Assessing the limits and regulatory definitions of financial advice

October 2020
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The challenges facing superannuation funds seeking to design and deliver financial guidance and advice to their members are considerable.

The provision of financial advice in super comes with a complex set of overlapping regulations addressing adviser conduct, conflicts, the scope of advice, fees and charging, disclosure, and an obligation to provide advice that is in the member’s best interest.

These are overlaid by new professional and ethical standards, in place from 1 January 2020, which do not appear to have been drafted with advice in super in mind. For the superannuation trustee, it can be opaque and confusing.

So, what to do? In our view, the first thing is to be clear about what is possible.

It is evident that anyone designing an advice service should start by identifying member needs. Solutions must be directed at meeting those needs and delivering the best possible member experience, commensurate with the commercial realities of delivering a personalised service at scale.

The regulatory environment should not dictate the service model, yet the dominant model across super funds at present is one in which the service is tailored to fit into a regulatory bucket.

It is understandable that trustees, licensees and other service providers – including IFS – design services to align with the various advice regulations. Obviously, the service must be compliant with the law, however there is no doubt that being constrained by these regulations will undermine optimal service model design. Pricing and fee regimes tied to regulatory categories, rather than the cost to serve, can be unfair or inefficient.

This paper aims to:
- establish a common understanding and clarity about which advice can, and which advice cannot, be offered by super fund trustees
- examine issues currently attracting the attention of the industry, regulators and policy makers.

These issues are:
- What assistance can be offered within the limits of factual information and general advice?
- How can limited/scaled advice be offered considering the ambiguity/vagueness of the FASEA Code of Conduct?
- How does the sole purpose test constrain advice services in super?

We hope that by providing clarity about what can be delivered within the current regulatory framework, trustees will feel more confident to explore new service models to better meet members’ needs.

The challenges identified in this paper were discussed and validated at an AIST/IFS Advice Forum on 31 August 2020, attended by 70 representatives of not-for-profit super funds. Throughout this document, you will see highlighted the questions posed at the Forum and IFS’s position on these. They are also detailed in Appendix 3.

This paper will feed into ASIC's current research program to identify opportunities to reduce friction in the advice process, reduce costs and increase access to advice.

IFS will follow this paper with a thought leadership piece focussing on the key elements of advice model design that considers member needs and expectations, commercial considerations and the regulatory framework.
The external pressures are rising

Over the past decade, advice within super has moved from the periphery to being a key strategic service and potential differentiator for fund trustees.

Today, it is not uncommon to see a super fund member offered a choice of digital, intra-fund and comprehensive personal advice, and trustees continuously honing the way they triage members to serve them in the most efficient and cost-effective manner.

This has helped super funds to establish advice offers reasonably quickly, particularly in addressing the simpler needs that traditional advice firms didn’t or couldn’t cater to.

But as the super industry has matured, the needs around providing advice have evolved. Members now have higher expectations, and a new set of competitors are seeking to attract their attention and assets.

What’s more, the demands on trustee budgets have never been higher. To compete, funds need to invest in the areas of brand, data analytics, technology and digital.

This has put pressure on super funds’ sometimes heavily subsidised advice offers, whether it’s an intra-fund service or a broader advice service which does not entirely cover its costs.

It has been questioned whether the attractiveness of subsidised advice could become an Achilles’ heel for a fund. Eventually the fund reaches financial capacity and can no longer grow its offering. Some industry commentators may also question how much members value intra-fund advice they receive at no cost and, therefore, how likely they are to implement it.

The regulatory environment

The provision of financial advice to ordinary Australians is heavily regulated.

As the FPA noted last year, advisers are covered by seven regulators, three disciplinary and complaints bodies and are also subject to licensee oversight.

Advisers employed by APRA-regulated super funds must also comply with the policies of their employer governing some of the same domains such as:

- conduct
- conflicts
- privacy
- fit and proper person tests
- continuous education
- integrity
- AML/CTF and more.

Despite all this regulation, ASIC Report 639 on advice in super found that 51% of files reviewed did not meet the compliance requirements of the Corporations Act, and that 15% were likely to result in member detriment.

So, how does a trustee make sense of it all?

The regulators view advice through two key lenses – the scope of the advice and the fee regime.

1. The scope of advice

When considering the scope of advice, the first distinction is between factual information and financial product advice.

- **Factual information** is objectively ascertainable information, the truth of which cannot be reasonably questioned. Trustees may provide factual information without an AFSL.

- **Financial product advice** generally involves a qualitative judgement about a product or its features.

The second distinction is between the two types of financial product advice – general advice and personal advice.

- **General advice** does not consider the person’s individual circumstances and does not recommend nor influence them to make a decision about a financial product or strategy. Whether the term “general advice” is understood by consumers or should be replaced is currently under review.
• **Personal advice** is given when the adviser has considered the person’s specific objectives, situation or needs, or could be reasonably seen to have done so, and includes a recommendation or opinion that could reasonably be regarded as intending to influence a person to make a decision about a financial product or class of products.

Personal advice can be limited or not limited. As a rule, the same consumer protection and ethical standards apply to all forms of personal advice, regardless of its scope, although the application of the rules will vary in practice.

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### Intra-fund advice

Trustees are prohibited from offering advice to their members that’s funded by apportioning costs collectively across the membership, unless the advice falls within the boundaries of ‘intra-fund advice’. Intra-fund advice is a special form of limited advice that is designed to be:

- simple
- not ongoing
- provided to existing fund members only and
- purely about their existing interest in the fund.

Many topics, such as account consolidation, cannot be covered under intra-fund advice.

All other personal advice must be charged directly to the member.

### Deducting fees from accounts

If the subject of the personal advice falls within the sole purpose test, the member can elect to pay from their super account.

Advisers and licensees are also required to have protocols in place to ensure compliance with these regulations.

This can add operational complexity as members receive services from both advisers and the trustee office in the same advice journey.

Not surprisingly, a common response is to segregate the advice offer into three discrete services – general advice, intra-fund and comprehensive advice.

Yet this segregated approach fails to capitalise on two elements:

- the flexibility that could be leveraged if trustees and licensees had greater confidence in how the best interest test and FASEA Code can scale up and down with advice complexity; and
- a greater ability to apportion fees to meet regulatory constraints.

The federal government says it intends to cut red tape in the advice industry to reduce costs and complexity for advisers. However, its current focus is on implementing the recommendations of the Royal Commission regarding deduction of fees from MySuper accounts and informed consent regarding other fee deductions.

There is ongoing industry commentary about the extent to which advice is subsidised in the not-for-profit super sector. This focuses particularly on the breadth of intra-fund advice offers, and whether the fees deducted from a member’s account are in line with the sole purpose test.
Regulatory complexity

Multiple regulators and regulations govern a single interaction with a member.

Presently, a super fund providing advice to its members is regulated by several bodies.

![Diagram showing multiple regulatory bodies]

There is no single body responsible for the way different regulatory bodies and legislation work together in a super fund context, which only adds to the complexity.

The multiple regulations frequently govern the same conduct or advice interaction from a different perspective. Take, for example, the obligation to act in a member’s best interest. An adviser is required to meet the obligations under the:

- Tax Practitioners’ Code ‘to act lawfully in the best interest of the client’
- FASEA Code ‘to act with integrity and in the best interests of each of your clients’
- Corporations Act, ‘to only provide advice that is appropriate to the clients and in their best interest’. An advice provider can meet this test if they have complied with the safe harbour steps s961B (2).

A piece of advice that fails this test could potentially be reviewed by six agencies:

- the Licensee
- ASIC
- AFCA
- a professional association and
- the soon-to-be established disciplinary body
- Tax Practitioners Board.

While IFS supports and welcomes the lifting of professional standards, there is clearly room to reduce friction and limit the scope for regulatory overlap.

Navigating the many pieces of legislation, explanatory memorandums and codes that govern the provision of advice is challenging for super funds.
How do super funds provide advice?

General advice

Historically, super funds have relied heavily on factual information and general advice to support members’ basic needs.

Factual information and general advice are provided through marketing campaigns, websites, call centres and field staff, and via seminars and webinars.

Increasingly, that factual information or general advice is quite complex, such as retirement and insurance information.

This may be targeted to specific cohorts of members, based on information held by the trustee, and can be supported by calculators where the member has supplied additional personal information.

The resulting information may be reasonably tailored to the member and help them make sense of their own circumstances and options, but it is designed to stop short of providing personal financial product advice.

These services are typically not seen as financial product advice and are delivered at no additional charge:

- one to many via marketing or websites
- one to several via webinars
- one to one, delivered digitally.

Current issues in general advice

How much assistance can be provided as general advice and factual information?

Factual information and general advice does not need to be simple and does not need to be free.

A trustee, for example, could provide factual information to sophisticated investors about its liquidity strategy or valuations policies, and in theory could charge for the resources allocated to delivering this information.

IFS is not advocating this service, but it does illustrate the opportunity to offer individual member support on complex topics within the scope of general advice.

Throughout the COVID-19 pandemic, the advice that members have needed most has been general advice, with a focus on budgeting, debt management, social security and accessing their super.

This could well be the catalyst for trustees to revisit their appetite for delivering strategy-only advice as general advice.

Trustees have tended to avoid delivering a one to one general advice service, partly due to cost but partly for fear of stepping into personal advice.

This has undoubtedly received even greater focus since the decision of the Full Federal Court in the Westpac general advice case, which sent a shot across the bow for those general advice providers – motivated by sales – who can easily cross the line into personal advice.

But from a regulatory perspective, factual information and general advice can be simple or complex, and can be provided free of charge or at a fee for service.

In contrast to super trustees, the financial planning industry, with its historical focus on product recommendations, has ignored the opportunities to assist consumers through general advice. But as advice firms look for new ways to deliver services without the support of product fees, there is a newfound interest in advice to address more fundamental consumer needs.

At the same time, trustees are seeking better ways to help members make good decisions using general advice.
Limited advice

Limited advice is not a category of advice, but rather a way of meeting the applicable legal obligations by scaling the obligations down as the complexity of the advice reduces.

All advice is limited in some way, and all the regulatory obligations relating to giving appropriate advice in the member’s best interest still apply, as do the FASEA education and ethical standards. 

Refer to Appendix 1: Regulatory Guidance – Intra-fund advice.

To give compliant advice that is limited in scope, trustees and licensees must:

- ensure that members are aware of the limited scope of the advice
- have good triaging processes in place
- have a discovery process to identify members for whom limited advice is not appropriate.

Intra-fund advice

The most controversial form of limited advice is intra-fund advice – the only form of financial advice in super that was allowed to remain cross-subsidised by product fees after 2013’s FoFA measures.

Industry funds see this collective charging as an important equity measure to ensure ordinary Australians have access to simple advice. However critics see it is an inequitable impost on members who do not use the service.

Regardless, in many funds the introduction of intra-fund charging rules became an offer unto itself, commonly provided by phone-based teams focussed on meeting simple advice needs.

The teams often comprised junior advisers with call centre backgrounds, with members referred to a ‘comprehensive’ licensed adviser for any needs that they were unable to address.

Over time, some trustees built more sophisticated teams and models, and today there is significant divergence between funds in what is covered under their intra-fund advice offering. This is, in part, due to the grey areas in the regulatory definition.

At the same time digital advice firms have developed advice tools to fit within the intra-fund definitions, which allows the cost of the service to be borne by the trustee and not individual members.

With the advent of the FASEA regime, there is a question mark over how to contain the costs of intra-fund advice since the same educational and ethical standards apply to all advisers whether they’re providing comprehensive or intra-fund advice.
Current issues in limited advice

How can limited advice be delivered in a way that’s consistent with an adviser’s professional and ethical obligations?

Despite more than a decade of regulatory guidance on how to deliver compliant limited advice, the issue is now being re-litigated. This is due to the apparent conflict between the provision of limited scope advice – particularly single-issue simple advice – and the ethical obligation in the FASEA code to consider the broad effects of the advice on the member, including their wider long-term interests and likely circumstances.

FASEA – December 2019 guidance:

*Limited scope engagement and/or scaled advice can be highly effective in meeting the member’s immediate needs. Such limited advice scenarios may include … intra-fund advice. The Code is not seeking to prohibit this type of advice.*

The adviser must make an assessment whether scoping the advice is in the best interest of the member and it is important the adviser considers the longer-term requirements for the member within the scope of the advice provided.

Example: insurance advice should include confirmation that the member understands the long-term cashflow implications and is expected to have the appropriate funds to pay the premium currently and in the future.

Pleasingly in October 2020, FASEA released updated guidance reaffirming its position that limited scope advice can co-exist with the Code of Ethics.

However the licensee must still determine how. Some practical questions therefore remain.

- How does an adviser reconcile the role of limited advice in ‘meeting a member’s immediate needs’ with the obligation to ‘actively consider the member’s broader long-term interests’?
- Can advisers provide advice on a single issue or very limited scope advice when the member clearly has a broad range of advice needs and opportunities?

In IFS’s view, advisers must undertake a reasonable investigation into the member’s broader circumstances, to ensure that the limited advice they are giving, is appropriate in light of those broader circumstances and not harmful – but they don’t need to actually give broader advice.

Advisers also need to call out member advice needs they have identified – even if they aren’t giving advice about those needs.

What if advisers were doctors?

If a 25-year-old visits the doctor complaining of a sprained ankle, it is reasonable for the GP to ask if they are otherwise healthy. If the patient says yes, the GP can treat the ankle without offering other medical treatment.

If a 55-year-old attends the clinic with a sprained ankle and no other obvious symptoms of ill health, the GP may take the patient’s blood pressure and ask about their medical background, including cholesterol and cancer screenings, before treating the ankle.

If the 55-year-old patient was overweight, pale, sweating and complaining of chest pain, the GP might order an ambulance and refuse to treat the ankle.

Are charging rules overly influencing limited advice service design?

Intra-fund advice can only be charged collectively if the advice is provided to a current member about their existing interest in the super fund. In order to fall within the collective charging model, the adviser cannot advise on any product outside of the fund.

There are questions over whether the adviser must consider the suitability and quality of the member’s existing product before providing any advice.

A balance should be struck between:

- not allowing an adviser’s employer to unduly influence advice, and
- the good that can be done by advice being made accessible to as many people as possible.

More fundamental, however, is whether the use of limited licensing to align with intra-fund charging rules is creating challenges for advice models and advisers.

The scope of member advice needs rarely fall neatly into one single charging bucket. The limited adviser needs to judge whether the member sufficiently understands the impact of only receiving limited advice before determining if it’s appropriate to proceed with only giving that advice.

Through the lens of ‘members’ best interests’, we take the position that charging rules should not have such a significant say in how advisers are licensed, and hence which members’ needs are addressed.
Forum Discussion

Limited advice

Q What advice can be collectively charged under intra-fund advice provisions?

Some aspects of s99F of the SIS Act and related regulator guidance are unclear. For example, where is the line between simple and more complex advice?

This lack of clarity is seen in diverging approaches by funds in how they define their intra-fund advice offerings.

Some funds do not allow intra-fund advice to make contributions into super from bank accounts because it may technically be a recommendation to dispose of a financial product outside of super. This means that in order to recommend such a strategy, the member would need to pay for this advice.

Q What strategies are in/out?

Q Can you define and base the ‘simplicity’ of the advice on the resulting recommendation, and disregard/overlook the advice discovery process?

Q Can ‘retirement planning’ be simple?

Q Can ‘goals based’ advice be simple, or is it only ‘transactional’ advice?

Q What are the scenarios in which members may reasonably consider that further advice will be provided or that ‘the implementation of the advice will be monitored’?

Q Can contributions advice involving disposal of funds from a bank account be charged as intra-fund advice?

IFS: Such advice should be allowed under intra-fund, but we acknowledge that the law and subsequent guidance isn’t clear.

Q Can retirement advice be provided as intra-fund advice?

This is where we see the biggest contention from the broader advice industry, and the widest range of interpretations among super funds. Some funds provide near full retirement planning advice under its ‘intra-fund offering’ and remain silent on advice relating to other products or a spouse. Other funds do not provide retirement advice in any form, on the basis that it isn’t simple and cannot include strategies for a non-member spouse.

IFS: It is possible to recommend the commencement of an income stream with retirement projections, including Centrelink. However, at present we do not allow our limited licensed advisers to provide retirement advice, given the need to consider the broader set of inputs that make up retirement. These include other assets, Centrelink maximisation opportunities and the advice needs of a spouse – areas prohibited under intra-fund. We believe members do not sufficiently understand the implications of receiving limited scope retirement advice, or what other strategies could have been employed by an unrestricted adviser which may have improved their retirement scenario.

Q Can Transition to Retirement (TTR) be provided under intra-fund charging rules?

Some funds do not allow transition to retirement advice, on the basis that it needs to be reviewed regularly and might fall foul of the prohibition on ongoing advice. If contributions advice and pension commencement is allowable, is TTR allowable? Or does combining them together into a TTR increase complexity so much it is no longer ‘simple’?

IFS: Allow TTR pension commencement to supplement part-time work, not as a superannuation savings strategy due to the need to regularly review/amend advice.

Q Can a TTR ‘re-boot’ be recommended?

Does it matter whether the original TTR advice was provided by the same adviser or fund? What if it’s a re-boot into an account-based pension at retirement?

IFS: TTR tax strategy advice is not allowed under intra-fund charging rules, as there is often an expectation by the member that the advice will be monitored and reviewed from year to year, particularly regarding contribution levels.
Q: How can the spouse be considered?
If the spouse of a member isn’t a member of the fund, that fund will typically not allow intra-fund advice relating to spouse splitting, spouse contributions or withdraw/recontribution advice. Although this is a correct reading of the law, ultimately it means that opportunities to further enhance a member’s overall position are left unrealised.
IFS: Not allowed under intra-fund.

Q: Does the restriction around ‘unrelated Cash Management Trusts’ affect what type of contribution advice can be provided?
Some funds/licensees do not allow contributions outside of salary sacrifice to be covered under their intra-fund advice offering, due to the need to dispose of a financial product such as a cash account.
IFS: It is reasonable and expected to allow all super contributions advice under intra-fund.

Q: Can ‘retirement planning’ be the scope? Or must the scope of limited advice be kept to short-term, transactional, needs-based advice, such as ‘making contributions to super’, not ‘retirement planning’
In order to satisfy FASEA Ethical Standard 2, broader long-term interests must consider their ability to afford contributions now and in the future.
IFS: The question we can solve through limited scope advice is ‘how do I generate $x from my super, and how long will my super last’, not ‘how much do I need in retirement?’ or ‘how can I achieve my retirement goals?’

Q: Must the adviser consider the suitability and quality of the member’s existing product before any advice can be provided? And, if so, when in the advice journey does this occur? It will add to the cost of advice, and see fewer members access simple investment choice or insurance advice.

Q: Can the adviser start from the position that their role is to provide advice and recommend strategies available to maximise the member’s interest in that fund?
There are many questions surrounding limited advice that require further consideration and discussion
Refer to Appendix 3 for more details of IFS’s position on questions raised.
Comprehensive (or full) advice

For advice that sits outside of that allowed under intra-fund, funds typically refer the member to a comprehensive adviser, either one they employ or an external adviser via a referral arrangement.

Some fund-employed advisers provide advice to the member and the member’s spouse on matters including insurance, non-super investment, debt management and other tax and investment issues.

In other funds, these issues do not figure prominently, in part because members do not pay for this advice from their super account. In these funds, the service is dictated by the advice topic and whether advice fees can be deducted from the member’s super account under the sole purpose test.

Current issues in comprehensive advice

Deducting advice fees from members’ accounts

Advice fees can be deducted from members’ accounts only where the advice relates to a member’s super and ancillary matters. This is because the retirement savings in the account have attracted favourable tax treatment and can only be used for the sole purpose of providing a retirement benefit.

The role of the sole purpose test in regulating advice within super was thrown into the spotlight in April 2019 when ASIC and APRA issued a joint letter to RSE licensees. It urged trustees to ensure they have oversight of the advice fees deducted from members’ accounts.

While the letter covered all elements of fee deductions – express authorisation, that the service paid for is actually provided, and member best interest – it was a reference to the sole purpose test that caught the attention of trustees and licensees.
APRA and ASIC chose to express the sole purpose test narrowly, stating that only costs that ‘relate to the member’s super and insurance obtained through super’ can be funded from account deductions. Refer to Appendix 1: Regulatory guidance – sole purpose test and advice fees.

This is consistent with the narrow view expressed in the final report of the Hayne Royal Commission:

“It is limited to advice about particular, actual or intended super investments. This may include such matters as consolidation of super accounts, selection of super funds or products, or asset allocations within a fund. It would not include broad advice on how the member might best provide for their retirement or maximise their wealth generally. Any practice by trustees of allowing fees for these latter kinds of financial advice to be deducted from super accounts must end.”

Under this strict reading, advice about the age pension, estate planning and aged care cannot be funded from super accounts, unless the advice is tied to the super benefit. An example of this is age pension advice given in the context of cashflows and drawdowns from an account-based pension.

IFS has seen a significant divergence in the way funds approach cost recovery for advice that cannot be collectively charged.

Some funds take a quite conservative approach, charging the member directly, on average, up to 70% of the advice fees. Other funds charge the member very little.

Cost recovery

There is scrutiny about the cost of advice, and whether trustees are partially subsidising advice that is captured by the intra-fund rules.

Are funds required to cost their advice functions by taking into account corporate overheads, and then determine their pricing, and their policy regarding fee deduction from super accounts versus direct payment? Many funds would struggle to point to a specific piece of analysis to determine their position.

On face value, trustees may find that their comprehensive advisers do recover the full cost of the service from member fees. However, we expect most comprehensive advice provided by fund-employed advisers could be seen as intra-fund advice and therefore allowed to be collectively charged.

Determining the fee payable by the member, either as a deduction from their super account or paid from their own funds, is an inexact science.

APRA had been expected to release the outcomes of its review of the sole purpose test in March 2020, which may have provided greater flexibility to deduct fees where the advice is directed at improving the member’s position in retirement.

The sole purpose test was originally designed to ensure that super tax concessions were not abused for non-retirement purposes.

As the deduction of fees from super accounts is a matter arising from the Royal Commission, it would make sense to allow a broader definition of the advice that can be offered while maintaining the protections against improper fee deductions.
Forum Discussion

Key questions

Q What advice fees can be charged to the member’s super account under the sole purpose test?

Does the sole purpose test (SPT) cover fees for super-related advice where the purpose of that advice is to help the member meet an objective other than to do with their retirement asset?

APRA has not provided clear guidance on what is permissible in the following cases:

• What advice is in and out when it comes to fee deduction from a member’s account?
• Related entity advice and insurance models (an issue of funds not having a capital base of their own)
• Does the SPT cover fees for retirement projections where the broader financial situation of the member (and their spouse) must be considered in preparing those projections?
• Have Commissioner Hayne’s comments in the Royal Commission final report changed the existing interpretation of what is allowable under the SPT?
• Does the super sector need explicit guidance from APRA about the circumstances where advice fees are allowable under the SPT?

• Can the charging be determined after identification and acceptance of advice needs? Can a full, comprehensive, complex advice needs discovery process be run, and then collectively charge the components which would otherwise be permissible under 99F? Is it complexity of service and process, or just the resulting recommendation?
• Can the comprehensive adviser discovery process be funded through collective charging?
• What are the implications of Section 99F and the Royal Commission Recommendation 3.2 for the structure of comprehensive advice offerings within super funds?
• Section 99F of the SIS Act provides guidance to funds about which super-related advice topics cannot be collectively charged. However, could Section 99F be interpreted to extend to the trustee costs incurred in providing a comprehensive, non-intra-fund, advice service where the charges to individual members do not fully recover the costs of making the service available to all members?
• Similarly, is Royal Commission recommendation 3.2 intended only to mean that non-intra-fund advice fees cannot be deducted from an individual member’s MySuper account? Or can it also be interpreted to mean that no unrecovered fund-level costs of providing a comprehensive advice service can be deducted from any member’s MySuper accounts?

Refer to Appendix 3 for more details of IFS’s position on questions raised.

These are matters that IFS’s member funds need regulatory clarity about when reviewing the design of their advice offerings.
Pricing methodology

Is it possible to split an SOA fee into three components (part intra-fund, part fee deduction from account, and part payable directly by the member)? A full retirement plan may involve advice on investment choice (covered by intra-fund), contributions and pension recommendations, including Centrelink, that we charge the member via a deduction from their account, and a non-super investment recommendation which the member needs to pay from their own funds, for example.

What is the expectation of a fund to accurately cost their advice in order to set their advice fees? Further, for advice that goes beyond intra-fund, how is it to be determined what the costs of those elements are in achieving cost recovery?

Example

Advice given in a single appointment includes:

1. Advice about investment choice
   - Fees covered by intrafund

2. Advice about contributions, pensions, Centrelink
   - Fees deducted from the member’s super account

3. Advice about non-super investments
   - Member pays these fees from their own funds
Debt vs Super

A member with a small amount of spare cashflow or who has been bequeathed some money is deciding whether to put the money into super or on their home loan.

If the member met with a limited licensed intra-fund adviser, the adviser would typically not be allowed to address the member’s debt and could only provide contributions advice if it were in that member’s best interests. Most limited licensed advisers would likely decline to provide any advice to this member.

Therefore, the member’s only option often is to seek comprehensive advice, either from the fund or via an external adviser, at an average cost of $2,000-$4,000. Further complexity exists about how this fee is to be paid. Debt repayment recommendations do not align with sole purpose test so the advice must be paid by the member from their own funds, whereas a superannuation recommendation may either be collectively charged or deducted from the member’s super account.

Retirement advice

A single member is seeking advice about planning for retirement. Apart from their home and a small amount of personal assets, their superannuation is all they have.

The member could get retirement advice that considers adequacy, longevity risk and Centrelink from a limited licensed financial adviser employed by her super fund, typically for as little as $300-$500 or at no direct cost.

If this same member had a spouse, the situation is immediately complicated. The limited licensed adviser cannot provide any advice to the non-member spouse if it is to be deemed intra-fund and hence collectively charged, leaving two options:

- Provide advice only to the member, excluding the spouse and Centrelink maximization strategies from the advice
- Refer the member to a comprehensive adviser who can consider a broader range of strategies to maximise their retirement position, such as asset sheltering, spouse contributions and gifting.

If the member received comprehensive advice, the advice fees could be treated in three parts:

1. The part of the advice that qualifies as intra-fund can be collectively charged
2. Strategies that align to the sole purpose test but are broader than intra-fund can be deducted from the member’s account
3. Strategies for the spouse can be paid for directly by the member from their own funds.

The challenge, when member consent is required up front, is that the adviser does not know in advance what strategies they will recommend, nor the corresponding fee charging mechanism.

As a result, most advisers working in superannuation take the conservative route and insist the member pays from their own funds if there is any doubt.
The advice offerings of superannuation funds tend to reflect the charging rules they must adhere to instead of expressing the advice needs and expectations of their members.

What’s more, there seems to be a desire to stay with the pack and maximise the amount of advice cost that can be distributed across members, rather than developing a model that strives for financial sustainability.

Funds that charge members for advice services typically do so to ensure compliance with the regulations, instead of the fee reflecting the value or input cost of the service.

Not surprisingly, the common theme across all advice offers in superannuation is a focus on super and retirement planning.

Advice is delivered through a combination of channels, including digital, centralised phone-based teams – either outsourced or employed directly – and dispersed advisers, either employed directly or via a referral arrangement, who provide a face to face service.

**Are there any common themes?**

Follow up work

IFS will use this paper as a baseline for a subsequent thought leadership piece on advice model design. It will seek to support funds in taking a product design methodology to the review and build of future advice offers.

They key questions we will be exploring are:

- What are the common member needs super funds typically need to meet with their advice offers?
- What are the member expectations when it comes to service experience design?
- What are the financial and commercial considerations in designing an advice offer for a super trustee?
- How does the trustee meet the best interest and member equity obligations when approaching collective charging or transaction-based advice fees?

We welcome industry input and feedback to inform our future thought leadership development.

**Where to from here?**

With the aim of making advice financially more sustainable and more accessible to members, IFS will:

- Seek better, more focussed guidance from the regulators on the most common examples where trustees are challenged or uncertain of what the rules allow
- Determine where the focus on regulatory reform should be – for example, to broaden the scope of intra-fund, to protect the challenge to general advice, or the disclosure requirements in the form of an SOA
- Develop a better understanding of how funds should review the models they have today
- Identify the demands of key partners in the industry – technology vendors, licensees, auditors, and external advice providers.

This paper has highlighted some of the grey areas in the regulatory advice environment. By achieving consensus on the practicalities of the rules around advice today, we can better achieve advice model design and policy reform in the future.

It would serve our industry well to demonstrate leadership and maturity in leading this discussion, instead of waiting to be led by policy makers and regulators.

**Follow up work**

IFS will use this paper as a baseline for a subsequent thought leadership piece on advice model design. It will seek to support funds in taking a product design methodology to the review and build of future advice offers.

They key questions we will be exploring are:

- What are the common member needs super funds typically need to meet with their advice offers?
- What are the member expectations when it comes to service experience design?
- What are the financial and commercial considerations in designing an advice offer for a super trustee?
- How does the trustee meet the best interest and member equity obligations when approaching collective charging or transaction-based advice fees?

We welcome industry input and feedback to inform our future thought leadership development.
Appendix 1

Regulatory Guidance – Intra-fund advice

There are three key documents to draw from to understand the rules with regards to ‘intra-fund’ advice:

- SIS Act, Section 99F: Cost of Financial Product Advice
- ASIC Information Sheet 168 – Giving and collectively charging for intra-fund advice.

Section 99F of the SIS Act stipulates that a super fund cannot collectively charge for advice across a fund membership in the following circumstances:

- The person is not yet a member of the fund
- The advice is about another financial product
- The advice is about consolidating your super
- The offering of an ongoing review service.

There is nothing explicit in the legislation that limits advice to simple topics, however the Explanatory Memorandum – Super Legislation Amendment Act 2012 provides some useful guidance:

- ‘...it’s important that members seeking more complex personal advice in relation to their super bear the cost of that advice
- ‘...provide a member with simple, non-ongoing personal advice...and that this advice be able to be collectively charged across the fund membership’
- ‘It is important to ensure the cost of providing this advice are kept at reasonable levels.’

The Explanatory Memorandum notes the following as allowed intra-fund topics:

- insurance needs (within fund)
- contributions
- changing investment options, including changing from accumulation to pension
- advice about a related pension fund, related insurance product or related cash management facility within the fund.

There is a warning with regards to TTR and where there is an expectation that advice will be ongoing and/or has some complexity, it should not be collectively charged.

Regulatory Guidance – Sole purpose test and advice fees

The sole purpose test (section 62 of the Super Industry (Supervision) Act 1993) means that only costs associated with advice that relates to the member’s super and insurance obtained through super may be deducted from the member’s super account.

Advice that relates to investments outside of super, for instance, cannot be funded from super account deductions.

Appendix 2

Extract from ASIC submission to House of Reps Economics Committee 2020

“When assessing whether an advice provider has complied with the best interests duty, we will consider whether a reasonable advice provider would believe that the client is likely to be in a better position if the client follows the advice provided,” the regulator said.

Elsewhere in its submission, ASIC said intra-fund advice is not a legal concept or a separate type of advice.

“Intra-fund advice is a term widely used in the industry to refer to the scaled or limited scope personal advice that a superannuation trustee can provide to members on the basis that the cost of the advice is borne by all members of the fund,” it said.

“Under the SIS Act the cost of scaled or limited scope personal advice can only be borne by all members of the fund if it covers certain limited topics, related to the member’s interest in the fund, and is not ongoing advice. The SIS Act deals only with the funding mechanism for this advice; it does not deal with the obligations of the financial advice provider in providing the advice,” ASIC said.

“Any personal advice provided under an intra-fund arrangement must, like all scaled advice or limited scope personal advice, comply with the best interests duty and related obligations and the disclosure obligations in the Corporations Act that are applicable to personal advice.”
## Appendix 3

### Areas requiring regulator guidance and clarification

<table>
<thead>
<tr>
<th>Theme</th>
<th>Topic/Example and impact on consumer</th>
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<tbody>
<tr>
<td><strong>General vs personal advice</strong></td>
<td>If a member is using a digital advice tool but being guided by an adviser or call centre representative, who is the entity providing the advice? This is limiting new advice models being tested as funds are hesitant to put human assistance around digital advice tools.</td>
<td>The licensee of the tool so long as human assistance is only focussed on inputs into the tool and not validation of the advice itself.</td>
<td>Low</td>
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<td><strong>What practical considerations exist for super funds wanting to provide one-on-one education and general advice to members?</strong> Since the Westpac case on general advice, super funds are hesitant to offer one-on-one service to members outside of personal advice captured in an SOA.</td>
<td>One-on-one wealth coaching focussed on budgeting and understanding money does not need to be personal advice.</td>
<td>Low</td>
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<td><strong>Can strategy-only general advice be provided about super and retirement?</strong></td>
<td>While an adviser can suggest what a member can do in terms of super and retirement planning, they cannot tell a member what they should do, for this takes the interaction into personal advice.</td>
<td>Medium</td>
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<td><strong>Fee charging/cost recovery</strong></td>
<td>Can fee charging mechanism be determined after identification and acceptance of advice needs? i.e. can you run a full, comprehensive, complex advice needs discovery process, and then collectively charge the components which would otherwise be permissible under 99F? Some funds are interpreting that 99F requires the whole advice interaction, not just the advice, to be in line with approved advice topics covered under 99F.</td>
<td>The restrictions outlined under 99F only relate to the explicit advice being provided, and not the needs analysis and fact-finding process. Therefore, yes the fee charging mechanism can be determined after fact finding has been completed.</td>
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<td><strong>How do the general advice rules intersect with the sole purpose test?</strong> What limits apply to the subject matter of general advice in terms of the sole purpose test? Some funds have quite broad education and ancillary service arrangements, while other funds have a much stricter interpretation.</td>
<td>It is our belief that the rules permit funds to offer education and ancillary services that relate to the member’s retirement planning more broadly than just the provision of an income stream (e.g. debt management, estate planning, career planning).</td>
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<td><strong>What advice can be collectively charged under intra-fund advice provisions?</strong> There are some aspects of s99F of the SIS Act that are not clear. For example, where is the line between simple and more complex advice? This lack of clarity is leading to distorted advice propositions and leaves a significant gulf between that which is deemed intra-fund and the fees associated with broader advice.</td>
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<td><strong>What strategies are in/out of intra-fund?</strong></td>
<td>Yes – Code of Ethics requires broader discovery process in any case.</td>
<td>High</td>
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<tr>
<td>1 Can you fund the comprehensive advice discovery process through collective charging?</td>
<td>2 Yes when there is no spouse, other assets, debts and other product types (e.g. annuities) to consider.</td>
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<td>2 Can ’retirement planning’ be simple?</td>
<td>3 We believe the rules should allow contribution advice where the funds are coming from a basic bank account (i.e. rather than being treated as a product disposal).</td>
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<td>3 Some funds do not allow contribution advice outside of salary sacrifice due to the need to recommend disposal of a product if funds are coming from a bank account. This means that in order to recommend such a strategy, the member would need to pay for this advice.</td>
<td>4 Goals based advice often isn’t simple because of the various strategies that can be considered.</td>
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<tr>
<td>4 Can ’goals based’ advice be simple, or is it only ’transactional’ superannuation advice?</td>
<td>5 TTR advice, where the goal is to maximise superannuation (withdraw and recontribute pre-tax), requires monitoring and ongoing advice and is difficult to provide as intra-fund.</td>
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<td>5 Can Transition to Retirement (TTR) be provided under intra-fund charging rules? Some funds do not allow TTR advice on the basis that it needs to be reviewed regularly and might foul the prohibition on ongoing advice being provided.</td>
<td>6 No.</td>
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### Assessing the limits and regulatory definitions of financial advice

#### Scoping

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<tr>
<td>Fee charging/cost recovery (cont’d)</td>
<td>What advice fees can be charged to the member’s super account under the sole purpose test? This uncertainty is limiting the investment of time and money into scaling up existing offerings, and developing new propositions for fund members. 1. Can funds capitalise a related entity to enable advice and other member services that go beyond what 99F and sole purpose test allow? (an issue of funds not having a capital base of their own) What are the implications of Section 99F and the Royal Commission Recommendation 3.2 for the structure of comprehensive advice offerings within super funds? 2. Does the sole purpose test cover fees for retirement projections where the member’s (and their spouse’s) broader financial situation must be considered in preparing those projections? 3. Section 99F of the SIS Act provides guidance to funds about which super-related advice topics cannot be collectively charged. However, could Section 99F be interpreted to extend costs in providing a comprehensive (non intra-fund) advice service to the trustee, where the advice fee charged to individual members does not fully recover the costs of making the service available to all members? 4. Similarly, is Royal Commission recommendation 3.2 intended only to mean that non-intra-fund advice fees cannot be deducted from an individual member’s MySuper account? Or could it also be interpreted to mean that unrecovered fund-level costs of providing a comprehensive advice service cannot be deducted from any member’s MySuper accounts?</td>
<td>Yes, it needs to be treated as an investment and hence offered on a commercial basis, with an appropriate return on capital derived. Further the trustee cannot manage the operations of this related business, and therefore there needs to be a separate management team and board. Yes. Yes, so long as the trustee can demonstrate that the costs not recovered as part of comprehensive advice offered, are otherwise covered under 99F. Our understanding is that it relates to advice costs that presently are deducted from a member’s account directly. Therefore funds could still provide the advice so long as the costs of it are paid by members from their own funds.</td>
<td>Medium</td>
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#### Pricing methodology

| | 1. Is it possible to split an SOA fee into three components (part intra-fund, part fee deduction from account, and part payable directly by the member? As an example, a full retirement plan may involve advice on investment choice (covered by intrafund); contributions and pension recommendations (including Centrelink) charged to the member as a deduction from their account, and a non-super investment recommendation which the member pays from their own funds. 2. What is the expectation of a fund to accurately cost their advice in order to set their advice fees? Further, for advice that goes beyond intra-fund, how are advice elements costed in achieving cost recovery? | Yes this is possible and a preferable outcome as opposed to offering a member two different interactions and advice documents, something commonly seen in funds today. A trustee needs to demonstrate that analysis has been undertaken on a periodic basis to determine advice fees based on productive capacity and a true reflection of cost base (explicit costs plus reasonable overhead for management oversight, compliance and technology). | High |

#### Advice Scoping

| | 1. Can retirement advice be provided as intra-fund advice? This is where we see the biggest contention from the broader advice industry, and the widest variance of interpretation amongst super funds. Some funds provide near full retirement planning advice under its ‘intra-fund offering’ and remain silent on advice relating to other products or a spouse. Other funds do not provide retirement advice in any form on the basis that it isn’t simple and cannot include strategies for a non-member spouse. | Only in very limited circumstances where the member has no spouse, other assets/debts and their advice needs are limited to the provision of an income stream. For most members the potential for benefits resulting from a broader range of strategies means that scoping advice down to meet intra-fund rules will not be in the their best interest. | High |

<p>| | 2. Should the charging rules have such a significant impact on how advisers are licensed, and hence which members needs are addressed? More fundamental is whether the use of limited licensing to align to intra-fund charging rules is creating challenges for advice models and advisers i.e. the scope of needs rarely falls neatly into one charging bucket. The limited adviser needs to assess whether the member sufficiently understands the impact of only receiving limited advice and then determine if it’s appropriate to proceed with giving it. | This is a growing conflict for limited licensed advisers who often need to operate at the limits of what they are allowed to do, yet are qualified and capable of solving for more. Further the member’s expectations are for them to address their superannuation and retirement needs. Limited super licensing is not something that a consumer should be expected to understand. Instead advisers should be licensed to solve for super and retirement and scope up and down as required. | High |</p>
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<td>Product advice</td>
<td><strong>Q</strong> Insurance product comparison advice is too hard to provide. How can we do this better? Insurance is complicated and comparing insurance products is complicated so we do not offer advice in this area. Where a member needs an insurance comparison, we refer elsewhere.</td>
<td>Intrafund insurance advice is useful to identify the insurance need a member might have. However, an adviser is challenged in some instances to recommend a product given the limited offerings they typically have available to them.</td>
<td>Medium</td>
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<td>Product advice</td>
<td><strong>Q</strong> Can strategy-only personal advice be provided about super and retirement? Does the member’s interest in the fund need to be tested each and every time they receive advice? Presently some funds are mandating that analysis of the existing product’s suitability should be undertaken before any strategic advice can be provided. Should there be a different view on this where there is no new product or consolidation of products being recommended?</td>
<td>There should not be a need to undertake an analysis of the member’s existing product if they don’t want it and the Adviser isn’t recommending a product switch, new product or product consolidation. Advisers should educate members about the product and explain to them how their current product ranks against peers so they can make an informed choice whether they want a full analysis.</td>
<td>High</td>
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<tr>
<td>Other</td>
<td><strong>Q</strong> Does there need to be more thought given to the guidance around goals based digital advice? Digital advice has been primarily focussed on portfolio management to date, but funds are increasingly looking for it to address broader retirement planning needs. In particular the accountabilities on the licensee and how this looks in the eyes of FASEA Code of Ethics, given retirement planning requires trade-off discussion of goals and consideration of long term implications of advice. Further, there are challenges for licensees and super funds wanting to design digital advice propositions that tries to blend elements of a calculator (to make it more interactive and engaging) and the more traditional linear advice process required of a personal advice journey.</td>
<td>We are uncertain of how digital advice will need to be evolved or be answerable to the Code of Ethics. There is an issue of two standards being accepted depending on who provides advice (human vs technology). There is some confusion amongst super funds in terms of the purpose and requirements of a calculator vs digital advice solution, and when one becomes the other.</td>
<td>Medium</td>
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<tr>
<td>Other</td>
<td><strong>Q</strong> What obligation do trustees have around the quality of advice (not just sole purpose) where they have a relationship with an outsourced provided and how does this work in practice under SPS 231?</td>
<td>IFS is often subject to reviews by our clients to ensure we have the appropriate governance, policies, training and operational support in place for our licensed advisers to ensure the advice they provide is in the best interests of members. In fact, we believe it is a strength of our model that the advice licence (and hence advice standards) is separated from the trustee as this best manages the conflict that would otherwise exist.</td>
<td>Low</td>
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