Submission to the Quality of Advice Review

on the

Consultation Paper – Proposals for Reform

Prepared by
COTA Australia
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COTA Australia

COTA Australia is the national consumer peak body representing older people. The COTA Federation has over 45,000 individual members and supporters and works with a network of seniors' organisations, which jointly engage the diversity of over 500,000 older Australians.

Speaking for the nearly nine million Australians over 50 years old COTA Australia prioritises economic, social, and political participation of older Australians and challenging ageism. The diversity of older Australians gives COTA Australia a broad policy agenda, currently we are prioritising policies about retirement incomes, aged care, housing, elder abuse, older workers, digital inclusion, health, and social isolation.

It advocates within government, business, and society maintaining effective relationships, and is respected as a legitimate, influential voice. COTA Australia promotes integrity, diversity, promoting equality, and prioritises collaborative engagement. With a membership including State and Territory Councils on the Ageing, COTA Australia has been identifying the needs of, issues affecting, and welfare of older Australians since it was first formed in 1951.

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Introduction

COTA Australia welcomes the opportunity to respond to the consultation paper – Proposals for Reform. We apologise for the lateness of this written response. We note that both the Chief Executive and Deputy Chief Executive participated in several of the consultative forums on the paper.

While COTA Australia does not support all the proposals made, we thank the Reviewer for consulting on her proposals for reform and appreciate the effort taken to holistically consider the issues and potential solutions contained within the broad suite of proposals.

COTA will comment on four areas of the proposals:

- **Superannuation** – recommendations regarding intra-fund advice and advice fees in superannuation (Proposals 5 & 6).
- **Disclosure** - recommendations around disclosure requirements.
- **What should be regulated** – recommendations regarding scope of personal advice and the removal of general advice protections (Proposals 9 & 10).
- **How should it be regulated** – recommendations around to replace best interest test with a good advice test.

In the final report of the review, COTA would welcome the greater use of cameos. The interaction between the recommendations is such that only when they are applied in practice does the true impact of the proposals come to light.

Superannuation funds and intra-fund advice
COTA Australia is particularly supportive of the proposed expansion of intra-fund advice rules. We note the importance of low cost advice as members of super funds begin to think about and later shift from the accumulation to retirement phases of their superannuation fund. Indeed COTA envisages that some funds may in the future design highly valued advice within the product offerings of their retirement products to assist in this way.

Taking account of a member's relationship status, the financial position of their partner where one exists, other superannuation and non-superannuation assets, and an assessment of a member's likely social security benefits is all important when preparing retirement advice. While we note the reviewer's advice this is an untested area of law fin which the proposed actions may already be permissible, we note that in practice the lack of explicit permission results in such advice not being provided.
Accordingly, Proposal 5 to expand the Superannuation Industry Supervision (SIS) Act's Sole Purpose Test (s62) is welcomed and supported.

We note the reviewer's proposal to remove section 99F of the SIS Act. The reviewer argues it is desirable to remove this section as it does not provide protection to members and is poorly understood. Further, the reviewer is reassured by the Trustee's Prudential Standard SPS 515 obligations around Strategic Planning and Member Outcomes. COTA also notes that recent regulatory changes for increased transparency in fees and their utility in performance testing may also have been an area of reassurance for the proposal.

However, in practice Trustees are a risk adverse group. They often will seek black and white permission of the law to ensure that they are acting within it. We are concerned therefore that the removal of section 99F may lead to a reduction in advice. This would have a significant impact on retirement advice. Our view is that section 99F should be retained with amendments that expressly permit personal advice being provided to the member about retirement adequacy, Age Pension eligibility and the member's

household (to the extent it is pertinent to the member's retirement). **Accordingly, Proposal 6 is not supported.**

Disclosure

COTA Australia is supportive of the proposals to remove the specific format of a written Statement of Advice. We note that this form of written advice may be a copy of the file notes, a summary of the products recommended or any other form of written advice. We are confident of advisors' ability to tailor the information so as to be relevant to the individual's needs.

We are very concerned however by the proposal to make any form of written advice an "opt-in" by the consumer. This presumes that the person will know of their right to ask for advice and the importance of doing so. We feel the absence of a written advice requirement will lead to increased complaints and confusion that will rely upon only the advisors case notes and no equivalent written documentation available to the consumer at the time. This is unfair.

While it is unnecessary for the format to dictated by regulation, the obligation to provide written advice via email or post should remain on the advisor. COTA would be supportive of an "opt out" approach where the advisor offers a written outcome of the conversation and a consumer elects to not receive that information. We feel such a process of "opt out" must be an explicit offer and rejection, not merely a term in the mix of pages of terms and conditions. **Accordingly, Proposal 9 is supported in part (abolition of Statement of Advice) and not supported in part (provide written record of advice upon request).**

Similarly we are concerned by the 'opt in' nature of the proposed changes to the Financial Services Guide. The reviewer states that a provider of advice may choose not to provide the advice to a customer, but merely have it available at the time the advice is provided. This again imposes the burden on the consumer and assumes their capacity to find the information and their knowledge to know they should look for it. Even if the consumer has this knowledge and capacity, websites can be tricky things to navigate and find the correct and relevant version of the Financial Services Guide. Old versions are often removed and the consumer is left with a newer and up to date FSG that may not be relevant to the information provided to them at the time they received advice. The obligation to provide a consumer with the relevant FSG should remain a requirement on the advisor. This can easily be delivered as a link in an email to the advice website. As the reviewer notes it is not an onerous burden for the advisor to maintain FSGs. **Accordingly, Proposal 10 is not supported.**

The reviewer has asked whether the removal of SOA will reduce compliance and thus cost. In our experience of comparable deregulation efforts, compliance costs would be reduced, but often those cost savings are not passed on without a concerted effort to name and shame the behaviour of the relevant industry. If the Reviewer and the Government of the day genuinely wishes to see those reduced compliance costs passed on to the consumer, we would suggest a concerted industry engagement will be needed to set the Government's expectations that if it were to remove the regulatory burden, cost savings would be passed on to consumers.

What should be regulated?

The reviewer proposes to abolish the category of general advice, while slightly expanding the scope of personal advice to capture more products and situations. COTA is attracted to the scope and proposed definition of personal advice to apply "whenever a recommendation or opinion is provided to a client about a financial product (or class of financial products)". We note the reviewer then goes on to include a qualifier "and, at the time the advice is provided, the provider has or holds information about the client's objectives, needs or any aspect of their financial situation".

This second part is perhaps problematic as opening a general bank account is definitely a financial product, but is the fact a bank holds some information about their financial situation sufficient to require

compliance with the advice regulation? Should perhaps 'any aspect' be a 'relevant aspect' test, or perhaps certain classes of financial products should be explicitly exempt from the test so as to not introduce an unintended consequence.

We note the wisdom of the reviewer in identifying additional categories of advice would lead to more complexity, costs and risks. However we are concerned that the same would occur in the proposed principles-based approach to regulation. We note the request of the sector for the 'safe harbour' steps to provide advisors with the assurance they are complying with the law and suspect any changes towards a principles based approach (or indeed the good advice test) will come with a similar industry call for assurances of a similar nature. We note the views of many during the consultations on these proposals was that compliance with today's safe harbour obligations is the number one regulatory contributor to advice cost.

COTA supports in part Proposal 1 noting our concerns about how broad the current proposed definition could apply.

COTA notes the proposal to remove the category of general advice. We note with appreciation the reviewer's discussion of alternative labels to general advice. The reviewer notes if general advice were no longer a regulated financial service, that consumer and competition law would still apply, such as the obligation to not engage in misleading or deceptive conduct.

The reviewer proposes that removal of general advice would essentially then result in three layers of consumer protections:

1) Information about a financial product (by a non AFS license holder) – protected by general consumer protections
2) Information about a financial product (by an AFS license holder) – general consumer protections plus AFS license obligations and ban on conflicted remuneration
3) Personal advice – all of the above plus the reviewers proposed personal advice requirements

COTA is unconvinced that the absence of a warning statement for general advice / information about a financial product is effective consumer protection. While over years the courts will test and settle the application of consumer law to the information provided about a financial product, these general consumer protections have no requirements about upfront warnings to trigger the consumer to think about the risks involved. We also note the rise of social media commentary that would be tantamount to general financial advice but would be unlikely to be covered by general consumer laws.

Finally we note that past examples have seen the legal bar for deceptive and misleading conduct being set too high for the kinds of protections currently afforded under the general advice definition. It would therefore be an insufficient substitute. **Accordingly, COTA is not supportive of proposal 2. If however proposal 2 were to be adopted in part, COTA would urge that the current general advice warning remain in some form.**

How should it be regulated?
We offer some limited comments below on the proposals of the reviewer about how to advice should be regulated.

F**irstly, we reject outright the suggestion that the 'best interests' test should be removed**. This proposal simply does not pass the pub test. While legalistically there may be merit in downgrading an imperfect 'best interest' obligation to a more sophisticated 'good advice' test, most people will not understand this nuance. 'Best interest' is a totemic cornerstone of consumer protections. To remove it would rip at the heart of the intention of regulating advice to protect consumers.

We are unconvinced by the reviewer's argument, supported by some in the industry, that it is the best interest duty rather than the obligations under the safe harbour steps that generate significant costs to the development of advice. We would welcome considerations by the reviewer how the current safe harbour steps could be abolished or revised to reduce the costs of advice. Indeed we strongly suggest that if the proposed 'good advice' were implemented history would indicate the industry would be seeking safe harbour steps for complying with this obligation. There is nothing at all to suggest that advisors who do not understand 'best interest' would better understand 'good advice'. And to be good advice would have to be in the best interest of the consumer.

We are nevertheless attracted to the structure of the good advice obligation outlined by the reviewer's proposal 3. We would submit both best interest and good advice can be complementary regulations.

Ends.