



Senate Inquiry into consumer protection in the banking, insurance and financial services sector

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AIST Submission

Senate Inquiry into consumer protection in the banking, insurance and financial services sector



AIST

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$700 billion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

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1 Executive summary

In brief:

The numerous exemptions from the regulatory framework for superannuation currently afforded choice (i.e. non-MySuper) products and investment options, platforms and legacy products should be removed to ensure that the retirement savings of all superannuation fund members are equally protected.

AIST welcomes the Senate Inquiry into consumer protection in the banking, insurance and financial services sector.

1.1 Failures evident in current laws and regulatory framework

The Australian financial services regulatory framework is based on the recommendations of the Final Report of the 1997 Financial System Inquiry. Over the 30 years since then, successive reviews have introduced numerous exemptions, gaps and inconsistencies to the regulatory framework for choice products and investment options, platforms and legacy products. This includes:

- Gaps in the 'no employer kickback rule'
- Trustee duties to promote the financial interests of beneficiaries and apply a scale test each year to ensure that the size of the product does not disadvantage members do not apply to choice products
- Requirements to act in the best interests of the member when switching the member out of a MySuper product into a choice product or option do not apply to general advice and no advice business models
- Standardised disclosure designed to allow consumers to compare products is not required for choice products or investment options, platforms or legacy products
- Requirements designed to ensure that funds disclose all fees and costs, including indirect costs do not apply to platforms
- Gaps in data reporting obligations result in gaps in APRA's statistical collection relating to the performance, fees and costs on choice products and investment options, platforms and legacy products.

There is no justification for these exemptions, gaps and inconsistencies. Their existence facilitates cross-selling of retail superannuation to employers and employees, make it difficult for members who hold these products to compare products and means that fees and costs disclosure for

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superannuation products held via a platform understate the level of fees and costs paid. This is misleading and makes it difficult to compare the fees and costs paid under a platform with the fees and costs for other superannuation products. These numerous exemptions, gaps and inconsistencies also send a signal to entities covered by these exemptions that such behaviour and ‘being let off the hook’ is seemingly acceptable.

The long list of exemptions secured by the choice sector deprives members of bank-owned and other retail funds of transparency about the performance, fees and costs of choice products and investment options and other critical consumer protections. It seems that whenever there is an attempt to introduce additional regulatory requirements designed to protect members and improve retirement outcomes, there is an exemption for the choice sector. No coherent rationale has been offered for this. It cannot be justified, particularly in a compulsory system, and it has happened simultaneously with a succession of scandals involving poor conduct in the four major banks.

The lack of transparency also hampers employers, financial advisers, Government and its policy advisers, researchers, commentators and trustees in their efforts to benchmark performance, compare products and assess system-wide trends and the efficiency of the superannuation system.

Other jurisdictions that have examined the cost of platform-based superannuation and legacy products have concluded that platforms can add significant costs and that legacy products are typically significantly more expensive than newer products, impacting members’ retirement savings.

All superannuation members deserve equal protection under the regulatory framework. AIST recommends the numerous exemptions currently afforded choice products and investment options, platforms and legacy products should be removed.

1.2 Impact of conduct on victims and consumers

The Financial System Inquiry estimated collapses in the retail financial services sector affected more than 80,000 consumers, with losses totalling more than \$5 billion. This estimate does not include subsequent scandals which have engulfed Australia’s four major banks. These include a large number of regulatory failures spanning the banks’ retail and business banking, superannuation, financial planning and retail life insurance businesses.

Notably, since 2014 the banks have implemented review and remediation programs relating to systemic failures ranging from charging excessive fees due to system errors, failures to comply

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with responsible lending laws, charging fees for services that were not provided and breaches of the regulatory regime for financial advice.

ASIC's regulatory guidance on client review and remediation does not require licensees to report either to ASIC or publicly on the outcomes of review and remediation programs. This makes it difficult to ascertain the impact of systemic problems on consumers and investors.

AIST recommends licensees should be required to report to ASIC and publicly on the establishment, process, progress and outcomes of all review and remediation programs.

1.3 Impact of commission structures

Significant exemptions from the ban on conflicted remuneration introduced under the Future of Financial Advice reforms mean banks and retail superannuation funds continue to pay staff and financial advisers commissions and other forms of conflicted remuneration including to recommend that customers switch to a retail superannuation fund. Commissions are also still permitted for the sale of retail life insurance policies, and are the dominant form of remuneration in the retail life insurance industry.

There is no justification for allowing the retail life insurance industry to continue to pay commissions which have been banned for the rest of the financial services industry since 2013. AIST recommends that all commissions and other forms of conflicted remuneration for the sale of retail life insurance policies should be banned.

1.4 Fee for no services

As at October 2016, following a review by ASIC, ANZ, NAB, CBA, Westpac and AMP had paid or agreed to pay \$23.7 million of fee refunds and compensation to over 27,000 customers who were charged fees for ongoing advice services which they never received.

ASIC estimated that total compensation may increase to over \$178 million, plus interest.

AIST recommends ASIC should provide regular updates on the number of customers who have received fee refunds and compensation for failure to deliver ongoing advice services and the total value of fee refunds and compensation paid.

1.5 Culture and chain of responsibility

ASIC has repeatedly pointed out that poor culture within the banks is a driver of poor conduct, regulatory failures and associated consumer losses.

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AIST shares ASIC's concerns that the for-profit culture of the banks adversely impacts retirement outcomes for members whose superannuation is invested in bank-owned products.

The fact that, despite a succession of regulatory failings so few bank senior executives have lost their jobs is a reflection of the poor culture within the banks which continue to place profits ahead of customers.

AIST strongly recommends that a clear signal be sent to the for-profit culture by removing the exemptions, gaps and inconsistencies identified within this submission. Our recommendations for redressing these inconsistencies are outlined in the next section.

1.6 Availability and adequacy of redress

The external dispute resolution framework in the financial services sector is the subject of a current review. An Interim Report released in December 2016 recommends the Superannuation Complaints Tribunal (SCT) be stripped of its tribunal status and transition to an industry-based ombudsman model, with a view to merging with the new Financial Ombudsman.

AIST strongly opposes this recommendation, which would significantly reduce the level of consumer protection for members of superannuation funds.

AIST recommends that due to the compulsory nature of superannuation, a specialist, legislative tribunal is the only model that can provide adequate redress for superannuation fund members.

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2 Recommendations

AIST recommends:

The numerous exemptions from the regulatory framework for superannuation currently afforded choice products and investment options, platforms and legacy products should be removed to ensure that all superannuation fund members are equally protected.

As part of the implementation of an industry funding model for ASIC, risk metrics should be used to assess the relative risk of industry sub sectors to better understand the relative risks of for profit versus not for profit subsectors and levy sub sectors appropriately.

Licensees should be required to report to ASIC and publicly on the process, progress and outcomes of all review and remediation programs.

All commissions and other forms of conflicted remuneration for the sale of retail life insurance policies should be banned.

A clear signal should be sent to the for-profit side of the financial services industry by removing exemptions, gaps and inconsistencies.

A specialist legislative tribunal for superannuation complaints should be retained as part of the EDR framework for financial services.

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3 At a glance - inconsistent treatment of choice superannuation products

3.1 Introduction

This submission covers the numerous exemptions, gaps and inconsistencies afforded through the legislative environment to choice superannuation products. At 30 June 2015, choice superannuation products cover \$904,556 million of members' pre-retirement superannuation moneys compared with \$428,300 million in MySuper. Here is a snapshot of the inconsistencies which this submission outlines in more detail:

Table 1 – Overview of exemptions from regulatory framework

Different treatment	Comments	Impact on consumers
No explicit duties on trustees to promote the financial interests of beneficiaries, or apply a scale test for choice products/investment options.	<p>The value of retirement savings in pre-retirement choice products /investment options is double the value in MySuper products.</p> <p>In 2014 SuperRatings found substantial differences between fees for MySuper and choice products, particularly within retail superannuation funds – even when the underlying asset allocations were almost identical.</p> <p>According to APRA there are 120 MySuper products but over 40,000 member investment choices.</p>	<p>The compounding effect of higher fees over long term reduces retirement incomes for members of choice products.</p> <p>Choice overload baffles members.</p> <p>The choice sector of the superannuation system is not achieving efficiencies of scale.</p>
<p>The Government deferred the requirement for choice dashboards in 2014, 2015 and 2016.</p> <p>It plans to amend</p>	<p>The Super System Review, Financial System Inquiry, and the Grattan Institute have all concluded that the level of fees paid by members is too high.</p> <p>SuperRatings has criticised the poor level of disclosure of fees, noting</p>	<p>Members of choice products/investment options do not have a dashboard and so cannot easily compare their returns, fees or costs with MySuper products.</p> <p>Under the Government's</p>

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<p>the law so funds would only need to produce dashboards for their 10 largest choice options.</p>	<p>there is still a long way to go to achieve comparability of fees across MySuper and choice products/investment options.</p>	<p>proposal, dashboards will not be required for most choice investment options.</p>
<p>APRA does not collect or publish statistics on choice products/investment options equivalent to the comprehensive statistical collection derived from the MySuper reporting standards.</p>	<p>APRA deferred collecting data for choice products/investment options for consideration during the development of the requirements for choice dashboards.</p>	<p>Members rely on APRA, employers, advisers, Government, researchers, commentators and trustees to analyse the characteristics and performance of choice products/investment options. Lack of data hampers this.</p>
<p>No requirement to ensure switching funds is in the best interests of the member when giving general advice or under no-advice business models.</p>	<p>ISA analysis of Roy Morgan research found an increase in cross-selling retail superannuation using general advice and no-advice business models.</p>	<p>Members are switched from a MySuper product to an inferior choice product/investment option, when it is not in the best interests of the member.</p>
<p>New fees and costs disclosure requirements do not apply to superannuation held via a platform.</p>	<p>According to Rainmaker, over 70 per cent of retail superannuation assets in Australia are held via platforms. According to Lane Clark Peacock, UK members may be paying up to 20 basis points per annum to access an active fund through a platform when compared with the cos of going</p>	<p>Disclosure for superannuation held via a platform understates fees and costs paid by the member. ASIC admits it would be misleading to compare the fees and costs of platforms and non-</p>

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	<p>direct to the fund manager.</p> <p>According to the UK Financial Conduct Authority, platforms add 20-90 basis points to costs.</p>	<p>platform superannuation funds.</p> <p>The compounding effect of higher costs over long term reduces retirement incomes for members.</p>
<p>The (unimplemented) dashboard regime for choice products/investment options will not include platforms.</p>	<p>While the Government amended the regime to require dashboards for products/investments held via a platform, platforms themselves will be exempt.</p>	<p>Members who hold their superannuation via a platform will not have a dashboard for it, compounding an existing difficulty comparing their returns, fees or costs with MySuper products.</p>
<p>APRA does not collect or publish statistics on platforms equivalent to the comprehensive statistical collection derived from the MySuper reporting standards.</p>	<p>APRA deferred collecting data for choice products/investment options for consideration during the development of the requirements for choice dashboards.</p>	<p>Members rely on APRA, employers, advisers, Government, researchers, commentators and trustees to analyse the characteristics and performance of superannuation held via a platform. Lack of data hampers this.</p>
<p>No requirement to produce a shorter PDS for legacy products.</p>	<p>According to Rice Warner, around 30% of personal superannuation assets are held in legacy products.</p>	<p>This makes it difficult for members in legacy products to compare the performance, fees or costs of the product with a contemporary product, understand the exit costs and assess whether they would be better off switching to a contemporary product.</p>
<p>The (unimplemented)</p>	<p>Rice Warner found fees and costs for legacy products are on average more</p>	<p>Members who hold legacy superannuation products will</p>

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<p>dashboard regime for choice products/investment options will not include legacy products.</p>	<p>than double those for contemporary products.</p> <p>UK Independent Project Board found £26 billion in legacy pension schemes had investment manager fees above 1%, with nearly £1 billion exposed to fees over 300 basis points per annum.</p>	<p>not have a dashboard, making it difficult to compare their returns, fees or costs with contemporary products.</p>
<p>APRA does not collect or publish statistics on legacy products equivalent to the comprehensive statistical collection derived from the MySuper reporting standards.</p>	<p>APRA deferred collecting data for choice products/investment options for consideration during the development of the requirements for choice dashboards.</p>	<p>Members rely on APRA, employers, advisers, Government, researchers, commentators and trustees to analyse the characteristics and performance of legacy products. Lack of data hampers this.</p>
<p>Conflicted remuneration is banned for most of the financial services industry, but there is an exemption for advice about retail life insurance.</p>	<p>In 2014 ASIC found more than one third of advice about retail life insurance reviewed did not comply with the law.</p> <p>96% of non-compliant advice was given by advisers paid an upfront commission.</p>	<p>Consumers are at significant risk of being recommended a life insurance policy that is not in their best interests.</p> <p>Industry and Government proposals to address this do not include banning commissions.</p>

4 Introduction

4.1 International context

In 2011, the Organisation of Economic Co-operation and Development developed High level principles on financial consumer protection (the OECD Principles).¹ The OECD Principles were endorsed by the G20 Finance Ministers and Central Bank Governors, including Australia. The principles include:

- Financial consumer protection should be an integral part of the regulatory framework.
- Oversight bodies responsible for financial consumer protection should have the necessary authority, resources and capabilities to fulfil their mandates.
- Treating consumers fairly should be an integral part of the good governance and corporate culture of all financial services providers.
- Financial services providers should provide consumers with information on material aspects of financial products. Standardised disclosure should be used where possible, to allow comparisons between products.
- Financial services providers should work in the best interest of their customers. Conflicts of interest should be avoided where possible. Where a conflict cannot be avoided, providers should disclose and manage the conflict, or decline to provide the product or advice. Remuneration should be designed to encourage responsible business conduct, fair treatment of consumers and avoid conflicts of interest.
- Competitive markets should be promoted. Consumers should be able to search, compare, and switch between products and providers easily and at reasonable and disclosed costs.

4.2 Regulatory framework for financial services

The Australian financial services regulatory framework is based on the recommendations of the Final Report of the 1997 Financial System Inquiry. It recommended a twin peaks regulatory structure with one regulator responsible for prudential regulation and a separate regulator

¹ Organisation of Economic Co-operation and Development, *High level principles on financial consumer protection*, 2011.

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responsible for regulation of corporations, financial market integrity and financial consumer protection.²

This was implemented with the establishment of the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC).

In performing and exercising its functions and powers, APRA is to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality and, in balancing these objectives, is to promote financial system stability in Australia.³

In performing its functions and exercising its powers, ASIC must strive to:

- (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
- (b) promote the confident and informed participation of investors and consumers in the financial system⁴

The 1997 Financial System Inquiry recommended that the introduction of a single regulatory framework to apply across all products and services that comprise the financial services industry, including superannuation.⁵

This recommendation was implemented in the form of the financial services reforms, contained in Chapter 7 of the *Corporations Act*. The main objects of this Chapter are to promote:⁶

- (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
- (b) fairness, honesty and professionalism by those who provide financial services; and
- (c) fair, orderly and transparent markets for financial products; and

² Financial System Inquiry, *Final Report*, 1997, Recommendations 1 and 31.

³ *Australian Prudential Regulation Authority Act 1998* (Cth) s 8(2).

⁴ *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2).

⁵ Financial System Inquiry, *Final Report*, 1997, Recommendations 1-3, 13 and 15.

⁶ *Corporations Act 2001* (Cth) s 760A.

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- (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.

4.3 Regulatory developments resulting in exemptions for retail superannuation

Since the commencement of the financial services reforms in 2004, there have been successive reviews of and numerous changes to the regulation of superannuation. A number of these have introduced exemptions, gaps or inconsistencies within the regulatory framework administered by ASIC and APRA.

In 2004, the Howard Government introduced reforms allowing many employees to choose which superannuation fund receives their superannuation contributions.⁷

In 2009, the Rudd Government announced a review into the governance, efficiency, structure and operation of Australia's superannuation system. The Super System Review released its Final Report in 2010.⁸

Also in 2010, the Joint Parliamentary Committee on Corporations and Financial Services released a report of its Inquiry into financial products and services in Australia (Ripoll Inquiry). The Ripoll Inquiry examined the role of financial advisers in the collapses of Storm Financial and Opes Prime and the adequacy of the existing regulatory framework. It made 11 recommendations including the introduction of a statutory fiduciary duty for financial advisers and the development of a mechanism by which to cease payments from product manufacturers to advisers.⁹

In December 2010, the Gillard Government announced its response to the Super System Review, Stronger Super. This included introducing a simple, low-cost superannuation product called MySuper, higher duties for superannuation trustees, enhanced reporting to APRA, a new

⁷ *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* (Cth).

⁸ Super System Review, *Final Report*, 2010.

⁹ Joint Parliamentary Committee on Corporations and Financial Services, *Inquiry into financial products and services in Australia, Report*, 2009, Recommendations 1 and 4.

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requirement for funds to produce a standardised product dashboard and tighter requirements for disclosing superannuation fees and costs.¹⁰

In 2012, the Gillard Government announced its response to the Ripoll Inquiry, the Future of Financial Advice (FOFA) reforms. The FOFA reforms included the introduction of a statutory duty requiring financial advisers to act in the best interests of clients, a ban on certain forms of conflicted remuneration and the extension of the financial services licensing regime to include accountants.

In 2013, the Abbott Government announced a Financial System Inquiry. The Inquiry released its Final Report in 2014.¹¹ It dedicated an entire chapter of the report to superannuation and retirement incomes and made a number of recommendations about superannuation including legislating the objective of the superannuation system, and reporting publicly on how policy proposals are consistent with achieving these objectives over the long term.¹²

In 2014, ASIC modified the superannuation fees and costs disclosure regime. In 2015, ASIC released updated regulatory guidance.¹³ In 2016, ASIC released a suite of Questions and Answers about the updated guidance which it subsequently expanded.¹⁴ The fees and costs disclosure regime as modified by ASIC is due to commence on 1 October 2017.

¹⁰ Federal Government, *Stronger Super – Government Response to the Super System Review*, 16 December 2010.

¹¹ Financial System Inquiry, *Final Report*, 2014.

¹² Financial System Inquiry, *Final Report*, 2014, Chapter 2 and Recommendation 9.

¹³ ASIC, Regulatory Guide 97, *Disclosing fees and costs in PDSs and periodic statements*.

¹⁴ ASIC, *Questions and answers – fees and costs disclosure – superannuation and managed investment products*, <http://tinyurl.com/hmd85jr> (accessed 27 February 2017).

5 Failures evident in current laws and regulatory framework

5.1 Failures in the regulatory framework for choice of fund – ‘no employer kickbacks’

The legislation introducing choice of fund included a new rule designed to prevent superannuation funds offering employers ‘kickbacks’.¹⁵

It provides that a trustee, or an associate, must not supply, or offer to supply, goods or services to an employer at all, or at a particular price, or offer to, give or allow, a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services to an employer, on the condition that one or more employees of the employer will be members of the fund. ASIC is responsible for administering this rule.¹⁶

As a result of the way the provision is drafted, there are significant gaps which undermine its usefulness as a regulatory tool:

- A breach of the rule cannot be enforced by ASIC, but merely gives an employee a right to commence civil proceedings. It is difficult to envisage an employee funding an expensive action against a superannuation fund for offering their employer a kickback.
- To establish a breach of the rule it is necessary to establish that the supply or offer is made ‘on the condition’ that one or more employees of the employer will be members of the fund. This is a high evidentiary threshold. Even if evidence existed capable of establishing a superannuation fund offered an employer a kickback on the condition that one or more employees of the employer will become a member of the fund, it is unlikely that an employee would be in a position to discover it.
- An employee would also need to establish that they suffered loss or damage as a result of the breach. Superannuation is a very long term investment. Assuming that an employee was switched from a high performing superannuation fund into an inferior fund as a result of a kickback offered by that fund to their employer, it could be decades before the loss or damage could be quantified.

¹⁵ *Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2004 (Cth), Explanatory Memorandum*, para 1.24.

¹⁶ *Superannuation Industry (Supervision) Act 1993 (Cth) s 68A*.

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In 2015, ASIC Commissioner Greg Tanzer highlighted these gaps in evidence before the Senate Economics Legislation Committee.¹⁷

Another limitation of the provision is that it does not prevent a superannuation fund or an associate from offering or supplying incentives to an existing employer of the fund, as a retention strategy.

In February 2016, following a review of retail and industry superannuation trustees to assess their compliance with the no employer kickbacks rule, ASIC updated its guidance for employers selecting a default superannuation fund to include a warning to employers to be very wary of employers offering inducements to choose their fund.¹⁸

5.1.1 Impact

There is evidence that some superannuation funds offer employers kickbacks. In 2010, research conducted by Colmar Brunton for the Australian Taxation Office found that 13% of employers surveyed reported being offered, or were not sure whether they had been offered receiving a direct or indirect benefit from a superannuation provider.¹⁹

In 2014, research by UMR for Industry Super Australia (ISA) found that more than one quarter of employers surveyed reported that their bank had approached them about their default superannuation arrangements for employees, and recommended a bank owned superannuation fund.²⁰ Employers reported being offered incentives which benefit the employer rather than the employees, including discounts on banking and insurance products. One third of the employers offered such incentives reported switching funds.

¹⁷ Senate Economics Legislation Committee, *Transcript of hearing*, 21 October 2015.

¹⁸ ASIC 16-038MR, *ASIC guidance to employers about super*, 17 February 2016.

¹⁹ Australian Taxation Office, *Investigating Superannuation: Quantitative Investigation with Employers*, 20 January 2010, Colmar Brunton Social Research, 55.

²⁰ UMR, *Employer Attitudes to Superannuation*, ISA, 2015.

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UMR repeated this research for ISA in 2016, finding no significant change in the number of employers approached by their bank about their default superannuation arrangements, the types of incentives offered or the number of employers who switched default funds.²¹

This suggests that the no employer kickback rule does not protect members from being switched to a different superannuation fund to benefit their employer, rather than the employees.

5.2 Exemptions, gaps and inconsistencies in the regulatory framework for choice of product/investment option

Table 2 sets out the value of assets in the MySuper and choice sectors of the superannuation system, as at 30 June 2015.

Table 2 Estimated MySuper assets at 30 June 2015

Market segment	Pre-Retirement				Retirement	Total	
	Choice	MySuper	ADAs	MySuper and ADAs	Choice	All	MySuper
	(\$m)			(%)	(\$m)	(\$m)	(%)
Not for Profit Funds							
Corporate Funds	44,857	17,000	1,900	29.6	5,319	69,076	27.4
Industry Funds	161,162	278,700	700	63.4	15,843	456,405	61.2
Public Sector Funds	163,162	97,200	900	37.5	61,966	323,228	30.4
Subtotal	369,180	392,900	3,500	51.6	83,128	848,709	46.7
Commercial Funds							
Employer Master Trusts					0	145,941	
Personal Superannuation	282,715	35,400	55,700	24.4	0	222,888	24.4
Eligible Rollover Funds					0	4,986	
Commercial Post Retirement Products	0	0	-	-	208,345	208,345	-
Subtotal	282,715	35,400	55,700	24.4	208,345	582,160	15.6
Self-managed Funds							
Self-managed Funds	252,661	0	-	-	339,374	592,035	-
Subtotal	252,661	0	0	-	339,374	592,035	-
Total Superannuation Market	904,556	428,300	59,200	35.0	630,847	2,022,904	24.1

The NFP profit sector has been quick to move the majority of their default funds under management into MySuper compliant products. Only a small fraction remains in legacy employer superannuation accounts, known as Accrued Default Amounts (ADAs). These are required to be moved by 1 July 2017.

The retail sector, on the other hand, has been more reluctant in moving funds into the MySuper products. However, the percentage of funds kept in default products is much lower for retail funds at just 24.4% of total funds under management, compared to 51.6% for the not for profit sector.

Source: Rice Warner for AIST

²¹ UMR, *Default funds and the banks*, ISA, 2017.

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The value of pre-retirement assets in the MySuper sector as at 30 June 2015 was \$428,300 million, while the value of pre-retirement assets in the Choice sector was significantly higher at \$904,556 million.

There are numerous exemptions, gaps and inconsistencies in the regulatory framework that substantially reduce the level of consumer protection afforded members whose superannuation is invested in choice products and investment options.

5.2.1 Less onerous trustee duties for choice products and investment options

Australia has adopted a trust structure for governance of superannuation funds. Trustees have fiduciary and statutory duties to manage the assets of the trust on behalf, and in the best interests of members.²²

The Super System review recommended specific additional duties for trustees of MySuper products.²³ The rationale for this was to ensure that the trustee is truly accountable to members, and unfettered in its pursuit of the best interests of members.²⁴

In 2012, the Gillard Government implemented these recommendations as part of the Stronger Super reforms.²⁵ As a result of these changes, trustees offering MySuper products must:²⁶

- Promote the financial interests of beneficiaries in MySuper products, in particular returns (after the deduction of fees, costs and taxes).
- Determine annually whether the members are disadvantaged because of lack of scale, in terms of number of members or assets, and include details of the trustee's determination of scale in the investment strategy for the MySuper product.

²² *Superannuation Industry (Supervision) Act 1993* (Cth) s 52.

²³ Super System Review, *Final Report*, 2010, Recommendation 1.6.

²⁴ Super System Review, *Final Report*, 2010, Part 2, Chapter 1, 10-14.

²⁵ *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth).

²⁶ *Superannuation Industry (Supervision) Act 1993* (Cth) Part 2C Div 6.

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- Include the investment return target over 10 years for the assets of the MySuper product, and the level of risk appropriate to the investment of those assets, in the investment strategy, and update this information annually.

These duties do not apply to trustees in relation to choice products and investment options.

5.2.1.1 Impact

As a result of Stronger Super reforms, trustee duties are less onerous for trustees that provide choice superannuation products. A trustee that offers a choice product or investment option is not subject to a specific obligation to promote the financial interests of beneficiaries, apply a scale test to the product annually, disclose the result of the scale test in the investment strategy for the product, or include an investment return target over 10 years for the assets of the product, or the level of risk appropriate to the investments of those assets, in the investment strategy.

There is evidence that suggests that this has an impact on member retirement savings.

5.2.1.1.1 Fees

SuperRatings analysis for AIST of fees across MySuper and choice products in 2014 found significant fee reductions within MySuper products, but only small fee decreases for choice products. SuperRatings also found substantial differences between fees for MySuper and choice products, particularly within retail superannuation funds.²⁷

SuperRatings found that the substantial differences between fees for MySuper and choice products existed even when the underlying asset allocations were almost identical. This suggests that differences in fees cannot be explained by different asset allocation.

A possible explanation is the higher trustee duties that apply to MySuper products, including a specific duty to promote the financial interests of beneficiaries of MySuper products.

²⁷ SuperRatings, *Fee and performance analysis*, AIST, 2015.

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5.2.1.1.2 Scale

There are 120 MySuper products in the Australian market.²⁸ Yet, according to APRA, Australia's superannuation system offers over 40,000 member investment choices.²⁹ This number of choice products and investment options is unnecessary, creates choice overload for consumers, and impedes scale efficiencies at a system level.

Arguably, the absence of an obligation to regularly apply a scale test to choice products and investment options contributes to this situation.

5.2.2 Deferral of and proposed exemptions from choice dashboard regime

The Stronger Super reforms recommended that superannuation funds should be required to produce dashboards for their MySuper product and every choice product and investment option provided by the fund.³⁰ Dashboards would be required to contain prescribed information, presented in a standardised format. According to the Panel, dashboards would:³¹

- Overcome deficiencies with existing disclosure, 'resulting in a lack of trustee accountability on the performance of investment options.'
- Encourage comparison shopping on important attributes.
- Provide meaningful information about the cost and risk that would help decision making.

In 2012, the Gillard Government implemented the framework for product dashboard requirements.³² Detailed requirements about the content and presentation of dashboards for MySuper products were subsequently set out in regulations.³³ ASIC also published regulatory

²⁸ APRA, List of MySuper authorisations, <https://tinyurl.com/je56f2z>, accessed 28 February 2017.

²⁹ H Rowell, *Forward Thinking – The Murray Inquiry & superannuation*, Panel discussion presented at Grattan Institute, Sydney, transcript, 18 February 2014, 7.

³⁰ Super System Review, *Final Report*, 2010, Recommendations 4.11 and 4.12.

³¹ Super System Review, *Final Report*, 2010, Part 2, Chapter 4, 113-14.

³² *Corporations Act 2012* s 1017BA, inserted by the *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012* (Cth).

³³ *Corporations Regulations 2001* Part 7.9 Div 2E.

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guidance on the content of dashboards for MySuper products.³⁴ The dashboard requirements for MySuper products commenced in December 2013.

In contrast, the product dashboard regime for choice products and investment options has not commenced because regulations setting out in detailed requirements for the content and presentation of information in dashboards these products and options have never been made.

In November 2013, the Abbott Government released a discussion paper seeking feedback on dashboards for choice products and investment options, including whether there was a need for exemptions.³⁵

In a submission in response to the discussion paper, the Financial Services Council submitted that the product dashboard requirements should not apply to choice products.³⁶

In May 2014 the Abbott Government announced a deferral of the start date for the product dashboard regime for choice products and investment options, to 1 July 2015.³⁷ ASIC formally deferred commencement of the requirement to provide a dashboard for choice products and investment products in the absence of regulations or amending legislation to fully implement these reforms.³⁸

In 2015, the Abbott Government released a package of draft legislation and regulations to amend the choice dashboard requirements.³⁹ The Government proposed significant exemptions from the requirements.

³⁴ ASIC INFO 170, *MySuper product dashboard requirements for superannuation trustees*.

³⁵ Federal Government, *Better regulation and governance, enhanced transparency and improved competition in superannuation*, Discussion Paper, 2013, Part 3A.

³⁶ FSC, *Better regulation and governance, enhanced transparency and improved competition in superannuation*, Discussion Paper, *Submission*, 11 February 2014, 18.

³⁷ Acting Assistant Treasurer, Media Release, *Providing greater stability and transparency in the superannuation system*, 4 May 2014.

³⁸ ASIC Class Order 14/443. ASIC subsequently extended the deferral of commencement in 2015 and again in 2017: ASIC *Corporations Amendment No 2 Instrument 2015* and ASIC 15-092 MR *Update on Stronger Super regime*; ASIC *Superannuation Amendment Instrument 2016/351* and ASIC 16-130 MR, *Further update on Stronger Super regime*. The requirements are currently due to commence on 1 July 2017.

³⁹ Federal Government, *Improved Superannuation Transparency, Exposure Draft*, 10 December 2015.

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First, the requirement would not apply to investment options held via a platform.

Secondly, the requirements would be restricted to the 10 largest choice investment options provided by the fund, as measured by funds under management on 30 June of the previous financial year.

The Government also proposed to insert new powers to make regulations creating further exemptions from the dashboard regime for both MySuper products and choice products/ investment options.

The FSC expressed support for the draft legislation.⁴⁰

AIST opposed the exemptions, arguing that the superannuation funds should be required to provide dashboards for all choice investment options.⁴¹

In 2016, the Turnbull Government introduced a Bill amending the choice dashboard regime.⁴² Consistently with the exposure draft, the Bill restricts the requirement to provide a dashboard to the 10 largest choice investment options provided by the fund, as measured by funds under management on 30 June of the previous financial year.

However, in the Bill as introduced, dashboards would be required for investment options held via a platform, although not for platforms themselves.

The Explanatory Memorandum to the Bill does not offer a rationale for the exemptions. In her second reading speech introducing the Bill⁴³, the Minister for Revenue and Financial Services explained that although the legislation containing the choice dashboard regime received royal assent in 2012, due to the complexity of the legislation and the significant compliance burden it placed on industry, supporting regulations were never made.

⁴⁰ FSC, Improved Superannuation Transparency, Exposure Draft, *Submission*, 22 January 2016, 24 <https://tinyurl.com/hmmrzra> (accessed 24 February 2017).

⁴¹ AIST, Improved Superannuation Transparency, Exposure Draft, *Submission*, 25 January 2016, <https://tinyurl.com/jxu9czt>, accessed 24 February 2017).

⁴² *Superannuation Legislation Amendment (Transparency Measures) Bill 2016* (Cth).

⁴³ Hansard, 17 March 2016.

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The Minister described the amended regime as ‘aiming to strike the right balance between enhancing the transparency, comparability and quality of information for consumers, and minimising the compliance costs to superannuation funds’.

The Bill lapsed when the 44th Parliament was prorogued. In November 2016, the Minister confirmed that the Turnbull Government intended to continue to progress the legislation.

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5.2.2.1 Impact

The failure to implement the choice dashboard regime deprives:

- members of MySuper products considering switching to a choice product or investment option of simple, clear information about the key attributes of that option, and
- members of choice products and investment options of the information needed to compare the key attributes of their current option with MySuper products or other choice products and options.

In other words, all superannuation members are impacted by the failure to implement the regime.

In her second reading speech, the Minister cited Treasury estimates that the amended requirements capture approximately 73 per cent of all choice investment options.⁴⁵ However, there is no further information about the basis of these estimates in the Explanatory Memorandum accompanying the Bill.

5.2.2.1.1 Fees

Choice dashboards would contain standardised information about fees and costs for choice products and investment options.

⁴⁴ Minister for Revenue and Financial Services, Address at the ASFA Conference 2016, 11 November 2016, <http://tinyurl.com/j34mj57> accessed 28 February 2017.

⁴⁵ Hansard, 17 March 2016.

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The Super System Review⁴⁶ and the Financial System Inquiry⁴⁷ found that superannuation fees have not fallen by as much as would be expected given the substantial increase in the scale of the superannuation system. Industry analysts have also observed that the level of fees and costs in the superannuation system are too high.⁴⁸ In particular, as noted above research by SuperRatings for AIST found substantial differences between fees for MySuper products and choice products/investment options.

SuperRatings lamented the poor levels of disclosure of fees and difficulty comparing fees across MySuper and choice products:⁴⁹

SuperRatings remains concerned with the poor level of disclosure of fees across the industry ...Poor disclosure of fees remains a critical issue for comparability. Based on the 622 products that SuperRatings analyses, it is evident that there is still a long way to go to achieve comparability of fees across MySuper and Choice options. Fee disclosure amongst funds still remains varied in the absence of prescriptive legislation that stipulates the degree of disclosure required from each fund along with the determination of materiality.

5.2.2.1.2 Flow on effect for APRA data

As a result of the failure to implement the choice dashboard requirements, APRA has not been able to progress the development of reporting standards for choice investment options. This gap and its impact are discussed below.

⁴⁶ Super System Review, *Final Report*, 2010, Part 1 at 7.

⁴⁷ Financial System Inquiry, *Final Report*, 2014, Chapter 2.

⁴⁸ SuperRatings, *Fee and performance analysis*, AIST, 2015; Grattan Institute, *Super Sting*, 2014; Grattan Institute, *Super Savings*, 2015.

⁴⁹ SuperRatings, *Fee and performance analysis*, AIST, 2015, section 5.1.

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5.2.3 Gaps in APRA product level data

Superannuation funds are required to report a range of data to APRA on a quarterly and annual basis.⁵⁰ The Super System Review recommended the introduction of additional reporting requirements.⁵¹

As part of the Stronger Super reforms, APRA developed reporting standards to set a consistent approach for reporting data about MySuper products.⁵² APRA publishes this data in Quarterly and Annual MySuper Statistics. APRA, as well as independent analysts and industry participants also use the data to analyse the characteristics and performance of MySuper products.⁵³

There is no equivalent statistical collection for choice products or investment options.

In April 2015 APRA announced that it would defer the collection of investment performance, fees and costs data for this sector for consideration during the development of the choice product dashboards.⁵⁴

In December 2015, the Abbott Government released a package of draft legislation and regulations to amend the choice dashboard requirements.⁵⁵ The amendments introduced two significant exemptions from the requirement to provide a dashboard for choice investment options, examined above.

Following the release of this package, APRA consulted on proposals to revise its reporting standards.⁵⁶

APRA did not propose to restrict data collection to products and investment options that would be required to produce a dashboard but instead proposed to expand the scope of its reporting

⁵⁰ *Financial Sector (Collection of Data) Act 2001* (Cth) and its reporting standards.

⁵¹ Super System Review, *Final Report*, 2010, Recommendations 4.1, 4.2, 44.4 and 4.13.

⁵² APRA, Reporting Standards SRS 700.0 *Product dashboard*, SRS 702.0 *Investment performance*, SRS 703.0 *Fees disclosed*.

⁵³ For example APRA, *MySuper selected feature*, June 2014; Rice Warner, *Lifecycle MySuper Product Fees*, AIST, 2016.

⁵⁴ APRA, Discussion Paper, *Superannuation reporting standards*, 2015, 11.

⁵⁵ Federal Government, *Improved Superannuation Transparency, Exposure Draft*, 10 December 2015.

⁵⁶ APRA, Consultation, *Proposed amendments to product dashboard requirements*, December 2015.

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standard on investment performance to include ‘select investment options’. APRA’s rationale for proposing to decouple the collection of investment performance data from the choice dashboard regime was:

APRA’s view is that applying draft SRS 702.1 to a greater proportion of members’ benefits than the proposed qualifying choice investment options is important for its prudential supervision of superannuation.⁵⁷

APRA foreshadowed further consultation on its proposals. To date no further public consultation has occurred, probably because the choice dashboards regime has not been implemented.

5.2.3.1 Impact

The lack of APRA data on choice products and investment options, particularly on investment performance, fees and costs, impedes assessment of the characteristics and performance of this sector, or comparative analysis, by APRA, employers, financial advisers, Government and its policy advisers, members, researchers, commentators and trustees.

5.2.4 Gaps in the best interest duty

In 2009 the Parliamentary Joint Committee on Corporations and Financial Services recommended the introduction of an explicit fiduciary duty for financial advisers, requiring them to place their clients’ interests ahead of their own.⁵⁸

In 2012, the Gillard Government implemented this recommendation as part of the FOFA reforms.⁵⁹ Compliance with the new requirement was mandatory from 1 July 2013.

However, despite the duty, financial advisers and bank staff are permitted to receive certain forms of conflicted remuneration, including for recommending bank-owned superannuation funds. It is difficult to reconcile the fact that advisers continue to receive commissions and other forms of

⁵⁷ APRA, Consultation, Proposed amendments to product dashboard requirements, December 2015, Letter to RSE licensees on Draft Reporting Standard SRS 700.0 Product Dashboard and Draft Reporting Standard SRS 702.1 Investment Performance (Non-MySuper Investment Options).

⁵⁸ Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into Financial Products and Services in Australia, *Report*, 2009, Recommendation 1.

⁵⁹ *Corporations Act 2001* Part 7.7A Div 2, inserted by the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth).

conflicted remuneration with their duty to act in the best interests of their clients. Section 5 examines the gaps in the ban on conflicted remuneration and its impact on consumers.

A further gap is that the best interests duty does not apply to advisers or sales staff when they give general advice, or avoid giving advice.

5.2.4.1 Impact

There is evidence that retail superannuation funds are exploiting this regulatory gap. Analysis by ISA in October 2016 of Roy Morgan Research found an increase in cross-selling retail super using general advice and no advice models.⁶⁰

The line between personal advice and general advice when switching members into a bank-owned superannuation fund is the subject of a current test case. In December 2016, ASIC commenced civil penalty proceedings in the Federal Court against Westpac subsidiaries Westpac Securities Administration Limited (WSAL) and BT Funds Management Limited (BTFM) for breaching the requirement to act in the best interests of clients.⁶¹

The proceedings follow an ASIC investigation into Westpac's telephone sales campaigns targeting superannuation fund members. ASIC's case sets out 15 examples of alleged contraventions of the best interests duty arising from two telephone campaigns instigated by WSAL and BTFM.

The BT Financial Group has rejected ASIC's interpretation of what constitutes general versus personal advice and stated that it will vigorously oppose the action ASIC has brought against it.⁶²

⁶⁰ ISA, *The Hard Sell*, 2016.

⁶¹ ASIC, MR 16-460, *ASIC takes action against Westpac entities in relation to the 'best interests duty' and superannuation customers*.

⁶² BT Financial Group, Media Releases, *BT Financial Group rejects ASIC's interpretation of general advice versus personal advice*, 23 December 2016.

5.3 Failures in the regulatory framework for platform-based superannuation

According to research by Rainmaker cited by ISA, as at December 2014, 72 per cent of retail superannuation assets were held via platforms.⁶³

This section examines a number of exemptions, gaps and inconsistencies in the regulatory framework that substantially reduce the level of consumer protection afforded members who hold their superannuation via a platform.

5.3.1 Exemption from enhanced fees and costs disclosure requirements

The regulatory framework for superannuation products includes detailed, technical and prescriptive requirements for disclosure of fees and costs in Shorter Product Disclosure Statements (PDSs) and member statements.⁶⁴ The requirements include prescribed content, a prescribed template, a consumer advisory warning and a worked example.

These requirements were amended by the Stronger Super reforms to include definitions for a number of permitted fees for MySuper products. Consequential changes were also made to the requirements.

In a 2014 review, ASIC found that some superannuation funds do not look beyond the first layer of fees in the underlying investment vehicle they invest through when disclosing fees and costs. As a result, these funds may materially understate fees, making any comparison of funds ineffective.⁶⁵

ASIC cited research by Chant West estimating that fees and costs may be understated by as much as 0.20%–0.40%.⁶⁶

⁶³ ISA, Media Release, *Government proposals will prevent consumer 'compare the pair'*, 28 January 2016.

⁶⁴ *Corporations Act 2001* Sch 10D.

⁶⁵ ASIC REP 398, *Fees and costs disclosure: Superannuation and managed investment products*, 2014, para 57.

⁶⁶ ASIC REP 398, *Fees and costs disclosure: Superannuation and managed investment products*, 2014, para 60.

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ASIC undertook to consult further on the definition of ‘indirect costs’ introduced to the fees and disclosure requirements as part of the Stronger Super reforms, and modify the law by issuing a class order to clarify the definition.⁶⁷

In 2014, ASIC modified the fees and costs disclosure regime by class order.⁶⁸ The Class Order inserts a new definition of ‘interposed vehicle’ into the fees and costs disclosure regime.

The Class Order also exempts investor directed portfolio services and similar platform-type arrangements from the definition of interposed vehicle. As a result of this exemption:

*if securities or interests in an entity are acquired through a platform the entity is not treated as an interposed vehicle on the basis that they are selected by the investor.*⁶⁹

ASIC’s rationale for exempting platforms from the definition of interposed vehicle was that consumers would not reasonably regard a platform as an interposed vehicle.⁷⁰

ASIC has extended the commencement date for the new fees and costs disclosure requirements for PDSs until 30 September 2017.⁷¹

5.3.1.1 Impact

The exclusion of platforms from the definition of interposed vehicle means that fees and costs disclosure for members who hold superannuation products via a platform understate the level of fees and costs paid. This is misleading and makes it difficult to compare the fees and costs paid under a platform with the fees and costs for other superannuation products.

ASIC’s regulatory guidance on fees and costs acknowledges this.⁷² ASIC’s guidance states that investors need to take into account the cumulative effect of costs at the platform level and in the

⁶⁷ ASIC REP 398, *Fees and costs disclosure: Superannuation and managed investment products*, 2014, para 106.

⁶⁸ ASIC Class Order 14/1252.

⁶⁹ ASIC Regulatory Guide 97, *Disclosing fees and costs in PDSs and periodic statements*, para 97.63.

⁷⁰ ASIC REP 457 *Response to submissions on draft Regulatory Guide 97 Disclosing fees and costs in PDSs and periodic statements*, 2016, paras 21 and 22.

⁷¹ ASIC 16-412 MR.

⁷² ASIC Regulatory Guide 97, *Disclosing fees and costs in PDSs and periodic statements*, paras 67-69.

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investments on the list they select in order to understand the impact of fees and costs. The guidance states that:

- To ensure that investors are not misled, the PDS must contain prominent statements following the example of annual fees and costs that the fees and costs of the platform relate to access to the investments on the list, not the costs within those investments, and that additional costs will be charged by the issuers of the products that the investor decides to invest in.
- Issuers can help ensure that the PDS is not misleading by including an example. The example should illustrate the combined effect of fees and costs of the platform and of an actual or hypothetical entity that may be regarded as typical, in terms of its fees and costs and investment strategy, for a major proportion of the investments selected by investors in the relevant platform.
- ASIC encourages platform operators to provide for each investment on their list similar examples of the cumulative effect of the fees and costs of the investment, taking into account the fees of the platform and the fees and costs for the investment that may be selected.

In 2017, ASIC released the following Question and Answer on superannuation fees and costs:⁷³

Q 22 Would it be misleading to compare the fees and costs of platforms and non-platform superannuation funds or registered scheme [sic] on the basis of fees and costs?

A: Yes, this is likely to be misleading.

The impact of the costs of platforms on retirement outcomes is the subject of ongoing scrutiny in the United Kingdom. According to 2015 analysis of pension fund fees and costs in the UK by investment consulting firm Lane Clark and Peacock, UK investors may be paying up to 20 basis points per annum more to access an active fund through a platform when compared with what it would cost going directly to the manager.⁷⁴

⁷³ ASIC, Questions and answers – fees and costs disclosure – superannuation and managed investments products, <https://tinyurl.com/jcm4q9r>, accessed 25 February 2017.

⁷⁴ LCP, Investment Management Fees Survey 2015, 21.

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Lane Clark and Peacock comment:⁷⁵

Investors should be careful to compare the differences between investing in a platform and investing directly with a manager.

In November 2016, the UK Financial Conduct Authority also found that platforms can have a significant impact on the total cost of investing.⁷⁶ It found that platforms can contribute a larger share of overall cost of investing than fees and costs charged by the fund itself for investors using passive funds.

The FCA also found that platform costs varied, depending on balance, from between 20 basis points to over 90 basis points.

The FCA flagged that it will be undertaking further work on the impact that financial advisers and platforms have on value for money for retail investors.⁷⁷

5.3.1.2 Reporting fees and costs data to ASIC

To be eligible for the extended transition period for complying with the new fees and costs disclosure regime as modified by ASIC, superannuation funds were required to notify ASIC in writing prior to 1 February 2017 that they intend to take advantage of the extension in relation to a PDS and, prior to 1 March 2017, provide certain fees and costs information to ASIC using a form published on the ASIC website.⁷⁸

The requirement to remit fees and costs data to ASIC is restricted to MySuper products and certain choice investment options: the largest investment option, and any other open investment option on the platform which has gross assets of more than \$100 million.

5.3.2 Proposed exemption from product dashboard regime

Section 3.2.2 sets out the background to the introduction of product dashboards, including the repeated deferral of the introduction of dashboards for choice products and investment options and the proposed exemption from the requirement for certain choice investment options.

⁷⁵ LCP, Investment Management Fees Survey 2015, 9.

⁷⁶ FCA, Asset Management Market Study, *Interim Report*, 2016, paras 5.14-5.15 and Figure 5.6.

⁷⁷ FCA, Asset Management Market Study, *Interim Report*, 2016, para 1.59.

⁷⁸ ASIC, <https://tinyurl.com/jcdk7hn>, accessed 6 March 2017.

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As noted in that section, in 2015, a package of draft legislation and regulations to amend the choice dashboard requirements released by the Abbott Government proposed an exemption from the requirement to produce a product dashboard for investment options held via a platform.

The Government subsequently partially abandoned that proposal. In the Bill as introduced in 2016 by the Turnbull Government, dashboards would be required for investment options held via a platform, although platforms themselves would be exempt.⁷⁹

That Bill lapsed when the 44th Parliament was prorogued. In November 2016, the Minister for Revenue and Financial Services stated that the Turnbull Government intended to continue to progress the legislation.⁸⁰

5.3.2.1 Impact

While dashboards have been required for MySuper products since 2013, three years later the choice dashboard regime has not been implemented.

The proposed exemption for platforms from the requirement to provide a dashboard would deprive:

- members of MySuper products considering switching to platform-based superannuation of simple, clear information about the performance, fees and costs of doing so, and
- members of platform-based superannuation of the information needed to compare the key attributes of their current situation with MySuper products.

As noted above, a majority of retail superannuation assets are held via a platform.

5.3.3 Gaps in APRA data

As noted in section 3.2.3, as part of the Stronger Super reforms, APRA developed reporting standards to set a consistent approach for reporting data about MySuper products. APRA publishes this data in Quarterly and Annual MySuper Statistics.

There is no equivalent statistical collection for choice products or investment options held via a platform.

⁷⁹ *Superannuation Legislation Amendment (Transparency Measures) Bill 2016* (Cth).

⁸⁰ Minister for Revenue and Financial Services, Address at the ASFA Conference 2016, 11 November 2016, <https://tinyurl.com/j34mj57> accessed 28 February 2017.

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5.3.3.1 Impact

Without accurate data, particularly on investment performance, fees and costs, it is not possible to accurately assess the performance of platform-based superannuation products or undertake comparative analysis.

5.4 Failures in the regulatory framework for legacy products

The widely accepted definition of a legacy product is a product that is closed to new members. According to research undertaken by Rice Warner for the FSC in 2014, around 30% of personal superannuation assets are held in legacy products. Fees and costs in legacy products are much higher than for contemporary products currently on sale. Rice Warner estimated that average fees legacy products were more than double those for contemporary products. Fees and cost levels for legacy products have declined at a much slower rate than contemporary products.⁸¹

This is consistent with the findings of the UK Independent Project Board of an audit of charges in legacy UK pension schemes cited by research by UK investment consultants Lane Clark and Peacock. The audit found £26 billion in legacy pension schemes had investment manager fees above 1%, with nearly £1 billion exposed to fees over 300 basis points per annum.⁸²

This section examines a number of exemptions, gaps and inconsistencies that substantially reduce the level of consumer protection afforded members whose superannuation is invested in these products.

5.4.1 No requirement to produce a Shorter PDS

The Shorter PDS requirements do not apply to legacy products. This is because the requirement to give a retail client a Shorter PDS is triggered by making a recommendation to the retail client to buy a product, offering to issue or arrange to issue a product, or offering to sell a product.⁸³ Because legacy products are not recommended, offered or sold to retail clients, the obligation to provide a Shorter PDS does not arise.

⁸¹ Rice Warner, Superannuation Fees Report 2014 FSC, 2014, 54.

⁸² LCP, Investment Management Fees Survey 2015, 6.

⁸³ *Corporations Act 2001* s 1012A, 1012B and 1012C.

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The rationale for this is that the purpose of a Shorter PDS is to enable retail clients to make an informed decision about whether to buy a product.⁸⁴

5.4.1.1 Impact

Although consumers cannot switch into a legacy superannuation product, because these products are by definition closed to new members, existing members can switch out of legacy products. The lack of shorter PDSs for legacy products makes it difficult for members of these products to compare the performance, fees or costs of the product with contemporary products, understand the exit costs, and assess whether they would achieve a better retirement outcome if they switched to a contemporary superannuation product.

5.4.2 Proposed exemption from choice dashboard regime

As set out in section 3.2.2 the Gillard Government implemented the framework for product dashboard requirements in 2012. This framework provides an exemption from the requirement to produce a dashboard for legacy products.⁸⁵ The Explanatory Memorandum to the legislation which implemented the framework does not offer a rationale for this exemption.

5.4.2.1 Impact

The exemption from the requirement to publish a dashboard for legacy products deprives members of prescriptive, standardised disclosure about the performance, fees and costs of these products. This makes it difficult for members of these products to determine whether they would achieve a better retirement outcome if they switched to a contemporary superannuation product.

5.4.3 Gaps in APRA data

Section 3.2.2 sets out an overview of the APRA data reporting regime for superannuation funds.

As noted in that section, as part of the Stronger Super reforms, APRA developed reporting standards to set a consistent approach for reporting data about MySuper products. APRA publishes this data in Quarterly and Annual MySuper Statistics.

There is no equivalent statistical collection for legacy products.

⁸⁴ ASIC Regulatory Guide 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*, para 36 – 40.

⁸⁵ *Corporations Act 2001* s 1017BA(4).

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5.4.3.1 Impact

There is a reasonably comprehensive APRA statistical collection for MySuper products but no equivalent collection for legacy superannuation products. Without accurate data on legacy products, particularly about performance, fees and costs, APRA, employers, financial advisers, Government and its policy advisers, members, researchers, commentators and trustees cannot accurately assess the performance of those products or undertake comparative analysis.

Recommendation

There is no justification for the numerous exemptions from the regulatory framework for superannuation currently afforded choice products and investment options, platforms and legacy products. The exemptions should be removed to ensure that all superannuation fund members are equally protected.

5.5 Inadequate penalties

In 2016, the Turnbull Government established an ASIC Enforcement Review Taskforce. The role of the Taskforce is to assess the suitability of the existing regulatory tools available to ASIC, including the adequacy of existing penalties.⁸⁶

AIST welcomes the review and supports ASIC having stronger regulatory powers. However, AIST believes that the setting of clearer objectives, identifying the resources needed and finalising the current review of ASIC funding should occur first.

5.6 Review of ASIC funding

In 2016, the Turnbull Government announced that it would introduce an industry funding model for ASIC, commencing in the second half of 2017. AIST strongly supports the proposed funding model.

AIST recommends the need to gather data to examine risk-related metrics for the purpose of setting ASIC levies. Such metrics should be used to assess each subsector of the superannuation industry to better understand the regulatory risks for the for-profit versus not-for-profit sectors so that areas needing regulator focus are identified and suitably levied.

⁸⁶ <https://tinyurl.com/htk265x>, accessed 6 March 2017.

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Recommendation

As part of the implementation of an industry funding model for ASIC, risk metrics should be used to assess the relative risk of industry sub sectors to better understand the relative risks of the for-profit versus not-for-profit sectors and levy sub sectors appropriately.

6 Impact of conduct on victims and consumers

In December 2014, the Financial System Inquiry estimated that collapses including Storm Financial, Opes Prime, Westpoint, Great Southern, Timbercorp and Banksia Securities affected more than 80,000 consumers, with losses totalling more than \$5 billion, or \$4 billion after compensation and liquidator recoveries.⁸⁷

This estimate does not include subsequent scandals which have engulfed Australia's four major banks. Appendix A is a summary the main regulatory failures at Australia's four major banks, and entities owned by these banks, from 1 January 2015 to 1 March 2017. It demonstrates:

- the large number of regulatory failures – on average, over one every fortnight, and
- the breadth of the problem, which has affected customers of the banks' retail and business banking, superannuation, financial planning and life insurance businesses.

Notably, during this period all four major banks have implemented multiple review and remediation programs in response to systemic failures including failure to apply fee reductions and waivers as a result of system errors, failures to comply with responsible lending laws, charging fees for ongoing advice services that were not provided, and breaches of the regulatory regime for financial advice.

In 2016, ASIC produced regulatory guidance on client review and remediation for businesses that provide personal advice to retail clients.⁸⁸ The guidance states that ASIC may request regular reporting on the progress of a review⁸⁹ and that businesses should consider whether it may be in the public interest to report publicly on the review and remediation.⁹⁰

ASIC states that:⁹¹

In general, we believe advice licensees should be transparent about review and remediation. Public reporting will be especially important for larger-scale review and

⁸⁷ Financial System Inquiry, *Final Report*, 28.

⁸⁸ ASIC Regulatory Guide 256, *Client review and remediation conducted by advice licensees*.

⁸⁹ ASIC Regulatory Guide 256, *Client review and remediation conducted by advice licensees*, para 43.

⁹⁰ ASIC Regulatory Guide 256, *Client review and remediation conducted by advice licensees*, para 164.

⁹¹ ASIC Regulatory Guide 256, *Client review and remediation conducted by advice licensees*, para 165.

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remediation, or a review and remediation that follows public reports of client losses, and alleged misconduct or other compliance failure.

However, the guidance stops short of requiring licensees to report either publicly or to ASIC on review and remediation programs. AIST's view is that licensees should be required to report to ASIC and publicly on all review and remediation programs. These programs are an alternative to court-based processes which are public. Transparency of processes and outcomes of review and remediation programs is critical for both accountability and public confidence.

Recommendation

Licensees should be required to report to ASIC and publicly on the establishment, process, progress and outcomes of all review and remediation programs.

Note that Appendix A is not a comprehensive summary of the impact all regulatory failures from 2015 to 2017 as it does not cover non-bank owned retail superannuation, retail life insurance or financial planning businesses.

7 Impact of commission structures

7.1 Exemptions from the ban on conflicted remuneration

In 2012, the Gillard Government introduced a ban on certain forms of conflicted remuneration for financial advice, as part of the FOFA reforms.⁹² The rationale offered for the ban was:⁹³

Product commissions may encourage advisers to sell products rather than give unbiased advice that is focused on serving the interests of the clients.

Unlike the best interests duty, the ban on conflicted remuneration applies to both personal and general advice. However, there are numerous exemptions from the ban.

ASIC's regulatory guidance on the ban includes an Appendix summarising 15 of the exemptions, which runs to five pages.⁹⁴

A number of significant exemptions allow banks and retail superannuation funds to continue to pay staff and financial advisers commissions and other conflicted remuneration, including to recommend that customers switch to a retail superannuation fund. These include:

- A blanket exemption for benefits paid under grandfathering arrangements.⁹⁵
- An exemption for benefits 'given by the client'.⁹⁶
- Different treatment of volume-based benefits, which are not banned but instead merely presumed to be conflicted remuneration.⁹⁷
- An exemption for benefits with an educational or training purpose.⁹⁸

⁹² *Corporations Act 2001* Part 7.7A Div 4, introduced by *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth).

⁹³ *Corporations Amendment (Further Future of Financial Advice) Measures Bill 2012 (Cth)*, Explanatory Memorandum, para 2.3.

⁹⁴ ASIC, Regulatory Guide 246, *Conflicted Remuneration*, Appendix.

⁹⁵ *Corporations Act 2001* s 1528(1) and *Corporations Regulations 2001* reg 7.7A.16.

⁹⁶ *Corporations Act 2001* s 963B(1)(d) and 963C(e).

⁹⁷ *Corporations Act 2001* s 963L.

⁹⁸ *Corporations Act 2001* s 963C(c) and *Corporations Regulations 2001* regs 7.7A.14, .7A.15 and 7.8.11A

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- An exemption for benefits for information technology software and support.⁹⁹

The Assistant Treasurer and Minister for Financial Services and Superannuation's second reading speech introducing the Bill referred to grandfathering arrangements as being necessary because the measures represent a large change to the industry, but did not provide a rationale for the other exemptions from the ban on conflicted remuneration.¹⁰⁰

In 2014, the Abbott Government introduced a Bill to significantly expand the scope of the exemptions from the conflicted remuneration.¹⁰¹ When it became clear that Parliament would not pass the Bill, the Abbott Government implemented most of the proposed amendments through regulations.¹⁰² The Regulation was disallowed by the Senate on 19 November 2014. A number of the disallowed regulations expanding the scope of the exemptions from the ban on conflicted remuneration were reinstated subsequent regulations. A later version of the Bill was eventually passed in 2016.

7.1.1 Impact

As a result of the exemptions, conflicted remuneration continues to be a feature of the superannuation system. For example:

- **Grandfathering of existing commissions** - This incentivises advisers receiving trail commissions to recommend that members stay in a retail superannuation product, even if it would be in the best interests of the member to switch to a better performing /less expensive contemporary product.
- **Using consent to pay conflicted remuneration** – ASIC has confirmed that the ability to receive benefits given by the client includes benefits that the member has consented to, and provided an example demonstrating that a product issuer can use an application form

⁹⁹ *Corporations Act 2001* s 963C(d) and *Corporations Regulations 2001* reg 7.8.11A.

¹⁰⁰ *Hansard*, 24 November 2011.

¹⁰¹ *Corporations Amendment (Streamlining of Future Financial Advice) Bill 2014*.

¹⁰² *Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014* (Cth).

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to obtain the consent of the client for the payment of benefits to a dealer group for advice.
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- **Rebutting the presumption that volume-based benefits are conflicted remuneration** - ASIC guidance explains the factors to consider in rebutting the presumption that a volume-based payment is conflicted remuneration.¹⁰⁴
- **Asset-based fees** - Superannuation funds continue to charge members asset-based fees.
- **Balanced scorecards** - Banks incentivise staff switch customers into bank-owned financial products as part of so-called balanced scorecard remuneration arrangements.
- **Commercial human resources platforms** –Some platforms include a facility enabling employees to switch funds under arrangements which provide that superannuation funds pays a commission to the platform provider for each member who switches to that fund.

7.2 Exemption from ban on commissions for the sale of retail life insurance

The ban on conflicted remuneration introduced as part of the FOFA reforms included bans on certain forms of conflicted remuneration for life insurance advice. In particular, conflicted remuneration is banned for advice about:

- all group life policies for superannuation fund members, and
- individual life policies held within superannuation by a default members.

However, there are exemptions from the ban on conflicted remuneration for:

- individual life policies within super for choice members, and
- all life policies held outside superannuation.¹⁰⁵

These exemptions were controversial when introduced. Neither the Explanatory Memorandum nor the Minister's second reading speech offer a rationale for them. Industry subsequently argued

¹⁰³ ASIC Regulatory Guide 246 *Conflicted Remuneration*, para 246.66 and Example 1.

¹⁰⁴ ASIC, Regulatory Guide 246, *Conflicted Remuneration*, Section C.

¹⁰⁵ *Corporations Act 2001* s 963B(1)(b) and *Corporations Regulations 2001* reg 7.7A12A.

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the exemptions were necessary to address concerns about the affordability of life insurance and problems with underinsurance.¹⁰⁶

The exemptions allow individual life policies to be sold with upfront commissions, creating an incentive for advisers to make a sale, rather than provide advice that is in the best interests of the consumer.

The Financial System Inquiry found that in practice, these commissions can be very high – up to 130 per cent of the first year’s premium, with an ongoing trail commission of around 10 per cent.¹⁰⁷

7.2.1 Impact

There is considerable evidence that conflicted remuneration causes problems with the quality of life insurance advice. In 2014, ASIC released a report on its review of retail life insurance advice.¹⁰⁸ The review, which covered advice given before and after the introduction of the FOFA reforms, found more than one third of the advice did not comply with relevant laws.

Over 80 percent of advisers were paid under up front commission models. ASIC concluded that conflicted remuneration was the main driver of advice that did not comply with the law - 96 percent of the advice assessed by ASIC as failing to comply with the law was given by advisers paid an upfront commission.¹⁰⁹

ASIC recommended insurers review their remuneration arrangements to ensure that consumer interests are prioritised and that conflicts of interest are better managed.¹¹⁰

¹⁰⁶ J Trowbridge, *Interim report on retail life insurance advice*, Life Insurance and Advice Working Group, FSC, 17 December 2014 at 7 and standard-form submissions to the Senate Economics Legislation Committee Inquiry into the first Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016.

¹⁰⁷ Financial System Inquiry, *Final Report*, 2014 Chapter 4.

¹⁰⁸ ASIC REP 413, *Review of retail life insurance advice*, 2014.

¹⁰⁹ ASIC REP 413, *Review of retail life insurance advice*, 2014, para 158.

¹¹⁰ ASIC REP 413, *Review of retail life insurance advice*, 2014, para 251.

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7.2.2 Subsequent developments

In December 2014, the Financial System Inquiry recommended abolishing the current upfront commission model, and a move to level commissions, where any upfront commission does not exceed ongoing commissions.¹¹¹

In 2015, John Trowbridge released a report into remuneration for life insurance advice sponsored by the FSC and AFA in response to ASIC's Report. While Trowbridge did not go so far as the Financial System Inquiry, he recommended capping upfront commissions, and supplementing upfront commissions with an Initial Advice Payment which would also be capped in terms of frequency and value.¹¹²

The AFA rejected the recommendations.¹¹³ They were not implemented.

In November 2015, the Turnbull Government announced reforms to life insurance remuneration. The key elements of the reform package were:¹¹⁴

- Gradually capping upfront commissions to a maximum of 80 per cent from 1 July 2016, 70 per cent from 1 July 2017 and then 60 per cent from 1 July 2018, together with a maximum 20 per cent ongoing commission; and
- introducing a two year retention ('clawback') period.

December 2015, the Treasury released a package of draft legislative amendments proposing to remove the exemptions from the ban on conflicted remuneration for life insurance advice and simultaneously allow conflicted remuneration to be paid to advisers if conditions set by ASIC were met.¹¹⁵

¹¹¹ Financial System Inquiry, *Final Report*, 2014, Recommendation 24.

¹¹² J Trowbridge, *Review of Retail Life Insurance Advice, Final Report*, 2015.

¹¹³ AFA Statement: Consumers Lose Access to Quality Advice, 20 April 2015.

¹¹⁴ Minister for Revenue and Financial Services, Media Release, *Government announces significant improvements to life insurance industry*, 6 November 2015.

¹¹⁵ The Treasury, *Life insurance reform legislation*, 3 December 2015.

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Shortly afterwards, ASIC released a Consultation Paper which proposed to set conditions for the payment of commissions substantially as announced by the Government.¹¹⁶

In 2016, the Turnbull Government introduced a Bill to implement its proposals.¹¹⁷ Twelve months later, in February 2017, the Bill was finally passed. The changes will be phased in over 3 years commencing in 2018.

Meanwhile, following ongoing media coverage of problems with life insurance, in September 2016, the Senate referred an inquiry into the life insurance industry to the Joint Parliamentary Committee on Corporations and Financial Services, for report by 30 June 2017.

7.2.2.1 Impact

The exemptions from the ban on conflicted remuneration that permit upfront commissions are still in place. There is no reason to believe that the quality of life insurance advice has improved. In fact, it is reasonable to assume that over a third of life insurance advice received by retail clients is still not in their best interests.

Despite the recommendation of the Financial System Inquiry that upfront commissions should be abolished, subsequent proposals did not go this far. Upfront commissions will continue to be permitted even once the recent amendments finally come into effect beginning in 2018, although these will be gradually capped.

No evidence has been presented that these changes will be sufficient to overcome widespread problems with the quality of life insurance advice. There is no basis for allowing the retail life insurance industry to continue to pay commissions which have been banned for the rest of the financial services industry since 2013.

Recommendation

All commissions and other forms of conflicted remuneration for the sale of retail life insurance policies should be banned.

¹¹⁶ ASIC Consultation Paper 245, *Retail life insurance advice reforms*, 2015.

¹¹⁷ *Corporations Amendment (Life Insurance Remuneration Arrangements) Bill 2016* (Cth).

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8 Fee for no service

In 2016, ASIC reported on its work to address financial institutions' and advisers' systemic failures, over a number of years, to provide ongoing advice services to customers who paid fees to receive those services.¹¹⁸

The failures set out in the report relate to instances where customers were charged a fee to receive an ongoing advice service, but had not been provided with this service because:

- the customer did not even have an adviser allocated to them, but was charged a fee for ongoing advice – usually by deduction from the customer's investment products, or
- the adviser allocated to the customer failed to deliver on their obligation to provide the ongoing advice service and the licensee failed to ensure that the service was provided.

As at October 2016, ANZ, NAB, CBA, Westpac and AMP had paid or agreed to pay \$23.7 million of fee refunds and compensation to over 27,000 customers under various licensees owned by these businesses.

Further reviews are being conducted by the licensees to determine the extent of their ongoing service fee failures. ASIC expects fee refunds and compensation to increase substantially. ASIC estimated compensation may increase by approximately \$154 million, plus interest, to over 175,000 further customers, bringing the total compensation for related failures to over \$178 million, plus interest.

Recommendation

ASIC should provide an update on the number of customers who have received fee refunds and compensation for failure to deliver ongoing advice services and the total value of fee refunds and compensation paid.

¹¹⁸ ASIC REP 499, *Financial advice – fees for no service*, 2016.

9 Culture and chain of responsibility – the accountability deficit

Culture is a set of shared values and assumptions within an organisation. It reflects the underlying ‘mindset of an organisation’, the ‘unwritten rules’ for how things really work.

In its recent report on fees charged for ongoing advice services that were not provided by NAB, ANZ, CBA, Westpac and AMP, ASIC observed:

The information we have gathered for this project to date suggests that cultural factors in the specific banking and financial services institutions and advice licensees covered by this report—in particular, those where multiple advisers and a large number of customers were involved—contributed to the systemic failures we observed. These systemic failures had direct impacts on outcomes for customers...

Of particular concern is that many of the banking and financial services institutions covered by this review publicly state that their core values include being customer focused, ‘doing what is right’ for customers, and acting with integrity.¹¹⁹

ASIC encouraged the institutions to consider how their culture may have supported systemic failures, and why their stated commitment to providing excellent service to customers is not translating into good outcomes for customers in the many instances we identified in the report.

In his opening statement to the House of Representatives Standing Committee on Economics in 2016, ASIC Chairman Greg Medcraft said:¹²⁰

Banks play a critical role in supporting economic growth and meeting the financial needs of Australian people.

However, in recent times banks have fallen short of community expectations, as they themselves have acknowledged. Work is needed to restore trust and confidence.

ASIC does see that the banks are taking important steps in the right direction to address this gap but they have a way to go on that journey.

¹¹⁹ ASIC REP 499, *Fees for no service*, 2016, para 208.

¹²⁰ ASIC 16-351 MR.

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In December 2016, ASIC Chairman Greg Medcraft observed that, because culture lies at the heart of how an organisation and its staff think and behave, in a financial services firm, it is an important driver of outcomes for investors and financial consumers.¹²¹ The Chairman identified lack of accountability for poor conduct and remuneration structures as key aspects of culture.

AIST agrees with ASIC's conclusion that poor culture has played a critical role in the ongoing regulatory failures in the retail banking, superannuation, financial planning and life insurance sector.

In 2016, the first review of the four major banks by the House of Representatives Standing Committee on Economics found that no senior executives had been terminated in relation to extremely serious regulatory failures of provision of poor quality financial advice at NAB, mishandling of life insurance claims at Commlnsure, NAB's failure to pay 62,000 wealth management customers the amount that they were owed, the poor administration of hardship support at CBA, ANZ's OnePath improperly collecting millions of dollars in fees from hundreds of thousands of customers and ANZ improperly collecting fees from 390,000 accounts that had not been properly disclosed.

The reluctance of the banks to hold senior executives to account was palpable in evidence before the Inquiry.

The Committee found:

*This is unacceptable and clearly demonstrates the accountability deficit that exists within these organisations.*¹²²

It is remarkable that despite the long list of regulatory failures across the banks retail banking, superannuation, financial planning and life insurance businesses, so few senior executives from those businesses have lost their jobs.

The Committee is currently holding its second review of the four major banks. In evidence before the Committee on 3 March 2017, the CEO of NAB gave evidence that the bank had finally dismissed two senior managers, and taken disciplinary action against a further three. However, he

¹²¹ G Medcraft, The importance of corporate culture, Australian Club Melbourne, International Table luncheon (Melbourne, Australia), 8 December 2016.

¹²² House of Representatives, Standing Committee on Economics, Review of the four major banks, *First Report*, 2016, para 3.6.

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also confirmed that NAB's Chief Customer officer of Consumer and Wealth remains in his role and in 2016 received 120 per cent of his bonus target.

Recommendation

A clear signal should be sent to the for-profit side of the financial services industry by removing exemptions, gaps and inconsistencies.

10 Availability and adequacy of redress

The key mechanisms for consumer redress for losses arising from regulatory failings in financial services are ASIC action, consumer complaints to external dispute resolution (EDR) schemes and review and remediation programs conducted by licensees, (which can be a result of ASIC action).

10.1 ASIC action

It is clear from the summary of regulatory failures involving the four major banks since the beginning of 2015 in Appendix A that ASIC dedicates substantial resources to taking action to obtain consumer redress and protect consumers. Since January 2015, ASIC has overseen a number of large scale review and remediation programs, extracted large civil penalties, issued infringement notices, imposed licence conditions, entered into enforceable undertakings and banned numerous financial planners.

ASIC must be adequately funded to perform its role. Section 3.6 sets out AIST's support for the introduction of an industry funding model for ASIC. It is clear that regulatory oversight of the retail financial services sector consumes a significant proportion of ASIC's resources. It is therefore appropriate that industry levies to fund ASIC reflect this.

10.2 External dispute resolution schemes

The EDR framework in the financial services sector is the subject of a current review which released an Interim Report in December 2016.

That review has recommended replacing the Financial Ombudsman Service and the Credit and Investments Ombudsman with a single industry ombudsman scheme (Financial Ombudsman) to reduce consumer confusion. AIST supports this recommendation.¹²³

The review also recommends the Superannuation Complaints Tribunal (SCT) be stripped of its tribunal status and transition to an industry-based ombudsman model, with a view to merging with the new Financial Ombudsman.¹²⁴

¹²³ Interim Report, Review of the Financial System External Dispute Resolution Framework, 2016, Recommendation 1.

¹²⁴ Interim Report, Review of the Financial System External Dispute Resolution Framework, 2016, 24 and 96.

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AIST strongly opposes this recommendation, which would significantly reduce the level of consumer protection for members of superannuation funds. Unlike an industry ombudsman scheme, under the existing tribunal structure:

- SCT decisions are enforceable, which significantly reduces non-compliance with its determinations. This is particularly important to ensure that third parties to disputes arising from life insurance claims on policies held within superannuation comply with determinations.
- Parties have clear, established appeal rights, which protects the integrity of the system and provides transparency and accountability.
- The SCT can hear disputes without requiring the consent of each party, and can join third parties to disputes. This is particularly important given that significant proportion of complaints to the SCT relate to life insurance claims and can involve multiple parties.
- The SCT as greater investigative powers not available to an ombudsman.

AIST recommends that due to the compulsory nature of superannuation, a specialist, legislative tribunal is the only model that can provide adequate redress for superannuation fund members.

AIST acknowledges that the SCT is underfunded and that the existing funding arrangements do not allow for an appropriate assessment of the funding needs of the SCT. This has been a driver of significant delays. AIST would welcome the opportunity for further discussions about this, as well as modernising the governance structure of the SCT.

Recommendation

Retain a specialist, legislative tribunal for superannuation complaints as part of the EDR framework for financial services.

10.3 Review and remediation programs

Advice licensees seek, through review and remediation, to address systemic issues where these issues are a result of the decisions, omissions or behaviour of the licensee (or its representatives) in relation to the provision of advice, misconduct or other compliance failures.

The aim of review and remediation is generally to place affected clients in the position they would have been in if the misconduct or other compliance failure had not occurred.

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An advantage of these programs is that the cost is borne by the licensee responsible for the consumer detriment the program is designed to address.

The four major banks have established a large number of review and remediation programs. In 2016 alone:

- In December 2016, ANZ subsidiaries implemented recommendations of an independent review following a significant number of breaches covering life insurance, general insurance, superannuation and funds management activities. ANZ agreed to the review following breaches affecting 1.3 million customers, requiring refunds and compensation of around \$4.5 million, rectifications and other remediation of approximately \$49 million.¹²⁵
- In December 2016 an independent report on steps taken by CBA advice businesses to compensate customers of former advisers found in some instances the businesses failed to meet required timeframes.¹²⁶
- In October 2016, ASIC estimated approximately \$23.7 million of fee refunds and compensation has been paid, or agreed to be paid, to over 27,000 customers of ANZ, NAB, CBA, Westpac and AMP where clients did not receive ongoing advice services. Based on estimates provided by the licensees to ASIC, total compensation may increase to over \$178 million, plus interest.¹²⁷
- In September 2016, CBA agreed to write off \$2.5 million in loan balances for breaches of responsible lending laws when providing personal overdrafts.¹²⁸
- In September 2016, Westpac refunded \$9.2 million to 161,414 customers after it failed to waive fees on Westpac and St. George branded savings and transaction accounts over six years.¹²⁹

¹²⁵ ASIC 16-069 MR and ASIC 16-457 MR.

¹²⁶ ASIC 16-415 MR.

¹²⁷ ASIC REP 499 *Fees for no service*, 2016.

¹²⁸ ASIC 16-308 MR.

¹²⁹ ASIC 16-304 MR.

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- In September 2016, Westpac refunded \$20 million to around 820,000 customers for not clearly disclosing the types of credit card transactions that attract foreign transaction fees.¹³⁰
- In September 2016, ANZ refunded almost \$29 million to more than 390,000 accounts after failing to clearly disclose when fees would apply.¹³¹
- In September 2016, CommSec refunded \$1.1 million in brokerage to more than 25,000 clients relating to alleged breaches of rules requiring disclosures in relation to crossings and trading as principal.¹³²
- In May 2016, CBA appointed Deloitte as independent expert to review past life insurance declined claims experienced by CommInsure customers.¹³³
- In March 2016, ANZ refunded 25,000 customers \$5 million after it failed to properly apply fee reductions and fee waivers.¹³⁴
- In January 2016, Westpac committed to a remediation program that includes proactive customer refunds, and a contribution of \$1 million over four years to support financial counselling and literacy following ASIC concerns that it breached responsible lending laws.¹³⁵

As noted in section 4, ASIC's regulatory guidance on client review and remediation does not require licensees to report to ASIC and publicly on the process, progress and outcomes of all review and remediation programs. This should be required.

10.4 Is there a need for a statutory compensation scheme?

While a compensation scheme may be appropriate for other financial services, it is unnecessary in the context of the superannuation industry.

¹³⁰ ASIC 16-298 MR.

¹³¹ ASIC 16-290 MR.

¹³² ASIC 16-289 MR.

¹³³ <http://tinyurl.com/jbrd2ta>, accessed 6 March 2017.

¹³⁴ ASIC 16-098 MR.

¹³⁵ ASIC 16-009 MR.

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Superannuation is a prudentially regulated industry and as such superannuation funds typically have the financial capacity to adhere to SCT determinations, and pay compensation to a member following a determination.

Members of APRA-regulated superannuation funds have additional protection under Part 23 of the *Superannuation Industry Supervision) Act 1993* which enables the trustee of a superannuation fund to apply to the Minister for a grant of financial assistance where the fund has suffered loss as a result of fraudulent conduct or theft. For example, in 2010 the Federal Government agreed to grants of financial assistance to APRA regulated funds that invested in Trio Capital, which collapsed due to fraud in 2009.¹³⁶

Requiring the superannuation industry to participate in an industry-funded compensation scheme of last resort creates risks of cross-subsidisation. AIST's view is that not-for-profit superannuation funds should not be required to subsidise a compensation scheme for consumers who suffer detriment as a result of their dealings with for-profit superannuation funds, or retail banking, financial planning or life insurance businesses.

¹³⁶ Minister for Financial Services and Superannuation, Over \$54 million in compensation payments to Trio victims commence, Media release, 14 September 2010, <http://tinyurl.com/hke7jyy>, accessed 6 March 2017.

11 Social impacts of consumer protection failures

In 2016, the Turnbull Government introduced a Bill to legislate that the objective of the superannuation system is 'to provide income in retirement to substitute or supplement the Age Pension.'¹³⁷ The Bill was referred to the Senate Economics Legislation Committee. In February 2017, a majority of the Committee recommended that the Senate pass the Bill.

Section 3 of this submission catalogues a long list of failures in the superannuation regulatory framework. As noted in that section, the impact of numerous exemptions is that retail superannuation funds switch members into their products when it is not in the best interests of the member, offer employers incentives to choose a bank-owned superannuation fund for the employees of the business, and are not required to give consumers standardised disclosure about the performance, fees and costs of choice products and investment options, platform-based superannuation and legacy products. This makes it difficult for members compare products.

APRA does not collect comprehensive data on the performance, fees and costs of choice products or investment options, platform-based superannuation or legacy products equivalent to its data on MySuper products. Without this data, APRA, employers, financial advisers, Government and its policy advisers, members, researchers, commentators and trustees cannot accurately assess the performance of this sector or undertake comparative analysis.

Other jurisdictions have published analysis that has found that platforms and legacy products have a significant impact on the total cost of investing for retail investors.

This web of exemptions undermines the objective of the superannuation system. Given that superannuation is a very long term investment, it is likely that the compounding impact of performance differences and the higher costs of many choice products and investment options, platform-based products and legacy products has a material impact on retirement outcomes, resulting in increased reliance on the Age Pension due to inadequacy of retirement savings within superannuation.

¹³⁷ *Superannuation (Objective) Bill 2016* (Cth).

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Appendix A

Summary of regulatory failures of four major banks and bank owned entities, 2015-2017

Date	Description
1 March 2017	ASIC launches civil penalty proceedings against Westpac for breaching home loan responsible lending laws: ASIC 17-048 MR
9 February 2017	Former Westpac home finance manager sentenced to 3 years' imprisonment after pleading guilty to dishonest use of his position: ASIC 17-025 MR
2 February 2017	ASIC imposes licence conditions on NAB's superannuation trustee following breakdowns in internal procedures : ASIC 17-022 MR
2 February 2017	Bankwest, a division of CBA, refunds approximately 10,800 customers almost \$5 million for overcharging interest on home loans: ASIC 17-021 MR
22 December 2016	<p>ASIC commences civil penalty proceedings in the Federal Court against Westpac entities for failure to comply with the best interests duty follow an ASIC investigation into Westpac's telephone sales campaigns targeting superannuation fund members: ASIC 16-460 MR</p> <p>BT rejects ASIC's interpretation of what constitutes general versus personal advice and will vigorously oppose the action ASIC has brought against it: BT Financial Group, Media Releases, BT Financial Group rejects ASIC's interpretation of general advice versus personal advice, 23 December 2016</p>
22 December 2016	<p>ANZ subsidiaries implement recommendations of independent review following a significant number of breaches covering life insurance, general insurance, superannuation and funds management activities: ASIC 16-457 MR</p> <p>ANZ agreed to the review following breaches affecting 1.3 million customers, requiring refunds and compensation of around \$4.5 million, rectifications and other remediation of approximately \$49 million: ASIC 16-069 MR</p>
21 December 2016	ASIC accepts enforceable undertaking from NAB and CBA in relation to its wholesale spot foreign exchange business to address ASIC concerns that between 1 January 2008 and 30 June 2013, the banks failed to ensure that their systems

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	and controls were adequate to address risks relating to instances of inappropriate conduct identified by ASIC: ASIC 16-455 MR
12 December 2016	ASIC bans former ANZ financial planner for 5 years for misleading and deceptive conduct including creating false documents and falsely amending documents contained on client files: ASIC 16-433 MR
5 December 2016	Independent report on steps taken by CBA advice businesses to compensate customers of former advisers finds in some instances the businesses failed to meet required timeframes: ASIC 16-415 MR
28 November 2016	ASIC bans former Westpac financial planner for 8 years for non-compliant advice under a one size fits all advice strategy that led to clients being over insured: ASIC 16-409 MR
16 November 2016	CommSec pays infringement notice penalty of \$200,000 relating to unauthorised market transactions for a deceased client: ASIC 16-389 MR
27 October 2016	ASIC releases report on charging of advice fees without paying advice. ASIC estimates approximately \$23.7 million of fee refunds and compensation has been paid, or agreed to be paid, to over 27,000 customers of ANZ, NAB, CBA, Westpac and AMP. Based on estimates provided by the licensees to ASIC, total compensation may increase to over \$178 million, plus interest: ASIC REP 499 <i>Fees for no service</i>
12 October 2016	ASIC provides update on investigation into CommInsure. The investigation is wide ranging and complex, is anticipated to continue for some time and remains a priority for ASIC: ASIC 16-348 MR
10 October 2016	ASIC permanently bans former financial adviser authorised to provide services as a representative of an ANZ subsidiary for acting dishonestly by misrepresenting and falsifying his qualifications: ASIC 16-342 MR
26 September 2016	ASIC bans former Westpac financial adviser for entering false information regarding various clients' health or health-risk factors in telephone applications for insurance policies: ASIC 16-323MR
14 September	CBA pays penalties totalling \$180,000 and agrees to write off \$2.5 million in loan balances for breaches of responsible lending laws when providing personal

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2016	overdrafts: ASIC 16-308 MR
13 September 2016	Westpac refunds \$9.2 million to 161,414 customers after it failed to waive fees on Westpac and St. George branded savings and transaction accounts over six years: ASIC 16-304 MR
8 September 2016	Westpac refunds \$20 million to around 820,000 customers for not clearly disclosing the types of credit card transactions that attract foreign transaction fees: ASIC 16-298 MR
5 September 2016	ANZ refunds almost \$29 million to more than 390,000 accounts after failing to clearly disclose when fees would apply: ASIC 16-290 MR
2 September 2016	CommSec pays penalties totalling \$700,000 and voluntarily refunds \$1.1 million in brokerage to more than 25,000 clients relating to alleged breaches of rules requiring disclosures in relation to crossings and trading as principal: ASIC 16-289 MR
26 July 2016	ASIC bans former ANZ financial planner for engaging in conduct that was likely to mislead, including forging a client signature, altering signed documents and falsifying records: ASIC 16-239 MR
8 June 2016	ASIC bans former ANZ financial adviser for failure to provide clients with written recommendations about their investment portfolio required as part of annual review service: ASIC 16-188 MR
7 June 2016	ASIC commences civil penalty proceedings against NAB in the Federal Court for unconscionable conduct and market manipulation in relation to NAB's involvement in setting the bank bill swap reference rate BBS in the period 8 June 2010 to 24 December 2012: ASIC 16-183 MR
20 May 2016	CBA appoints Deloitte as independent expert to review past life insurance declined claims: https://tinyurl.com/jbrd2ta
17 May 2016	ASIC charges former CBA planner with forgery: ASIC 16-144 MR. This follows ASIC placing conditions on the AFS licence of CFPL in 2014: ASIC 14-192 MR and permanently banning the planner from providing any financial services: ASIC 12-269 MR

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26 April 2016	ASIC permanently bans former NAB financial planner for misappropriating advice fees owed to his employer, charging excessive fees, and failure to provide statements of advice: ASIC 16-124 MR
5 April 2016	ASIC commences civil penalty proceedings in the Federal Court against Westpac for unconscionable conduct and market manipulation in relation to Westpac's involvement in setting the bank bill swap reference rate in the period 6 April 2010 and 6 June 2012: ASIC 16-110 MR
5 April 2016	Westpac subsidiary pays penalties totalling \$493,000 for breaches of consumer protections relating to the repossession of motor vehicles: ASIC 16-106 MR
30 March 2016	ANZ refunds 25,000 customers \$5 million after it failed to properly apply fee reductions and fee waivers: ASIC 16-098 MR
7 March 2016	ANZ pays penalties totalling \$212,500 for breaching responsible lending laws in making offers of overdraft facilities: ASIC 16-063 MR
7 March 2016	The former chief medical officer of Commsure makes claims about a culture of dishonest and unethical practices to avoid payouts to sick and dying people. The chief medical officer alleged doctors were pressured to change their opinions, outdated medical definitions were used to deny payouts, and medical files disappeared from the internal filing system: http://tinyurl.com/jnwjmza
4 March 2016	ASIC commences civil penalty proceedings in the Federal Court for unconscionable conduct and market manipulation in relation to the ANZ's involvement in setting the bank bill swap reference rate in the period March 2010 to May 2012: ASIC 16-060 MR
3 March 2016	ASIC bans former NAB adviser for 5 years for misleading and deceptive conduct including telephoning an industry superannuation fund falsely representing that he was a member of the superannuation fund in order to obtain information on that fund member's superannuation account when not authorised to do so and assisting a client to complete and lodge false withdrawal forms: ASIC 16-059 MR On 19 December 2016 the AAT set aside ASIC's decision. On 11 January 2017, ASIC filed a Notice of Appeal against the AAT's decision: ASIC 16-448 MR

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4 February 2016	ASIC bans former NAB adviser for 7 years for misleading and deceptive conduct including forging client signatures and falsifying documents: ASIC 16-022 MR
4 February 2016	The Sydney Morning Herald reports 2 CBA staff were allegedly complicit in an elaborate Ponzi scheme worth \$76m: http://tinyurl.com/zzbjpxk
2 February 2016	The Australian reports CBA has offered nearly \$3m to people affected by its financial planning scandal as part of its open advice review, and paid more than \$2m to victims, with more than 6,000 cases still in the program
20 January 2016	Westpac commits to remediation program that includes proactive customer refunds, and a contribution of \$1 million over four years to support financial counselling and literacy following ASIC concerns that it breached responsible lending laws: ASIC 16-009 MR
14 January 2016	ASIC bans former ANZ adviser for 10 years for misleading and deceptive conduct including forging client signatures and falsifying documents: ASIC 16-004 MR
18 December 2015	<p>ASIC permanently bans former Westpac bank manager for making unauthorised withdrawals from various bank accounts in a friend's name, totalling \$515,000: ASIC 15-399 MR</p> <p>The manager was also convicted and sentenced in August 2015, in separate proceedings in the District Court of Western Australia, of nine counts of stealing and fraud</p>
17 December 2015	<p>An independent report into an advice compensation program relating to the activities of CBA financial planning businesses found that the businesses did not have a reasonable basis for the processes they used to determine whether a group of the potentially high-risk advisers they identified should have been included in a compensation program</p> <p>As a result the businesses were required to review client files of 17 advisers to determine whether the advisers should be included in a compensation program and compensate any affected clients: ASIC 15-390 MR</p>
25 November 2015	CBA refunds \$80 million to around 216,000 customers as compensation for failing to apply fee waivers, interest concessions and other benefits since 2008: ASIC 15-

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	355 MR
12 November 2015	ANZ compensates 200,000 customers \$13 million for failure to accurately apply bonus interest to accounts for several years: ASIC MR 15-330
29 October 2015	Westpac offers to refund premiums paid by more than 10,600 insurance customers for loan protection insurance provided while the customers did not have a loan on foot: ASIC 15-318 MR
21 October 2015	ASIC announces that NAB has implemented a large review and remediation program for customers affected by non-compliant advice since 2009. Affected clients will have their files reviewed to determine if compensation should be paid and receive financial assistance to seek professional independent advice: ASIC 15-306 MR
19 October 2015	CBA refunds \$7.6 million to 8,400 customers after it failed to apply fee waivers and ongoing benefits over a number of years: ASIC 15-298 MR
15 October 2015	ASIC permanently bans financial adviser and former authorised representative of Westpac subsidiary from providing financial services for transferring funds from client accounts without authorisation and falsifying documents: ASIC 15-294 MR
7 October 2015	ASIC bans former Commonwealth Financial Planning Limited (CFPL) adviser for 5 years for failure to provide a Statement of Advice within the required timeframe on more than 500 occasions, despite warnings from CFPL, and for not disclosing his previous employment with CFPL and their investigation into him when applying to become an authorised representative at another licensee: ASIC MR 15-288
6 October 2015	ASIC bans former Commonwealth Financial Planning Limited adviser for 8 years for conduct likely to mislead or deceive and unconscionable conduct including forging client signatures and charging excessive fees: ASIC 15-286 MR
1 October 2015	ASIC imposes conditions on the licence of Total Financial Solutions (TFS) Pty Ltd in response to serious concerns including a "one size fits all" approach when providing superannuation rollover advice, systemic failures to act in the client's best interests, especially in instances where the advice related to a client's existing defined benefit superannuation funds and failure to prioritise the client's

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	<p>interests when providing advice.</p> <p>TFS is a wholly owned subsidiary of Countplus Limited, a publicly listed company on the ASX. Count Financial, which is owned by CBA, is the largest single shareholder of Countplus: ASIC MR 15-279 MR</p>
16 September 2015	<p>ASIC bans financial adviser and former authorised representative of NAB subsidiary for 5 years for providing non-compliant advice and failure to provide statements of advice: ASIC MR 15-259</p>
13 August 2015	<p>ASIC permanently bans former Westpac senior financial planner after an investigation found he had submitted false insurance policy proposals to the bank in order to obtain benefits for himself ASIC 15-218 MR</p>
24 July 2015	<p>NAB Wealth pays \$25 million compensation to 62,000 customers for system errors on its Navigator Wrap platform: ASIC 15-194 MR</p>
16 June 2015	<p>BT Funds Management Ltd pays \$20,400 in penalties after ASIC issued two infringement notices for misleading statements contained in the online advertising of BT Super: ASIC 15-149 MR</p>
5 May 2015	<p>The Age reports that ANZ will reimburse millions of customers a total of \$30 million after it miscalculated the interest charged for cash advances on credit cards: http://tinyurl.com/juemkzk</p>
23 April 2015	<p>Independent report on steps taken by CBA advice businesses to compensate customers of former advisers finds inconsistencies and deficiencies in original scheme. CBA contacts 2740 customers to offer them up to \$5000 to have their advice assessment reviewed and to seek independent advice: ASIC 15-083 MR</p>
21 April 2015	<p>NAB tells the Senate Economics References Committee that over the past 5 years it had dismissed 41 planners and reported 10 planners to ASIC for breaches.</p> <p>NAB tells the Committee that it had compensated more than 750 of its financial advice customers a total of \$14.5m between January 2010 and September 2014: http://tinyurl.com/jekzu37</p>
21 April 2015	<p>CBA tells the Senate Economics References Committee that it had reported 12 advisers to the police over allegations of fraud or forgery since 2011; and that 43</p>

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	planners had left in previous three years, including some who left while under investigation: http://tinyurl.com/zzcuhb5
21 April 2015	ANZ tells the Senate Economics References Committee that in the 12 months to April 2015 it had reported six planners to ASIC for breaches and terminated the employment of 16 planners over the previous three years for behaviours that range from cultural differences and inappropriate behaviour through to the serious compliance breaches reported to ASIC: http://tinyurl.com/zjv9jkr
20 April 2015	The Sydney Morning Herald reports that 2 Queensland businessmen are suing Westpac for misleading and deceptive conduct for investing their savings in structured products which lost millions: http://tinyurl.com/hk45awn
16 April 2015	The ABC reports that ANZ will reimburse 8,500 financial planning clients for failure to deliver annual reviews: http://tinyurl.com/gte37td
31 March 2015	ASIC bans Commonwealth Financial Planning Limited employee for 18 months, for creating false documents for client files ASIC 15-070 MR
27 March 2015	The Sydney Morning Herald reports two former CBA IT executives charged over alleged bribery scandal for allegedly receiving more than \$1.9m in return for awarding an IT contract to a particular company: http://tinyurl.com/jsv8czr
17 March 2015	The AFR reports a former NAB foreign exchange trader is sentenced to 7 years' jail for insider trading: http://tinyurl.com/hh83mdv
26 February 2015	ASIC permanently bans former Westpac home finance manager convicted of fraud: ASIC 15-041
24 February 2015	CBA subsidiary provides advice reviews and implements additional risk controls in response to ASIC concerns arising from a review of advice on complex structured investment products: ASIC MR 15-036
24 February 2015	Westpac undertakes remedial action including fee refunds in response to ASIC concerns arising from a review of advice on complex structured investment products: ASIC MR 15-036
10 February 2015	Former financial adviser jailed for 6 years for defrauding 150 clients of almost \$6 million over 20 year period. For part of this time she was a representative of

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	subsidiaries of CBA and ANZ: ASIC 15-018 MR
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