



23 February 2022

Financial Services Legislation
Australian Law Reform Commission
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Dear Secretary

Consultation: Financial Services Legislation Interim Report A

The Actuaries Institute ('Institute') welcomes the opportunity to comment on an aspect of the Financial Services Legislation Interim Report A ('ALRC Report') dated November 2021. The Institute is the sole professional body for actuaries in Australia.

Paragraph 12.13 of the ALRC Report poses the question as to whether the existing retail client definition remains fit for purpose. Question 16b of the ALRC Report asks whether the definition of retail client should be amended as proposed in the question. Our submission focuses on these issues as they relate to superannuation products, and in particular our recommendation that a change is made to the definition of retail client where this limits the ability of actuaries to advise employers and trustees of smaller superannuation funds about superannuation.

Support for change to definition of retail clients

As set out in Chapter 12 of the ALRC Report entitled "*Definitions of 'Retail Client' and 'Wholesale Client'*", the distinction between retail and wholesale clients is of critical importance from a policy perspective as it determines when particular protections are available to retail clients. The Institute supports retention of the distinction between retail and wholesale clients, given the policy intent that wholesale clients are better informed and better able to assess the risks involved in financial transactions and therefore do not need the same level of protection as retail clients.

The Institute further supports the ALRC's suggestion to simplify application of retail and wholesale clients in relation to superannuation and Retirement Savings Account (RSA) products for the reasons set out in the ALRC Report, where an exclusion from treatment as retail clients would continue to apply in relation to professional investors.

However, the Institute believes the proposed amendments should not perpetuate classification of the following two types of persons as retail clients with respect to superannuation and RSA products:

- Employers other than a small business¹;
- Smaller APRA regulated superannuation funds with more than 4 members but less than \$10 million in assets.

¹ As defined in s761G of the Corporations Act



The Institute believes that these two types of persons are better considered as professional investors since:

- Superannuation legislation and the industry has changed significantly in recent years. There remain very few small superannuation funds regulated by APRA. These fund Trustees must comply with the ever-increasing complexity of superannuation law and need to be sophisticated to do so. The Trustees of all APRA regulated superannuation funds are now required to hold an AFS license, irrespective of size. In our view it is an anomaly that these trustees are not already excluded from the retail client definition.
- Section 761G of the Corporations Act excludes businesses that are not small businesses for most other purposes, but not superannuation. This means Australia's largest companies and governments are retail clients for the purpose of superannuation advice. It is often Australia's largest companies and governments (Commonwealth, State and Local government) that have legacy defined benefit superannuation funds. Employers above a certain size are sophisticated. Pragmatically, the current exclusion from being a retail client for a business that is not a small business should be extended to superannuation.

Public policy considerations in relation to superannuation actuarial advice associated with proposed broader definition of professional investor

Some actuaries provide professional actuarial advice to employers and trustees of smaller APRA regulated funds. Some of this specialist superannuation actuarial advice is required by legislation to be provided by an actuary, including various defined benefit matters and advice on certain tax matters. Other advice is not required by legislation to be provided by an actuary, but can only practically be provided by someone with an actuarial background. This includes advice to employers² and trustees of smaller APRA regulated funds on:

- Defined benefit superannuation obligations;
- Defined benefit surplus reversion and defined benefit conversions;
- Superannuation self-insurance funding and risks; and
- Superannuation benefit design changes, including associated insurance in superannuation arrangements.

As a consequence of employers and trustees of smaller superannuation funds (with less than \$10 million in assets) being considered retail clients, actuaries providing specialist actuarial advice to them must meet the financial advice requirements, including being registered with ASIC, unless an exemption applies³. There are currently only a small number of superannuation actuaries (around 30) on the register, who have been able to maintain their registration under the transitional arrangements for existing advisers.

It is problematic for additional superannuation actuaries to qualify to be added to the ASIC register because of the educational requirements, which currently include completion of an

² This includes superannuation advice provided to larger trustees where a copy of the advice is provided to the employer as a secondary service (which may be required by legislation or by the fund's governing rules or for other reasons).

³ It is possible that Corporations Regulations 2001 7.1.29(5) may enable some relevant actuarial services to be provided as an exempt service. However, in our view, the application and scope of these provisions is unclear and, at best, they would only enable some of the relevant services to be exempt.



approved degree⁴. Whilst highly qualified, actuaries typically do not have an approved degree and the course material of such a degree is not relevant to the specialist advice that superannuation actuaries provide. Because superannuation actuaries spend a small portion of their time advising employers and the trustees of smaller superannuation funds it is not likely that any would choose to complete the additional education, given the substantial time and cost commitment required.

To remain on the ASIC register from 1 January 2026, most superannuation actuaries will need to have completed further education. For similar reasons to those described above affecting future additions of superannuation actuaries to the ASIC register, it is unlikely that many of the currently registered superannuation actuaries will choose to complete this additional education, leaving them unable to provide advice to both employers and the trustees of smaller superannuation funds after 2025.

If this legislative change to the definition of retail client does not occur it should be of public policy concern because:

- Trustees of smaller defined benefit superannuation funds will/may be unable to obtain the advice required by law; and
- Employer sponsors of superannuation funds will/may be unable to obtain independent actuarial advice (in order to avoid conflicts of interest, generally employers require separate advice to the superannuation fund trustee).

Further discussion

If you would like to discuss this matter further please do not hesitate to contact me at

[REDACTED]

Yours sincerely

[REDACTED]

Tim Jenkins

Convenor, Superannuation and Investments Practice Committee

cc.

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⁴ The proposals in the Treasury Policy Paper 'Education Standards for Financial Advisors' dated December 2021 would assist superannuation actuaries to continue to be able to provide advice to retail clients by reducing the additional education requirements, but even if all proposals were adopted significant difficulties would remain.