is it factual information about a product or the tax system, marketing material intended solely to sell a product, strategic information about financial matters, or is it just an opinion? What was the subject matter of the ‘advice’?
- Who provides the ‘general advice’ to the consumer – is it an individual representing the interests of the product issuer, or a financial planner representing the interests of the consumer, for example?
- The intent behind the provision of the ‘general advice’ – is it to inform in the selling of a product or help the consumer make an informed decision about some aspect of their interaction with certain persons?
- The context in which the information is provided – is the ‘general advice’ given in a setting which suggests to the consumer that it will be appropriate for to their personal circumstances?

While changing the name of ‘general advice’ is a positive step, the FPA suggests this is not just about the label but also the definitions of each of general advice, financial product advice, personal advice and factual information in the Corporations Act, the current general advice warning, and the regulatory exemptions available to product issuers in the Corporations Regulations.

Principles for alternative general advice label

The FPA recommends guiding principles be used to identify an appropriate alternative label for ‘general advice’.

The alternative label for ‘general advice’ must take into account the likely interactions a consumer would have when receiving ‘general advice’, the subject matter of such interactions, the likely

knowledge base of most consumers in relation to financial matters, and the high probability that this would create a power imbalance between the consumer and the person providing the information.

The representative has detailed knowledge of the subject matter. Even if the representative has no prior information about the consumer, the questions asked by the consumer often disclose details or even hints about the individual's personal circumstance. Representatives also usually ask pertinent questions of the consumer, sometimes to ensure they are not providing them with information that is inappropriate or unnecessary for the individual, however this type of interaction naturally leads the consumer to believe the information is being provided because their individual circumstances have been considered by the representative.

Hence, the FPA suggests a set of principles be developed to ensure the alternative label for 'general advice' delivers the intended consumer protection outcomes. For example:

- The alternative label must not include 'advice' or 'like terms'. This is consistent with s923C of the Corporations Act for the use of the terms financial planner and financial adviser.
- It should be considered the 'least confusing' label for consumers (rather than the clearest)
- It must be clear to the consumer that their individual circumstances have not been considered, and whose interest the provider of the 'general advice' is representing.
- There must not be a disconnect between the financial services representative's interpretation of the meaning of the label and the consumer / lay person's understanding of what the label means.
- It must be unambiguous and clear to the consumer that what is being provided to them is general in nature.
- The label selected must be based on the common understanding of its meaning by consumers and use in everyday language.
- The legal definition to be included in the Corporations Act must strictly emulate the common understanding of the alternative label's meaning by consumers, use in everyday language, and reflect/mirror well-established and supported dictionary meanings.
- The alternative label must consider and reflect the common and positive interactions between consumers and representatives, and hence whether one label can truly represent the services consumers need and are seeking.
- The alternative label must be simple.
- It must have a clear and simple warning that consumers are encouraged to truly heed.
- The alternative label and its requirements make it clear to the consumer the purpose or intent of that 'advice', and whose interests the advice provider is representing – the consumer's or the product issuer.



The FPA stands by our long-held position that the only 'financial advice' provided to consumers must be 'personal advice' provided by a registered financial planner who meets the legal requirements in s923C of the Corporations Act; and that 'financial product advice' be redefined as 'personal financial advice'. Advice to a person may not specifically relate to a specific financial product in particular (though it may relate to a class of products), such as in salary sacrificing advice. Specific financial products are merely aspect that may or may not be relevant to the advice sort by the client and provided by the financial planner. Hence the label and definition of 'personal financial advice' should stand alone and should not be reliant on financial product.

The FPA has previously agreed with ASIC's preliminary view that there is a "*broad nature of conduct that currently falls under the label of 'general advice'*". However, as clearly indicated in ASIC's research and by the evidence provided at the Royal Commission, significant consumer harm is experienced when 'general advice' is provided by front line sales staff of product issuers.

When considering an alternative label to appropriately name 'general advice', care must be taken to ensure the intended consumer protections are achieved and the requirements that replace the current 'general advice' regime are simple for consumers to understand. Law makers must be certain that there would be no unintended consequences that disadvantage consumers in determining an alternative label and should consider the multi-faceted nature of 'general advice' (as discussed above).

The FPA strongly believes that it must be made clear to a consumer when 'general advice' is provided with the intent to 'sell', to encourage the consumer to heed the warning regarding that information.

The FPA recommends:

- ***Frontline staff, such as sales staff, of product issuers who are not authorised to provide personal advice, should be prohibited from providing 'general advice'. Such representatives should be restricted to the provision of factual information only.***
- ***The FPA recommends the specific label of 'financial product sales material' or 'financial product information and promotion' be given to the information provided by product issuers' sales representatives to sell a product to clearly show consumers the nature of the information being provided.***
- ***The provision of financial product sales material' or 'financial product information and promotion' by product issuer representatives should be monitored by ASIC under its new product regulation powers, to ensure 'advice' is not being provided to consumers by product issuer representatives.***
- ***A new warning should be created for product issuers' representatives providing 'product sales material' to sell a product. This warning should make it clear that the representative is representing the interests of the product issuer and is providing the 'information' to sell a product.***

Product sales currently conducted under the guise of 'general advice' are provided by representatives of product issuers and individuals representing the interests of product issuers. This type of 'general advice' is provided with the intent of selling the product and is not provided in the consumer's interest. This is not advice, this is financial product selling.

The complexity of identifying an appropriate alternative label for 'general advice' lies in its definition. Based in the current definition, general advice is not 'factual information'. 'General advice' falls under the definition of financial product advice, which is a statement that involves a qualitative judgement or opinion about a financial product or a class of financial product that was intended to influence (or could have reasonably been regarded to have intended to influence).

However, consumers understand and rely on the dictionary meaning of certain words. Therefore, it is important to consider labels that clearly represent the intent or purpose of the 'general advice' being provided and the consumer's understanding of that label. For example:

- The dictionary meaning of 'advice' is "*an opinion that someone offers you about what you should do or how you should act in a particular situation*"; and "*guidance or recommendations offered with regard to prudent future action*". Important to this meaning is the definition of 'prudent' – "*acting with or showing care and thought for the future*". This implies that the meaning of 'advice' shows that it is intended to help the recipient, not the provider of the 'advice'.
- However, and importantly, the dictionary meaning of 'sell' is defined as "*the job and skill of persuading people to buy things*"; and to "*give or hand over (something) in exchange for money, persuade someone of the merits of, trick or deceive (someone)*". To persuade a person is "*to make someone do or believe something by giving them a good reason to do it or by talking to that person and making them believe it*". The definitions of 'sell' and 'persuade' clearly demonstrate that consumers would understand that a representative who is 'selling' is not acting in the interests of the consumer.

Consumers expect any 'advice' they are provided with to have been given with their best interests in mind. Any material a product issuer publishes by advertising, marketing or otherwise 'selling' a financial product is not, and never should be understood to be 'advice'. This distinction must be made clear in the alternative label and warning for 'general advice'.

As stated above, the FPA recommends frontline staff and other representatives of product issuers should be prohibited from providing any 'advice' and should be restricted to the provision of 'factual information'. This type of 'information', which should be labeled 'financial product information and promotion' or 'financial product sales material', and should be accompanied by a clear and strong warning as to the intent and purpose of the 'financial product information and promotion' / 'financial product sales material'. ASIC should regulate and monitor the provision of 'financial product information and promotion' / 'financial product sales material' under its product regulation powers.

As summated by Commissioner Hayne, it is unrealistic to expect a label and warning as to the limitations of the advice would be understood and heeded by a consumer, if the provider of the 'general advice' has received information about the consumer's circumstances.

All interactions between a consumer and a financial services representative will involve the discussion of some of the consumer's circumstances (their objectives, situation and needs), either directly or indirectly. For example:



- A consumer contacts a financial services provider for the first time to enquire about a specific product, such as a home mortgage. The fact the consumer is seeking information about a home mortgage gives the provider information about the consumer's circumstance – they are purchasing a home, the amount they would like to borrow, the family status of the consumer, potentially the income level of the consumer, etc.

Hence, there is a high risk that consumers will ignore the message in the alternative label and warning unless it is clear by the label and warning that the 'general advice' is being provided either in the interests of the consumer or the provider.

Consumers may find it difficult to understand the nature and limitations of the advice due to the following factors:

- the complexity of the product and the information provided
- the financial capability of the consumer
- the delivery of the 'general advice' – for example, when the advice is provided by a friendly and approachable representative of a product issuer it may cloud the consumer's judgement as to the limitations of the advice
- when the consumer is an existing customer of a product issuer and therefore the representative already has information about the consumer; or, as discussed above, the consumer may have provided the representative with information about themselves.
- when it is unclear that the 'general advice' is being provided to sell a product.

The FPA recommends the warning for 'financial product information and promotion' / 'financial product sales material' must clearly state that:

- ***it is not 'advice', it is material which describes the financial product provided for the purposes of assisting any person to consider whether to acquire that product***
- ***the consumer's circumstances have not been considered in the 'product sales material' / 'financial product information and promotion' provided. The 'material' is general and 'non-personalised' in nature.***
- ***the consumer themselves must consider whether the features of the product provided in the 'product sales material' are suitable for their circumstances, and***
- ***the 'product sales material' provided is about a complex financial product and the consumer should consider seeking professional financial advice provided in their interest and tailored to their individual circumstances by a registered financial planner to ensure the product meets their needs.***

Where ‘financial product information and promotion’ / ‘financial product sales material’ is being provided in the product issuer’s interest to sell a product, the warning should be clearly and prominently provided prior to the delivery of the ‘financial product information and promotion’ / ‘financial product sales material’ in sales seminars, product newsletters and brochures, articles, videos, websites and webinars, and in call centre and shop front interactions with consumers.

Attachment 1 is FPA’s feedback on alternative ‘general advice’ labels previously proposed by ASIC. The FPA opposed many of the alternative labels as they would least support consumer understanding of the nature and limitations of the ‘advice’ being provided. Our reasons for these views are also provided in the table.

The FPA has provided dictionary meanings of the alternative labels as an indication of the common consumer understanding of the proposed words, as well as a clear indication of the FPA’s support for or opposition of the label with reasons.

The FPA opposed many of the proposed alternative labels as they would not address the consumer confusion and consumer protection issues of the existing ‘general advice’ regime.

As stated above, the FPA believes a multi-faceted approach is needed to improve ‘general advice’ outcomes for consumers and supports the alternative terms ‘financial product information and promotion’ or ‘financial product sales material’.

To facilitate this change, the licensing regime and the authorisations provided under an AFSL should also be reviewed, particularly in relation to ‘class of product’ only authorisations which bare little resemblance to the spectrum of advice provided by professional financial planners to their clients.

Personal Advice

The definition of ‘personal financial advice’ should not be based on the recommendation of a financial product or class of financial product. The word ‘product’ should not be included in the definition of personal financial advice.

The FPA recommends ‘personal financial advice’ be defined as a client-centric professional service, not a product, that can incorporate advice on financial matters based on a client’s circumstances and financial goals and may include information about a financial product or class of financial product.

Personal financial advice should stand alone, ideally outside the Corporations Act, and include:

- a. Appropriate advice disclosure documentation commensurate to financial planners’ professional obligations
- b. Professional standards
- c. Registration obligations
- d. Represents the client’s interest – advice in the best interest of client

The Structure of the Corporations and Financial Services Law

Significant changes in the regulatory environment over the last five years – particularly the introduction of the Design and Distribution Obligations (DDO) for product issuers and distributors; and legislated education and professional standards for financial planners – provide a tremendous opportunity to ensure the law gives consumers clear delineations, protections and redress between financial products and professional personal financial advice.

The FPA notes Figure 11.1: Comparison of the regulation of financial product advice and other financial services on page 448 of Interim Report A.

To support a clear definition of ‘personal financial advice’ and ‘financial product information and promotion’ / ‘financial product sales material’ the FPA supports the ALRC’s call to remove Chapter 7 from the Corporations Act as a standalone Act and recommends further discussion on the following potential future high-level structure of the corporations and financial services law.



Benefits of a robust and compelling advice regulatory environment that clearly separates financial advice and financial products include:

- Consumer:
 - Reduced complexity resulting in the provision of quality advice available to more consumers
 - Improved and more appropriate disclosure
 - Clear that they are receiving sales information or advice
 - Clearer lines of accountability for misconduct (i.e. between advice provider and product issuer)
 - Improved accessibility to advice
- Regulatory oversight – Advice:
 - Clearer as to whether entity/individual is providing advice or not.
 - All advice providers (except for exempt fund managers) would be caught –including intra-fund – it is either advice or it is not; no grey areas



- Regulatory oversight – product sales distribution:
 - DDOs
 - Financial product information and promotion
 - Increased accountability for consumer interactions
 - Increased ability to identify gaps in regulatory cover
- Financial advice providers
 - Requirements based on service provided to client
 - Reduce regulatory complexity and costs
 - Effective regulation focused solely on advice
 - Regulatory requirements focus on the advice service provided, not the product



Chapter 12 - Definitions of 'Retail Client' and 'Wholesale Client'

- Question A16: Should the definition of 'retail client' in s 761G of the Corporations Act 2001 (Cth) be amended:
- a. to remove:
 - ii. subsections (5), (6), and (6A), being provisions in relation to general insurance products, superannuation products, RSA products, and traditional trustee company services; and
 - iii. the product value exception in sub-s (7)(a) and the asset and income exceptions in sub-s (7)(c); or
 - b. in some other manner?

Generally, we accept the recommendations by the ALRC and to retain the distinction between wholesale and retail clients.

We are concerned that the lack of disclosure and conduct obligations that do not apply for wholesale clients puts clients at risk in those cases where clients are inappropriately classified as wholesale, when they have a lack of the necessary knowledge, understanding and experience of financial matters as intended by the legislation for these measures to apply.

Due to the inclusion of a client's property (such as the principal residence) and a general increase in earnings over the years, with no increase in the legislated thresholds for client classification, many individuals now fall into the definition of a wholesale client, that would not have been the case at the time of the original drafting the legislation.

We recommend financial planners who are not relevant providers be compelled to comply with the professional and ethical obligations that apply to financial planners providing advice to retail clients (relevant providers), or such obligations be inserted into the Corporations Act.

Wholesale clients are permitted to access more complex and sophisticated financial products and strategies. However, the *Financial Planners and Advisers Code of Ethics* only applies to those financial planners authorised to provide personal advice to retail clients ('relevant providers'); and the professional standards relating to education and training also do not apply if the financial planner is not a relevant provider. Hence the professional and ethical standards do not apply to financial planners advising those investors that typically can access more complex and sophisticated products and strategies due to the wholesale client thresholds. This puts these clients at significant risk of harm when the community expects a certain level of professionalism, ethics and education is expected of a financial planner. Consumer protections and compensation through AFCA and under the new breach reporting regime do not apply to wholesale clients.

We do not recommend the Corporations Act s761G be amended to remove the net wealth or income test and product value test but do recommend these be reviewed.

In relation to the tests discussed below, we recommend it be made explicit that each individual must be assessed as a wholesale investor on their own merit – assets cannot be combined to reach the required value. Two vulnerable, individual investors in need of regulatory protection will still be at risk should they be combined into one investor purely to meet the wholesale client test.

Net wealth or income test

According to modelling undertaken by the Australian National University⁷, at the time of the implementation of the wholesale asset/income test in 2002, only 1.9 per cent of the population were

⁷ Source: <https://insideinvestor.com.au/wholesale-investor-boom-sparks-concerns>



eligible to be classified as wholesale clients. However, this figure has risen to 16 per cent in 2021 (3.25 million individuals) and if unchanged could rise to 29.1 per cent of the population by 2031 (6.78 million individuals) and by 2041, 43.6 per cent of the population (11.5 million individuals).

We recommend this test be retained with the following amendments.

Net asset value

We recommend the net assets test:

- *be brought in line with the general Transfer Balance Cap (TBC), currently \$1.7 million and associated indexation of this. Application of the TBC limit to the assets test should be to the individual (e.g. \$1.7m); or double the TBC limit (e.g. \$3.4m) for a couple.*
- *include the net asset value of the home only, and*
- *exclude the value of a non-commutable defined benefit pensions/income streams.*

Industry consultation should occur as to how best to deal with transitional arrangements for existing clients being treated as wholesale, for example compliance with the informed consent recommendations outlined below in addition to the recommended increases in assets and income.

Income

We recommend the current income threshold be increased to \$350,000 and defined as 'adjusted taxable income'.

Indexation of the current \$250,000 income test (which remains unchanged from the original legislation) to Average Weekly Ordinary Times Earnings (AWOTE) results in a current equivalent income of approximately \$322,000.

'Income' is currently not defined in the Act and so is often interpreted differently – for instance, taxable income versus assessable income. 'Adjusted taxable income' (ATI) is utilised to calculate eligibility for tax offsets, Medicare levy surcharge, spouse super contributions tax offset and private health insurance tax offset.

We recommend the definition of 'income' be amended to 'adjusted taxable income' (A New Tax System (Family Assistance) Act 1999 Schedule 3), which includes reportable employer superannuation contributions (but excludes mandatory superannuation contributions).

We recommend this threshold be indexed in line with AWOTE when the transfer balance cap adjusts and increases by \$5,000 increments.

Product value test

We recommend the product value test remain and be increased from \$500,000 to \$1 million.

However, there are particular matters that need to be clarified, such as key areas evidenced by the Storm Financial case, for example:

- Whether the test should include the amount advised upon versus the amount invested
- Separate treatment for members of a couple, or joint investors.
- Treatment of advice provided at different points in time.

Other recommendations

We recommend the following in relation to all wholesale clients:

Wholesale client warning

We recommend a wholesale client warning, clearly and specifically detailing the consumer protections that will be forfeited as a wholesale client, is to be provided prior to informed consent being given and the provision of a financial service

This warning, to be provided to clients prior to investing in a product/at the time of receiving financial advice should state:

- Products offered to wholesale clients are typically more complex and maybe associated with higher risks.
- It is assumed the client has the requisite financial knowledge and experience to understand the associated risks and products
- The protections associated with being classified as a 'retail client' are not available to wholesale clients.

Informed consent

There is currently no consent required by the client to be treated as a wholesale client and so no knowledge is required as to what the client is forgoing in terms of protections afforded to retail clients, regardless of the client's level of financial literacy. This results in greater risk being borne by the client not only due to the lack of retail protections, but as the products offered to wholesale clients are often riskier and time sensitive.

We recommend informed consent be required for a client to be treated as 'wholesale', with opt-in to reconfirm consent every two years

The *Financial Planners and Advisers Code of Ethics 2019 Explanatory Statement* defines informed consent as "consent requires that the client understands and agrees to the arrangements. You will need to be satisfied of this and have reasonable grounds to be satisfied" [para 43].

The informed consent should allow the financial services provider to be satisfied that the client understands the following matters, particularly in comparison to if they were treated as a retail client:

- those disclosure documents the client will not receive
- restrictions on accessing dispute resolution schemes
- those requirements of the Corporations Act that the representative does not have to comply with
- the *Financial Planners and Advisers Code of Ethics* does not apply unless the provider is a relevant provider also providing advice to retail clients
- the client has the requisite financial literacy and experience to make suitable financial decisions and understand the risks associated with the products available to wholesale clients

Consistency across all products and services

We recommend the Corporations Act be amended for consistency between Chapters 6D and 7, so the wholesale test is applied uniformly across all financial products and services and securities. This includes the above recommendations.



It is important that financial planners, brokers, intermediaries and issuers of securities are all operating from the same classifications and a client defined as 'wholesale' would be classified as such across all products and services.

General insurance products, superannuation products, RSA products and traditional trustee company services

We recommend that the Corporations Act/law continues to treat individuals as retail clients for the purchase of general insurance products, superannuation products, RSA products and traditional trustee company services.

Currently wholesale clients cannot be advised by wholesale advisers to buy, hold or sell and what to do with their retail super. Allowing superannuation and associated contribution strategies/ recommendations to be provided to individuals as wholesale clients may have significant unintended consequences for individuals' superannuation assets, including in relation to mandatory contributions. This should continue to occur under the retail personal advice framework to ensure consumers are appropriately protecting their retirement assets and being advised under the *Financial Planners and Advisers Code of Ethics*.

Question A17: What conditions or criteria should be considered in respect of the sophisticated investor exception in s 761GA of the Corporations Act 2001 (Cth)?

Sophisticated investor test

Whilst the sophisticated investor test does currently require a certain level of consent to be treated as such, we recommend the above informed consent, warnings and limits should apply to any and all of the requirements/ classifications to meeting the wholesale client test.



Chapter 13 – Conduct Obligations, including best interest duty

Question A18: Should Chapter 7 of the Corporations Act 2001 (Cth) be amended to insert certain norms as an objects clause?

Question A19: What norms should be included in such an objects clause?

We do not agree that additional norms should be included as an objects clause in the Corporations Act, as this will create further confusion and require clarification to be provided for particular sections of the Act.

Section 912A(1)(a) is sufficient for this purpose and, as outlined in the Consultation Paper, includes broad principles that cover the intent of the law.

Proposal A20: Section 912A(1)(a) of the Corporations Act 2001 (Cth) should be amended by:

- i. separating the words 'efficiently', 'honestly', and 'fairly' into individual paragraphs;
- ii. replacing the word 'efficiently' with 'professionally'; and
- iii. inserting a note containing examples of conduct that would fail to satisfy the 'fairly' standard.

i. We agree that these requirements are an overarching expectation by financial services licensees and somewhat act as a catch all for the general behaviour and conduct in the industry. As they are extremely important, any doubt or lack of interpretation is essential to address given the enormity of the implications of this phrase for licensees. As such we acknowledge the concerns raised in various case law matters and agree with the ALRC recommendation.

ii. We recommend replacing the word 'efficiently' with 'professionally' in section 912A(1)(a) of the Corporations Act, as 'professionally' has a broader meaning and brings in expected level of behaviour from a customer's perspective. An organisation may be efficient but may not be professional. Conversely, it is unprofessional to be inefficient where it is to the detriment of the consumer.

iii. We acknowledge that the use of examples may assist in the interpretation of fairly, however, warn that providing examples can in itself create further confusion and would need to be a wide range of examples to ensure many aspects of fairness are covered and not include examples on something which can often be construed as irrelevant or does not apply. Further, equivalent examples or explanation should be provided for 'efficiently' and 'honestly' also, or "professionally" dependant on the change as a result of point ii. above.

Proposal A21: Section 912A(1) of the Corporations Act 2001 (Cth) should be amended by removing the following prescriptive requirements:

- a. to have in place arrangements for the management of conflicts of interest (s 912A(1)(aa));
- b. to maintain the competence to provide the financial services (s 912A(1)(e));
- c. to ensure representatives are adequately trained (s 912A(1)(f)); and
- d. to have adequate risk management systems (s 912A(1)(h))

We recommend that the licensee obligations in section 912A(1) of the Corporations Act remain unchanged.

The inclusion of these requirements provides specificity to licensees of what exactly is required rather than relying on the implied meaning of 'efficiently, honestly and fairly'. One could argue that if you removed some of these license obligations you could remove others, which we do not recommend.

The FPA however believes the profession of financial planning should be separated from the licensing regime and regulated as a stand alone profession similar to the legal, accounting and medical professions. While licensees assist with recruiting financial planners, ensure they have adequate education, integrity and ethics, more could be done in this area. While licensees are obligated to verify that authorised advice providers meet relevant education, ethical and professional obligations as part of their onboarding process, the FPA believes there is a role for an independent third party to be involved formally as a check for any past disciplinary action taken against the adviser by the regulators and professional associations.

To this point, the parliament has already legislated an obligation for financial planners to register directly with the new single disciplinary body. As the financial planning services is provided by the individual financial planner to their client, the authorisation by a licensee creates an unknown corporate entity between the professional services provided by the individual financial planner and the client which can unduly influence the advice being provided. As seen through the Royal Commission, this conflict has the ability to inappropriately influence the advice and recommendations made by the financial planner given the leverage this authorisation places on the individual.

In addition to this, both entry and ongoing education standards and compliance with the *Financial Planners and Advisers Code of Ethics 2019*⁸ are individual obligations on the financial planner. Licensees therefor add an additional layer of cost, oversight and influence over the financial planner in conflict with the standards under the code, and therefore in direct conflict to *efficiently, honestly and fairly*.

It should be recognised that the authorising licensee's interests are commercial – to act in the interests of their shareholders. It is the reality of economics that businesses must generate revenue and be viable to survive and be able to provide services to their clients. As evidenced in the Royal Commission case studies, there is a need to make sure licensees take appropriate measures to ensure that the licensee's commercial interests do not unduly interfere in the individual planner's performance of his or her best interest duty to their client.

The licensee's interests may be constrained by the conditions placed on their license and other consumer protection measures in the Corporations Act, as well as their general law obligations. However, their interests are fundamentally commercial and therefore can be in conflict with the interests of their clients.

There will be many circumstances in which it is not possible for the individual financial planner to know the (commercial) interests of the licensee. The practical reality is advisers are unlikely to have perfect knowledge of their licensee's commercial interests despite the disclosure obligations in place to obviate this risk.

Therefore if the ALRC was to consider an amendment to s912A in relation to including the term professionalism, this would support a best interest obligation being included under the licensee general obligations in support of the financial planner (should there be no separation of the profession).

Additionally, there is an inherent conflict of such a degree between the product manufacturers need to sell products and the advice businesses' legal and professional obligations to act in the client's best interest, that it is better for the community to restrict the combination of product and advice.

The FPA has long held the view that it is necessary to have a separation of advice and product. The reason for our position is the strong tension between the professionally constrained interests of advice businesses and the commercial interests of product businesses. Unless advice businesses are

⁸ <https://www.legislation.gov.au/Details/F2019L00117>



protected from undue pressure from product businesses, the tension between product and advice may not serve the interests of consumers.

Although there are benefits to vertical integration, such as economies of scale, adaptability and risk management, we believe these benefits can potentially be outweighed by the risks and costs to consumers of biased advice. Consumers are generally not in a position to assess the influence those pressures may have on the quality of advice as demonstrated through a number of ASIC reports (such as Report 279⁹ at [22]) which show consumers are unable to discern advice that is not of good quality (Report 279 at [18]).

Therefore, the FPA recommends that the relationship between the advice business and product business within a vertically integrated business must be considered.

Another issue is the current reliance on the definition of ‘financial product advice’ is problematic as it ties the obligations for the provision of personal advice to financial products (as discussed in Chapter 11). This also excludes the provision of: budget management/cash flow; paying down debt; whether to lend money to family; property decisions around purchasing versus renting; whether to renovate or buy a new house; how to fund children’s education (for example) from the personal advice regulatory obligations yet are common areas of enquiry by consumers.

The FPA therefore recommends that it is important to start with a rethink of the legislative definition of ‘personal advice’ being based on ‘financial product advice’ in the Corporations Act which explicitly ties advice to product.

Proposal A22: In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, s 991A of the Corporations Act 2001 (Cth) and s 12CA of the Australian Securities and Investments Commission Act 2001 (Cth) should be repealed.

We agree with this recommendation.

Proposal A23: In accordance with the principle that terminology should be used consistently to reflect the same or similar concepts, proscriptions concerning false or misleading representations and misleading or deceptive conduct in the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) should be consolidated into a single provision.

We agree with this recommendation.

Question A24: Would the Corporations Act 2001 (Cth) be simplified by:

- amending s 961B(2) to re-cast paragraphs (a)–(f) as indicative behaviours of compliance, to which a court must have regard when determining whether the primary obligation in sub-s (1) has been satisfied; and

We recommend the safe harbour steps do not apply to relevant providers, who must instead comply with the Financial Planners and Advisers Code of Ethics (the Code). The Code is an overarching requirement intended to go above and beyond the law.

We note the safe harbour steps do apply to some non-relevant providers. The Code offers a principles-based framework for which relevant providers can assess the appropriateness of their advice. This offers greater flexibility and ease to be updated. The Code is broad to cover the range of circumstances required in the safe harbour steps and complements the remaining best interests obligations in the law if the safe harbour steps were removed.

⁹ <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-279-shadow-shopping-study-of-retirement-advice/>



We note the best interests' provisions and the Code is recommended to be reviewed in the Quality of Advice Review.

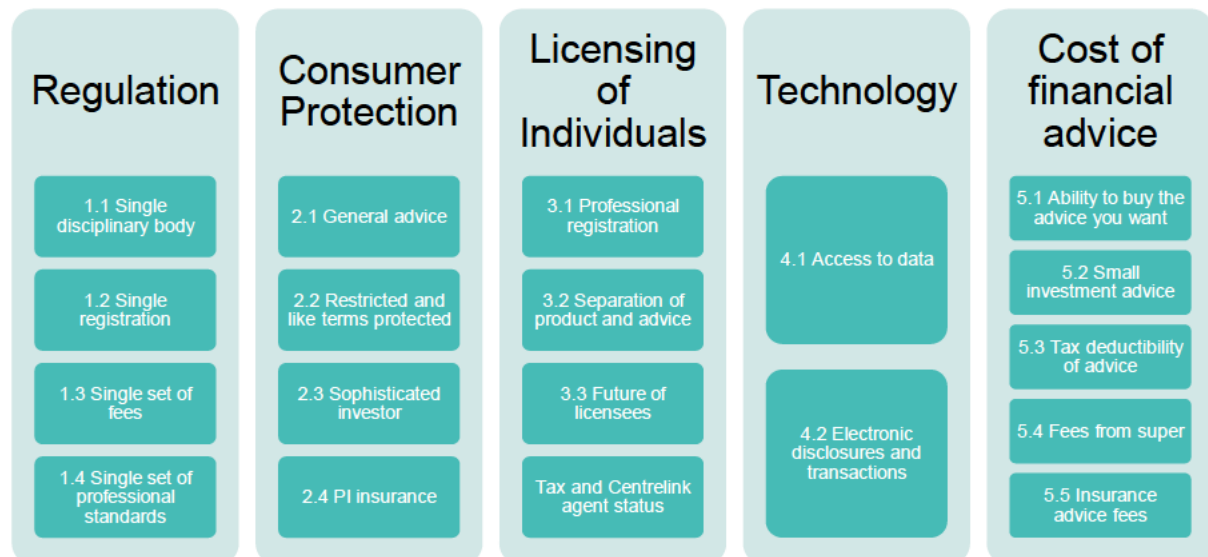
b. repealing ss 961C and 961D?

We agree with the recommendation to repeal ss 961C and 961D.

As these sections explain phrases in the safe harbour steps (s961B of the Corporations Act) and the terms are intended to take on their ordinary meaning, we agree that they are not required. However, as noted in Proposal A24, we are recommending that the safe harbour steps not apply to relevant providers and the Code is the requisite standard. As such, these terms may be of use to non-relevant providers where the safe harbour steps remain. This will also depend if and how the safe harbour steps are recast in updated legislation.



Appendix 1 – FPA Policy Platform: Affordable Advice, Sustainable Profession



On 3 June 2020, the FPA released its new policy platform for financial planning advocacy, 'Affordable Advice, Sustainable Profession'

The policy platform guide's the FPA's advocacy with government, regulators and other key stakeholders over the next five years. It continues FPA's long history of advocating for reform in financial planning for the benefit of consumers, practitioners and the Australian community. During 2019, hundreds of FPA members shared their views and contributed to the development of this policy platform when they responded to FPA's discussion paper.

We have made 19 recommendations for action, ranging from achievable short-term goals to major, big-picture ideas. These include:

- a range of recommendations about sensible and streamlined regulation
- a focus on pursuing individual professional registration in place of corporate licensing for financial advice
- renewing our call for tax deductibility of all financial advice.

A full version of the FPA Policy Platform can be found here: <https://fpa.com.au/wp-content/uploads/2020/06/FPA-Policy-Platform-2020-FINAL.pdf>

The following recommendations are full extracts of the FPA's platform relevant to the ALRC's review.

2.1 General advice

Evidence clearly shows that consumers are confused about the difference between personal advice and general advice and often misunderstand what they are receiving.

Multiple reports (including the Financial Systems Inquiry final report, the Joint Parliamentary Committee on Corporations and Financial Services inquiry into proposals to lift the professional, ethical and education standards in the financial services industry; and the Productivity Commission's Inquiry into Competition in the Australian Financial System) have recommended that the term "general advice" be changed to something that more accurately reflects what is being offered under this category - information that does not consider a consumer's specific circumstances.

ASIC has also reported on this problem (ASIC Report 614) and has started consulting on an alternative term to replace “general advice”. The FPA strongly supports this work continuing and the term “general advice” being replaced.

Where general advice is given, the consumer must also be given a standard warning about the nature of that advice. In its current form, the warning has proven to be ineffective at protecting the consumer’s interests. The warning should be amended to more specifically state that general advice does not consider personal circumstances and that the consumer might benefit from seeking advice that does consider their personal circumstances from a financial planner.

The law should be changed to rename the term ‘general advice’ to ‘product information’ and ‘strategy information’, which better reflects the definition and is less misleading to consumers. Any replacement must ensure that the term ‘advice’ can only be used in association with ‘personal advice’ — that is, advice that takes into consideration personal circumstances.

The general advice warning should be amended to include a statement that the recipient may benefit from advice which takes account of their personal circumstances and they should consider seeking advice from a financial planner.

At an appropriate point after renaming ‘general advice’ and amending the general advice warning, the Government should review the use of general advice to determine whether general advice is being provided in appropriate circumstances and if consumer interests are being protected.

2.2 Restricted and like terms protections

The government has created significant new consumer protections that apply to financial planners, including professional standards like a minimum education requirement, a professional exam and adherence to a Code of Ethics. While these standards will increase the quality of financial advice, they have also created an incentive for some people to pass themselves off as financial planners without complying with the relevant standards.

It is important that consumers are not misled about whether the professional they are seeking advice from is qualified to provide that advice and whether they comply with the FASEA standards.

The existing restrictions on using the terms ‘financial planner’, ‘financial adviser’ and like terms should be maintained. There is some evidence that incidence of people misusing these terms is increasing and the government should take action to ensure consumers can have confidence when they see those terms used.

ASIC should review the use of the terms ‘financial planner’, ‘financial adviser’ and like terms (including ‘financial coach’, ‘financial mentor’ and ‘financial guru’) to determine if restrictions on the use of these terms are effectively protecting consumers from unqualified financial advice.

2.3 Sophisticated investor

The current test to give a consumer the status of a “sophisticated investor” was set in 2001 at \$250,000 per year of gross income or net assets to the value of \$2.5 million. There is evidence to suggest that consumers are being classed as “sophisticated investors” as they meet these thresholds, despite having low financial literacy and little experience in investing.

FASEA has attempted to address this problem through its Code of Ethics and suggested that a financial planner cannot rely on the “sophisticated investor” test if they know that their client has

limited financial capability. By laying this additional test on top of that which exists in the primary legislation, FASEA has created confusion and uncertainty about how the tests should operate.

While the FPA fundamentally agrees with FASEA's goal, it is more appropriate to fix the problem where it exists in the primary legislation.

The law should be changed to revise the test for a 'sophisticated investor' by increasing the dollar- value threshold to an appropriate and contemporary level, providing a method for indexation and introducing a financial capability measure.

3.2 Separation of product and advice

The regulation of financial advice is currently tied to the recommendation of a financial product, reflecting a history in which a product recommendation was the core component of most financial advice. In a professionalised financial planning sector, this is no longer the case.

Contemporary financial planning is about a lot more than recommending financial products. There is a wide variety of topics that might be covered by financial advice and many may not include a product recommendation. Regulation of financial advice should reflect the variety of advice that can be provided, and not continue to be tied to financial product recommendations.

Existing requirements to deliver financial advice should be reviewed to ensure they apply effectively to financial advice that does not include a product recommendation. Future regulation of financial advice should focus on the broad nature of contemporary financial advice and not limit its focus to financial products.

The law should be changed to separate the regulation of financial products from the regulation of financial advice.

3.3 Future of licensees

The Australian Financial Services License ('AFSL') system plays an important role in regulating financial products and services. However, recent reforms have focused the regulation of financial advice at the individual practitioner level. This is an appropriate approach and acknowledges the relationship between a client and their financial planner is a personal relationship, not one between an AFSL and the client. Future reforms to the regulation of financial advice should occur through the professional standards framework and rely on individual registration of financial planners.

In this context, the continued use of the AFSL system to oversee the provision of financial advice duplicates regulation, creates significant additional regulatory cost and introduces potential conflicts between the views of the licensee and the professional judgement of the financial planner.

The AFSL system should be maintained to provide regulatory oversight of financial products and some services. The future regulation of financial advice should occur through individual registration and oversight, and not require an AFSL for a financial planner to provide financial advice.

The law should be changed to focus the AFSL system on the regulation of financial products and remove the requirement for an AFSL to cover the provision of financial advice.



Attachment 2: FPA response to alternative general advice labels proposed by ASIC (2019)

ASIC's proposed alternative label	Dictionary meanings	FPA comment for 'general advice' provided in a product provider's interest
Choices/general choices/financial choices/product choices	Means there is a range of different things the consumer can choose from.	Oppose 'Choices' does not make it clear that the representative providing the "choices" has not taken into account the individual's circumstances. Rather, the word choices could imply that the representative has in fact limited the range of 'choices' based on the individual's circumstances. It implies there may be more 'choices' that the representative has assessed as not applicable to
Options/general options/financial options/product options	One thing that can be chosen from a set of possibilities, or the freedom to make a choice. However it also means that a person has to do a particular thing because there is no possibility of doing anything	Oppose A consumer could interpret the 'options' provided by a representative as not being general in nature but have been purposefully selected based on the individual's personal circumstances
Guidance/general guidance/financial guidance/product guidance	Something that provides direction or advice as to a decision or course of action The act of guiding or showing the way	Oppose The meaning and common/ lay person understanding of guidance has the same intent as the meaning of 'advice' and therefore will not resolve the issues with the term 'general advice'. To guide someone is to provide assistance. Assistance implies it is provided in the individual's interest to help them.
Information/general information/product information	Information means " <i>facts</i> " and " <i>knowledge obtained from investigation, study, or instruction</i> ".	Support Information is a clear term that consumers understand does not take into account their personal circumstances.
Suggestions/general suggestions/financial suggestions/product suggestions	The process by which a physical or mental state is influenced by a thought or idea. An idea or plan that you offer for someone to consider.	Oppose This label is ambiguous. It implies that the 'suggestions' being provided are done so to help the consumer, without clearly describing to the consumer why the 'suggestions' are being offered. It is commonly understood that when a 'suggestion' is



		<p>offered to a person, it is done so in order to help that person. Therefore, this label is misleading as it implies the 'suggestion' has been personalised in some way as it is intended to 'help' the consumer. It could lead the consumer to believe that the representative providing the 'suggestions' thinks the 'suggestions' are relevant to the consumer in some way and will help them, particularly as the representative would likely be more knowledgeable on the subject matter of the 'suggestions' than the consumer.</p>
<p>Tips/general tips/financial tips/product tips</p>	<p>A tip is:</p> <ul style="list-style-type: none"> • a piece of advice or expert or authoritative information • a piece of advance or confidential information given by one thought to have access to special or inside sources • a useful piece of information or advice, especially something secret or not generally known 	<p>Oppose</p> <p>To provide someone with a 'tip' implies that the person will miss out on something if they do not act on the tip provided; that the 'tip' is about an opportunity with a high probability of a positive and worthwhile outcome. It also implies that the 'tip' contains more detailed and specialised information that other people have not be privy to. This label could mislead and confuse consumers and does not appropriately or accurately represent what 'general</p>



Ideas/general ideas/financial ideas/product ideas	<p>An understanding, thought or picture in your mind</p> <p>A purpose or reason for doing something. A formulated thought or opinion</p>	<p>Oppose</p> <p>The word 'idea' is ambiguous and can present slightly different meanings for different people. Its meaning is heavily influenced by the interaction taking place. For example, a consumer may believe an 'idea' is "an understanding, thought or picture in [the] mind" of the representative based on the consumer's circumstances that the representative is aware of. It is the opinion of the representative that has been 'formulated' based on the consumer's circumstances.</p> <p>Therefore, it may mislead consumers into thinking the 'idea' presented to them by a representative is about them and has been provided</p>
Pointers/general pointers/financial pointers	<p>A helpful piece of advice or information.</p> <p>A useful suggestion or hint about how to do or understand something better</p> <p>A pointer to something suggests that it exists or gives an idea of what it is like.</p> <p>A pointer is a piece of advice or information which helps you to understand a situation or to find a way of making progress.</p>	<p>Oppose</p> <p>The word 'pointers' is unusual and not commonly used by people. It could therefore be easily misunderstood and inconsistently interpreted by consumers and industry as to the purpose or limitations of the 'pointers' provided.</p> <p>As its meaning suggests, it could also be misinterpreted as 'advice' and whether the consumer's personal circumstances have or have not been considered.</p>
Guidelines/general guidelines/financial guidelines/product guidelines	<p>Information intended to advise people on how something should be done or what something should be.</p> <p>Official instruction or advice about how to do something.</p> <p>A standard or principle by which to make a judgment or determine a course of action.</p> <p>Something that can be used to help you plan your action or to form an opinion about something.</p>	<p>Oppose</p> <p>The word 'guidelines' is ambiguous. It has a specific meaning in business that it is sets official rules that must be followed; whereas outside the business context 'guidelines' may be seen more as fluid suggestions that may or may not be considered.</p>



Hints/general hints/financial hints	<p>Something that you say or do that shows what you think or want, usually in a way that is not direct.</p> <p>A piece of advice that helps you to do something.</p>	<p>Oppose</p> <p>Implies the representative is not providing all the facts. As 'hints' are provided "usually in a way that is not direct" it implies the 'hints' and the reasons they are provided may be secretive in some way, making it unclear that the consumer's circumstances have not</p>
Opinions/general opinions/financial opinions	<p>A view, judgment, or appraisal formed in the mind about a particular matter</p> <p>A belief stronger than impression and less strong than positive knowledge</p> <p>A formal expression of judgment or advice by an expert</p> <p>A belief not based on absolute certainty or positive knowledge but on what seems true, valid or probably to one's own mind.</p> <p>An evaluation, impression, or estimation of the quality or worth of a person or thing</p>	<p>Oppose</p> <p>As explained above, consumers will most likely disclose information about their personal circumstances to a financial services provider in all the interactions they have with the entity or person.</p> <p>An opinion applies to a conclusion or judgement about a particular matter. It is therefore reasonable that a consumer could misunderstand that a representative has consider the consumer's circumstances in formulating the "conclusion or</p>
Recommendations/general recommendations/financial recommendations/product recommendations/sales recommendations/marketing recommendations		<p>Oppose</p> <p>The legal requirements for personal financial advice in the Corporations Act and ASIC's associated guidance, particularly in relation to the best interest duty in s961B, specifically rely on the provision of 'recommendations' about financial products explicitly in relation to the consumer's circumstances. It would therefore be inappropriate for this word to be used as an alternative label for 'general advice' which does not consider the consumer's circumstances.</p>



<p>Sales conversation/marketing conversation/product conversation</p>	<p>Talk between two or more people in which thoughts, feelings and ideas are expressed, questions are asked and answered, or news and information is exchanged.</p> <p>A discussion with someone about a particular subject</p> <p>Oral exchange of sentiments, observations, opinions, or ideas</p>	<p>Oppose</p> <p>'Conversation' implies the representative is actively listening to the consumer and responding with comments directly related to the information disclosed by the consumer during that interaction. Hence it is highly likely consumers would interpret the 'product conversation' to be relevant to their individual circumstances and not</p>
<p>Sales discussion/marketing discussion/product discussion</p>	<p>A conversation about something, usually something important.</p> <p>The activity in which people talk about something and tell each other their ideas or opinions.</p> <p>The formal examination or consideration of a matter in speech or writing</p> <p>Talk or writing in which pros and cons or various aspects of a subject are considered.</p> <p>If there is discussion about something, people talk about it, in order to reach a decision.</p>	<p>Oppose</p> <p>A discussion is defined as a conversation. Therefore it presents the same issues as the word 'conversation' as an alternative label for 'general advice'.</p> <p>However a 'discussion' is also considered more "formal" than a 'conversation' and "considers the pros and cons of the subject matter" by "tell[ing] each other their ideas and opinion", "in order to reach a decision". This implies that one party of a discussion is involved in order to help another party make a decision based on the opinions and ideas of the other party. That is, that one party, the consumer, is sharing information about themselves in relation to that subject matter.</p> <p>Hence it is highly likely consumers would interpret a 'product discussion' to be relevant to their individual</p>



Statements/sales statements/marketing statements/product statements	<p>Something that is said, especially formally and officially</p> <p>An act or object that expresses an idea or opinion</p> <p>A piece of paper that lists financial details A declaration of matter of facts</p> <p>An expression of confidence or authority</p>	<p>Oppose</p> <p>Financial services providers have had long standing legal requirements placed upon them to provide consumers with 'statements' of their personal circumstances or assets as held or known by the entity. For example, a bank statement, credit card statement, loan statement, and in relation to financial advice, a Statement of Advice. These documents come with strict legal requirements which hold penalties if breached.</p> <p>Hence, consumers expect a 'statement' from a financial services provider to be a formal, official document relating to their personal circumstances.</p> <p>It would therefore be inappropriate for this word to be used as an alternative label for 'general advice'.</p>
Sales communication/marketing communication	<p>The imparting or exchanging of information by speaking, writing, or using some other medium.</p> <p>The process of sharing information, especially when this increases understanding between people or groups.</p>	<p>Oppose</p> <p>The term 'communication' is inappropriate as it has specific and formal meaning in many industries and businesses and therefore is easily open to</p>
Presentation/sales presentation/marketing presentation/product presentation	<p>A talk to a group in which information about a new product, plane, etc., is presented</p> <p>An act of showing, describing, or explaining something to a group of people</p> <p>A formal talk in which you describe or explain something to a group of people</p>	<p>Oppose</p> <p>The word 'presentation' has limited application in relation to the breadth of situations in which consumers may be provided with 'general advice'. It would be only be application to seminars as its meaning limits its application to one-on-one interactions a consumer may have with a representative, videos, newsletter, and articles, for example. This meaning is commonly understood.</p>



<p>Product advertising/product marketing</p>	<p>Advertising is the business of trying to persuade people to buy products</p> <p>Marketing is the organisation of the sale of a product, for example, deciding on its price, the areas it should be supplied to, and how it should be advertised</p>	<p>Support</p> <p>The FPA would support the label 'product advertising or product marketing' in relation to 'general advice' currently provided to sell products. However, we would prefer the label 'product sales material' as detailed above.</p> <p>It is well understood by consumers that advertising and marketing is general in nature, does not take into account an individual's circumstance, is intended to sell a product, and does not represent the consumer's</p>
<p>For each of these options an additional alternative is adding either "non- personalised" or "non- tailored" in front of them. For example, an additional option for "choices" can be either "non-personalised choices" or "non-tailored choices".</p>		<p>Support - "non-personalised" however, this must come with a clear explanation that it is general in nature, that the consumer's specific circumstances have not been considered; that other options have not been considered as to whether they may better serve the consumer; as it is general in nature the 'product sales material' or the 'strategy information' may not be in their best interest or suit their specific and broader needs; the consumer must consider how and if the 'product sales material' or the 'strategy information' may suit their needs; and a suggestion to consider seeking personal financial advice to assist the consumer in making an informed decision.</p> <p>Oppose "non-tailored" - Consumers may not have a clear understanding of the meaning of "non-tailored". "Tailored" may be industry jargon rather than a</p>