

WHOSE BEST INTERESTS ARE PRIORITISED? AN ASSESSMENT OF THE BEST INTERESTS DUTY AND THE PROPOSED AMENDMENTS TO THE REGULATION OF FINANCIAL PRODUCT ADVICE

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Australian consumers are dependent on financial advisers to receive financial advice that is tailored to their personal circumstances and is in their best interests. Following Michelle Levy's Treasury-led Quality of Advice Review ('QAR') and recommendations, the Australian Government announced the Delivering Better Financial Outcomes reform package to streamline regulatory compliance, and improve the quality and affordability of financial advice. This article contributes to the scholarship on the provision of financial product advice by examining a financial adviser's best interests duty under section 961B of the Corporations Act 2001 (Cth). It also evaluates the recommendations by the QAR to introduce a statutory fiduciary best interests duty and the proposed reforms to remove the safe harbour provisions in section 961B. This article argues that the absence of an equitable or statutory context to guide the interpretation of 'best interests' in section 961B renders the proposed recommendations and reforms suboptimal.

I INTRODUCTION

The interests of client, intermediary and provider of a product or service are not only different, they are opposed. An intermediary who seeks to 'stand in more than one canoe' cannot. Duty (to client) and (self) interest pull in opposite directions.¹

The provision of financial advice is a highly regulated and complex activity.² In an industry covering financial products, including mortgages, financial and investment planning, superannuation and insurance, ordinary consumers are dependent on financial advisers for assistance to utilise and navigate these complex

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1 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 2–3 ('Banking Royal Commission Final Report').

2 *Quality of Advice Review* (Final Report, 16 December 2022) 40–1 ('QAR').

financial products.³ The ordinary consumer discloses their personal and financial information to financial advisers, with the expectation that the recommendations received are tailored and in their best interests.

Given the critical role that financial advisers have in affecting the future financial health of consumers, the Australian Government developed an extensive regulatory regime to control the provision of financial product advice, and protect the ordinary consumer from harm.⁴ The *Corporations Act 2001* (Cth) (*'Corporations Act'*) requires financial advisers that provide financial product advice to comply with certain conduct and disclosure obligations.⁵ The obligations that apply are dependent on whether the advice is personal or general advice.⁶ To qualify as 'personal advice', the recommendations by a financial adviser must consider one or more of a person's objectives, financial situation and needs.⁷ This article will focus exclusively on personal advice, rather than general advice, provided by financial advisers.⁸

One key aspect of the regulatory regime governing personal financial product advice is the statutory duty of an adviser to 'act in the best interests of the client'.⁹ The concept of the best interests duty is undefined under the *Corporations Act*.¹⁰ However, section 961B(2) of the *Corporations Act*, known as the 'safe harbour provisions', prescribes that financial advisers will satisfy the best interests duty if the subsection's prescriptive steps are completed.¹¹ This core requirement is complemented by ancillary obligations in chapter 7 of the *Corporations Act* to provide appropriate advice, warn the client if their advice is based on inaccurate information, and prioritise the client's interests.¹² Collectively known as the 'best interests duty and the related obligations',¹³ these obligations were introduced as part of the Labor Government's Future of Financial Advice ('FOFA') reforms in

3 Han-Wei Liu et al, 'In Whose Best Interests? Regulating Financial Advisers, the Royal Commission and the Dilemma of Reform' (2020) 42(1) *Sydney Law Review* 37, 38.

4 See especially *Corporations Act 2001* (Cth) ch 7 pts 7.7–7.7A (*'Corporations Act'*). See, eg, *Financial Planners and Advisers Code of Ethics 2019* (Cth) cl 5 (*'Code of Ethics'*). See also *Corporations Regulations 2001* (Cth) ch 7 pts 7.2, 7.6, 7.7 divs 2–3, 7.7A div 2 (*'Corporations Regulations'*).

5 *Corporations Act* (n 4) pts 7.7–7.7A.

6 Ibid s 766B.

7 Ibid s 766B(3).

8 General advice is advice that does not constitute personal advice. General advice does not consider a client's objectives, financial situation or needs: Australian Securities & Investments Commission, 'Licensing: Financial Product Advisers' (Regulatory Guide No 175, 15 June 2021) 14 [175.39]–[175.40] (*'RG 175'*). See also *Corporations Act* (n 4) s 766B. Readers should note that Australian Securities & Investments Commission regulatory guides are subject to revision and update. 'RG 175' (n 8), originally released on 15 June 2021, was updated on 21 November 2024.

9 *Corporations Act* (n 4) s 961B(1).

10 Liu et al (n 3) 38. See also Stephen Corones and Thomas Galloway, 'The Effectiveness of the Best Interests Duty: Enhancing Consumer Protection?' (2013) 41(1) *Australian Business Law Review* 5, 24.

11 *Corporations Act* (n 4) ss 961B(2)(a)–(g); Liu et al (n 3) 38. Moshinsky J comments that section 961B(2) operates as a defence for advisers if they are accused of breaching the best interests duty: *Australian Securities and Investments Commission v NSG Services Pty Ltd* [2017] FCA 345, [17] (*'NSG Services'*).

12 *Corporations Act* (n 4) ss 961G–961J, 961L.

13 See, eg, 'RG 175' (n 8) 8 [175.20]–[175.21].

2012. The FOFA reforms were designed to enhance the quality of financial advice and restore trust in the financial advice industry.¹⁴

The 2019 Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry ('Banking Royal Commission'), led by Commissioner Kenneth Hayne, recommended that a review be undertaken to assess, inter alia, the operation of the safe harbour provisions in section 961B(2).¹⁵ The Banking Royal Commission questioned the value of the safe harbour provisions as a substantive test and whether it amounts to a 'tick-a-box' exercise that undermines the duty to act in the best interests of a consumer.¹⁶

Following the Banking Royal Commission's recommendation, Michelle Levy finalised the Quality of Advice Review Final Report on 8 February 2023 ('*QAR*').¹⁷ The *QAR* contained 22 recommendations on how the current financial advice framework can be amended to streamline regulatory compliance, and enhance the quality, accessibility, and affordability of financial advice.¹⁸ One of these recommendations was to replace the best interests duty and its related obligations with a new statutory duty.¹⁹ This new statutory best interests duty would be a true fiduciary duty that reflects the general law, and would not include the safe harbour provisions, and its related obligations.²⁰ In December 2023, the Assistant Treasurer released the Australian Government's final response to the *QAR*, briefly outlining that the safe harbour provisions would be abolished.²¹ This decision forms part of the Government's second tranche of reforms, known as the Delivering Better Financial Outcomes package ('Tranche 2 DBFO'). The Tranche 2 DBFO package is designed to improve the quality of advice and reduce unnecessary regulatory red tape that adds to the cost of advice.²²

14 The underlying objective of the reforms is to improve the quality of financial advice and build trust and confidence in the financial advice industry. The Delivering Better Financial Outcomes reforms aim to achieve this through enhanced regulatory standards that align the interests of the adviser with the client and reduce conflicts of interest: Explanatory Memorandum, Corporations Amendment (Future of Financial Advice) Bill 2012 (Cth) 3. See also *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) ('*FOFA Act*'); Matthew Peckham, 'From the Wallis Report to the Murray Report: A Critical Analysis of the Financial Services Regime between Two Financial System Inquiries' (2015) 33(7) *Company and Securities Law Journal* 478, 490.

15 *Banking Royal Commission Final Report* (n 1) 177–9. See also Explanatory Memorandum, Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024 (Cth) 10–11.

16 *Banking Royal Commission Final Report* (n 1) 177–9.

17 Treasury (Cth), 'Quality of Advice Review: Terms of Reference' (Terms of Reference, 11 March 2022); *QAR* (n 2) 14. The *QAR* attaches the Terms of Reference at 187–8.

18 *QAR* (n 2) 5–12, 14.

19 *Ibid* 6, 102.

20 *Ibid*.

21 Australian Government, *Delivering Better Financial Outcomes* (Detailed Overview, 7 December 2023) 1 <<https://treasury.gov.au/publication/p2023-471470>> ('*Final Government Response to QAR*'). See also Australian Government, *Delivering Better Financial Outcomes* (Detailed Overview, 19 June 2023) 1 <<https://treasury.gov.au/publication/p2023-407255>> ('*Initial Government Response to QAR*').

22 'Delivering Better Financial Outcomes (DBFO) Package', *Australian Securities & Investments Commission* (Web Page) <<https://asic.gov.au/regulatory-resources/financial-services/regulatory-reforms/delivering-better-financial-outcomes-dbfo-package/>>.

A Objectives and Research Methodology

This article will use doctrinal research to assess the current regulatory framework governing the best interests duty and the safe harbour provisions. This article will also incorporate historical analysis, regulatory theory and comparative law.

Attention will be drawn to previous academic literature and legal texts, including legislation, explanatory memoranda, Hansard materials, cases, law reform papers, and relevant Treasury inquiries and reports.²³ These materials will assist in evaluating Australia's best interests duty, the reasonable expectations of the reforms for consumer protection, and for the quality of personal advice. The doctrinal method will be accompanied by a 'rules-based and principles-based' analysis. This will be essential to evaluate whether transitioning to, and interpreting a principles-based best interests duty, by removing the safe harbour provisions, will be clear or certain.²⁴

This article has several interrelated objectives. First, to assess a financial adviser's compliance with the safe harbour provisions, as a method to satisfy the best interests duty. Special consideration will be given to consumer protection, the quality of advice, and regulatory efficacy. Second, to assess the Australian Government's objective of balancing improvements in the quality of advice, and providing certainty in interpreting and applying the law.²⁵ This will also consider the prospective impact of removing the safe harbour provisions on consumer protection.²⁶ Third, to consider whether removing the safe harbour provisions or implementing a statutory fiduciary duty ('proposed reforms and recommendations') will eliminate the 'tick-a-box exercise' method of compliance, and provide a

23 See, eg, *FOFA Act* (n 14). The 2012 FOFA reforms were implemented through two enactments, the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) and the *Corporations Amendment (Further Future of Financial Advice) Act 2012* (Cth). The latter provided broader implementation and amendments to the FOFA reforms: see especially 'Future of Financial Advice: Implementation', *The Treasury* (Web Page) <<https://treasury.gov.au/future-financial-advice/implementation>>. See also Explanatory Memorandum, Corporations Amendment (Future of Financial Advice) Bill 2012 (Cth); Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Financial Products and Services in Australia* (Final Report, November 2009) ('*Ripoll Report*'); *Corporations Amendment (Further Future of Financial Advice) Act 2012* (Cth) ('*FFOFA Act*'); Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth); *QAR* (n 2); *Banking Royal Commission Final Report* (n 1); Australian Law Reform Commission, *Financial Services Legislation* (Report No 137, November 2021) ('*ALRC Report 137*').

24 The Australian Law Reform Commission expressed that a 'key debate regarding prescriptive and principled legislation is the degree to which each approach is capable of achieving "precision", "clarity" and "simplicity"': *ALRC Report 137* (n 23) 74 [2.94]. Relevant regulatory theories that have been utilised in developing financial services law include rules-based and principles-based regulation. Rules-based regulation relies on highly prescriptive rules to prescribe conduct. In contrast, principles-based regulation relies on broad-based standards or norms to achieve regulatory outcomes: at 69–72. A rule is clear or certain if the stakeholders that interpret and apply the rule agree on what the rule means or reach the same understanding. Stakeholders primarily comprise of regulators, regulated entities, courts and tribunals: Julia Black, 'Principles Based Regulation: Risks, Challenges and Opportunities' (Presentation Paper, University of Sydney, 28 March 2007) 8 <<https://researchonline.lse.ac.uk/id/eprint/62814/>> ('*Risks, Challenges and Opportunities*').

25 Explanatory Memorandum, Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024 (Cth) 10–11 [1.5].

26 *Ibid.*

more substantive test for ensuring quality personal advice.²⁷ This assessment will illustrate whether transitioning from a prescriptive to a principles-based framework will create greater confusion for financial advisers in determining what behaviour is required for regulatory compliance.²⁸ Finally, to evaluate whether granting advisers more autonomy to exercise their professional judgement in the advice process, by adhering to a principles-based framework, will compromise consumer protection.²⁹

B Limitations of Article and Contingency

It is important to acknowledge that the scope and findings of this article may be limited by the current absence of a draft Bill, and explanatory documents of the Tranche 2 DBFO reform package. The Australian Government has indicated that it is currently undergoing consultation with industry and consumer stakeholders on the design of the draft legislation.³⁰ On 21 March 2025, the Treasury released exposure draft legislation for consultation as part of the Government's second tranche of financial advice reforms, but the draft Bill neither proposes amendments to, nor substantively addresses, the best interests duty or the safe harbour provisions.³¹ Without such parliamentary materials, a complete insight into the operation of the reformulated best interests duty, without the safe harbour provisions, is limited. Notwithstanding that, on 24 July 2024, the first tranche of the Delivering Better Financial Outcomes package received royal assent.³² Although the amendments of this reform package are not entirely relevant to the proposed amendments, its

27 See above nn 15–16.

28 The Australian Securities & Investments Commission ('ASIC') outlines that the '[I]ack of certainty in what the law requires causes confusion for advice providers in determining what behaviour is required to comply with their obligations': Australian Securities & Investments Commission, 'Future of Financial Advice: Best Interests Duty and Related Obligations' (Regulation Impact Statement, December 2012) 10–11 [34]–[41] ('Regulation Impact Statement').

29 The *QAR* explains that financial advisers suggested that 'the current framework is overly prescriptive and does not allow advisers to rely on their professional judgement when providing advice': *QAR* (n 2) 191. The Association of Independently Owned Financial Professionals expressed that they want 'ASIC and the minister to allow financial advisers to have the ability to implement more professional judgement with certain aspects of the advice process': Keith Ford, 'Let Advisers Use "Professional Judgement": The Way Forward for Self-Regulation', *Independent Financial Adviser* (Web Page, 10 October 2023) <<https://www.ifa.com.au/news/33385-let-advisers-use-professional-judgement-the-way-forward-for-self-regulation>>.

30 See 'Albanese Government Passes Financial Advice Laws', *Ministers: Treasury Portfolio* (Web Page, 4 July 2024) <<https://ministers.treasury.gov.au/ministers/stephen-jones-2022/media-releases/albanese-government-passes-financial-advice-laws>> ('Albanese Financial Advice Laws').

31 Exposure Draft, Treasury Laws Amendment (Delivering Better Financial Outcomes) Bill 2025 (Cth). See also Exposure Draft Explanatory Memorandum, Treasury Laws Amendment (Delivering Financial Outcomes) Bill 2025 (Cth). The Treasury's proposals sought to streamline the delivery of advice by replacing the statement of advice with a fit-for-purpose client record, clarifying the types of advice that may be collectively charged through superannuation, and enabling superannuation funds to issue targeted prompts to encourage member engagement at key life stages. The consultation closed on 2 May 2025: 'Improving Access to Affordable and Quality Financial Advice', *The Treasury* (Consultation Hub) <<https://consult.treasury.gov.au/c2025-637814>>.

32 Ibid. See also *Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Act* (Cth) 2024. See also Explanatory Memorandum, Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024 (Cth).

explanatory documents provide critical insight into the underlying purpose and motivations of the Delivering Better Financial Outcomes ('DBFO') reforms.³³

Regardless of whether the Tranche 2 DBFO reform package receives royal assent, financial advice is undergoing significant assessments to resolve the ongoing complexities, and legal uncertainties, that contribute to regulatory non-compliance and poor financial advice.³⁴ Thus, an assessment of the proposed amendments will indicate its effectiveness as a future reform, to provide regulatory certainty and simplicity, for compliance under the current framework.³⁵

C Structure of Article

A significant challenge for Australian legislators and regulators is developing a framework that balances consumer protection, and the provision of quality financial advice, while keeping it reasonably affordable and accessible.³⁶ Given this, and the underlying objectives of the proposed legislative amendments,³⁷ this article will be structured into six parts. This will allow an in-depth evaluation of the current framework regulating financial product advice and the prospective impacts of the proposed reforms and recommendations.

First, consideration must be given to the historical development and context leading up to the enactment of the best interests duty, and the safe harbour provisions. This will be analysed in Part II of this article. This will assist in understanding the underlying regulatory purpose of the best interests duty and its objectives. Part II will also examine the current fiduciary relationship between financial advisers and clients under the general law, and the attempt to implement a statutory fiduciary duty in the FOFA reforms.

Part III will critically assess the current application of the best interests duty and the safe harbour provisions through key Federal Court proceedings. From this analysis, Part III will also evaluate the Australian Securities & Investments Commission's ('ASIC') enforcement of financial advisers for non-compliance with the prescriptive rules prescribed in their regulatory guides.³⁸

33 The Explanatory Memorandum, Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024 (Cth) states that the Bill delivers the first tranche of the Government's Delivering Better Financial Outcomes package of reforms, which will 'improve the process of providing financial advice by ... removing onerous red tape that adds to the cost of advice with no consumer benefit': at 10–11 [1.5]. The Memorandum further outlines that the amendments are to 'increase accessibility and affordability of personal financial advice by removing regulatory red tape for financial advisers that adds to the cost of financial advice': at 11 [1.7].

34 IBISWorld, *Financial Planning and Investment Advice in Australia* (Report, December 2023) 19; *ALRC Report 137* (n 23) 537–8 [13.143]–[13.146].

35 See above n 24.

36 The Treasury expressed that only 20–40% of consumers have access to financial advice services. Barriers to accessing financial advice consist of its high costs and a consumer's lack of funds to pay for an adviser's services: Treasury (Cth), *Financial Services Royal Commission: Key Reforms in the Regulation of Financial Advice* (Background Paper No 8, April 2018) 1 ('*Reforms in the Regulation of Financial Advice*').

37 See above nn 17–21 and accompanying text.

38 See, eg, 'RG 175' (n 8). Cristean Yazbeck expresses that the best interests duty permits ASIC to operate with 'a completely different set of rules, operating under the guise of "fiduciary duties"': Cristean Yazbeck, 'QAR, "Good Advice" and the Statutory BID: Handle with Care' (Blog Post, 24 March 2023)

Part IV will analyse the underlying motivations of the future amendments to remove the safe harbour provisions under the Tranche 2 DBFO package. Part V will evaluate the prospective impact of the *QAR*'s recommendation to implement a statutory fiduciary duty. Part V will specifically examine whether the proposed reforms and recommendations will undermine the legislation's current safeguards, to guarantee a consumer's financial safety. This will also discuss how these changes might materially diminish the framework's ability to clearly define an adviser's obligations. Additionally, this part will include an intra-jurisdictional comparative analysis with South Africa, to assess the prospects of implementing a statutory fiduciary duty to act in a client's best interests, as a future reform in Australia.³⁹ Part VI concludes.

II REGULATING FOR LOYALTY IN FINANCIAL SERVICES: UNDERSTANDING THE 'BEST INTERESTS' DUTY AND RELATED OBLIGATIONS

The best interests duty and related obligations are located in part 7.7A of chapter 7 of the *Corporations Act*. This framework regulates the provision of financial services, and the operation of the financial markets. To provide financial advice, financial advisers must satisfy the stringent criteria of an Australian Financial Service ('AFS') licence application,⁴⁰ or be authorised as an 'authorised representative' by an existing AFS licence holder.⁴¹ Section 912A of the *Corporations Act* imposes a general obligation on AFS licence holders to provide financial services 'efficiently, honestly and fairly'.⁴² This general obligation is complemented by a broad obligation on AFS licensees, to ensure their representatives comply with financial services laws.⁴³

<<https://www.professionalplanner.com.au/2023/03/qar-good-advice-and-the-statutory-best-interests-duty-handle-with-care/>>. See also Corones and Galloway (n 10) 22.

39 Note that the comparative analysis of South Africa's legal framework is intended to propose a statutory framework that could be adopted by Australia to implement common fiduciary duties. Further research, detailed examination and critical analysis of South Africa's jurisdiction is necessary to assess whether it may effectively address the challenges identified within Australia's context.

40 See *Corporations Act* (n 4) s 911A. AFS licence holders must meet stringent requirements to provide financial advice, including a fit and proper test: at ss 913A–913BB.

41 Ibid ss 916A–916C. See also Australian Securities & Investments Commission, 'Who Can Be an Authorised Representative of an AFS Licensee' (Information Sheet No 91) <<https://asic.gov.au/for-finance-professionals/afs-licensees/appointing-and-ceasing-an-afs-authorised-representative/who-can-be-an-authorised-representative-of-an-afs-licensee/>>.

42 The author expresses that the duty to provide financial services efficiently, honestly and fairly 'is a cornerstone duty'. This duty has an 'extremely broad application' that 'applies to all functions that a licensee performs which have a nexus with the provision of financial services covered by the licence': Leif Gamertsfelder, 'Efficiently, Honestly and Fairly: A Norm That Applies in an Infinite Variety of Circumstances' (2021) 50(2) *Australian Bar Review* 345, 369.

43 *Corporations Act* (n 4) s 912A(1)(ca). AFS licence holders are responsible for the acts or omissions of their authorised representatives when those representatives are acting within their authority for the provision of specific financial products: at s 917B.

Part 7.7 of the *Corporations Act* governs the disclosure requirements of financial advice to retail clients.⁴⁴ To provide personal advice,⁴⁵ financial advisers must prepare and provide a Statement of Advice ('SOA') document that details the adviser's recommendations, reasoning, and any remuneration, commission, or benefits, that the AFS licence holder will receive.⁴⁶ The SOA document is an essential element in demonstrating an adviser's compliance with the best interests duty and its related obligations in part 7.7A of the *Corporations Act*.

Previously, financial advisers were regulated by the repealed 'suitability rule' under section 945A of the *Corporations Act*.⁴⁷ Analysing how the suitability rule operated is essential to understanding the underlying objectives of the enacting legislation of the best interests duty, and its related obligations.⁴⁸ This will also be essential in understanding why the best interests duty did not become a statutory fiduciary duty, but rather a fiduciary-like duty.⁴⁹ This is examined in Part II(A) of this article.

A Financial Product Advice in the Pre-FOFA Reforms

Introduced in 1986 by section 191 of the *Companies and Securities Legislation (Miscellaneous Amendments) Act 1985* (Cth), the suitability rule, otherwise known as the 'appropriate advice' rule, was the cornerstone of regulating a 'providing entity'⁵⁰ (ie, an AFS licensee or authorised representative).⁵¹ The appropriate advice rule was designed to protect consumers, who relied on professional financial advice

44 The meaning of a retail client is dependent on the type of financial product the advice relates to and the nature of the client: *Corporations Act* (n 4) s 761G. See also 'RG 175' (n 8) 13–14 [175.38].

45 See above nn 6–8.

46 *Corporations Act* (n 4) ch 7 pt 7.7 div 3. See also 'RG 175' (n 8) 50–1 [175.183].

47 *Corporations Act* (n 4) ss 945A–945B, as repealed by *FFOFA Act* (n 23) sch 1 item 9. See also Paul Latimer, 'Protecting the Best Interests of the Client' (2014) 29(1) *Australian Journal of Corporate Law* 8, 15–16 <https://doi.org/10.1057/9781137469359_3>.

48 See above nn 11–13.

49 The author outlines that the Parliamentary Joint Committee on Corporations and Financial Services, chaired by Labor MP, Bernie Ripoll, recommended the introduction of a statutory fiduciary duty for financial advisers, however, the invocation of an equitable concept in a statutory form was 'criticised at the time as an inapposite way of capturing the loyalty which the Ripoll Committee sought to promote': see Samuel Walpole, M Scott Donald and Rosemary Teele Langford, 'Regulating for Loyalty in the Financial Services Industry' (2021) 38(5) *Company and Securities Law Journal* 355, 362.

50 'RG 175' (n 8) 12 [175.30]. The regulatory guide expresses that a providing entity may be an AFS licensee or an authorised representative. Representatives that are not authorised representatives are not providing entities. Where a licensee provides financial product advice (eg, through one of its employees), the licensee is the providing entity, whereas where an authorised representative provides financial product advice, the authorised representative is the providing entity.

51 Section 191 of the *Companies and Securities Legislation (Miscellaneous Amendments) Act 1985* (Cth) was inserted into section 65A of the *Securities Industry Act 1980* (Cth), which explained that the implementation of the appropriate advice rule was to remedy concern regarding 'the practice of advising clients to place funds into particular investments irrespective of whether there is a reasonable basis for that advice and irrespective of whether the investments are suitable for the clients': Explanatory Memorandum, *Companies and Securities Legislation (Miscellaneous Amendments) Bill 1985* (Cth) 191–3 [691]–[699]. See also Andrew J Serpell, 'Re-evaluating the Appropriate Advice Rule in Light of the Global Financial Crisis' (2009) 4(2) *University of New England Law Journal* 33, 34 ('Re-evaluating the Appropriate Advice Rule'); Liu et al (n 3) 40.

to help them make informed financial decisions based on their circumstances. The Corporate Law Economic Reform Program expressed that '[t]he suitability rule is designed to address the lack of sophistication of retail investors who, irrespective of the level of risk disclosure, may not be able to adequately analyse their investment needs or develop strategies to achieve their investment goals.'⁵²

The pre-FOFA landmark case of *Australian Securities and Investments Commission v Cassimatis* [No 8] ('*Cassimatis*') per Edelman J, provides further guidance on the purpose of the appropriate advice rule.⁵³ Edelman J expressed that the rule was a mechanism to ensure that financial advice to a client was suitable and made on a reasonable basis.⁵⁴

The appropriate advice rule imposed three discrete interrelated obligations on a providing entity to provide financial product advice to retail clients.⁵⁵ First, section 945A(1)(a) of the *Corporations Act* mandated that a client's objectives, financial situation, and needs – collectively known as the client's 'relevant personal circumstances' – be assessed before providing personal advice.⁵⁶ Second, section 945A(1)(b) requires providing entities to reasonably consider and investigate a client's relevant personal circumstances, to determine the specific subject matter of the advice being sought.⁵⁷ Lastly, section 945A(1)(c) imposes an obligation to ensure that advice is appropriate.⁵⁸ To satisfy this section, advisers were required to base their recommendations on the client's relevant circumstances.⁵⁹

In the pre-FOFA era, empirical evidence demonstrated widespread non-compliance with the appropriate advice rule.⁶⁰ ASIC reviewed the quality of advice under section 945A, and found that 58% of advice examples were adequate, 39% were poor, and 'two examples were good quality advice (3%)'.⁶¹ ASIC emphasised that the likelihood of an adviser providing high-quality advice is severely reduced if they do not adequately assess the client's circumstance.⁶² ASIC's findings highlighted the flaws in the appropriate advice rule, expressing that section 945A consistently failed to meet consumers' expectations, and its regulatory objective, to provide tailored financial advice in a client's best interests.⁶³

52 Treasury (Cth), 'Financial Markets and Investment Products: Promoting Competition, Financial Innovation and Investment' (Paper No 6, April 1997) 103.

53 (2016) 336 ALR 209, 315–16 [549]–[551], 348 [729] ('*Cassimatis*').

54 Ibid.

55 Ibid 316 [550]; Andrew J Serpell, 'The Future of Financial Advice Reforms' (2012) 30(4) *Company and Securities Law Journal* 240, 243 ('Future of Financial Advice Reforms').

56 This obligation also requires that the providing entity make reasonable inquiries to ascertain a client's relevant personal circumstances: *Cassimatis* (n 53) 315 [549], 325 [599] (Edelman J).

57 Ibid 315 [549], 325 [601].

58 Ibid 315 [549], 327 [618].

59 Ibid.

60 See, eg, Weiping He and Han-Wei Liu, 'Regulating Financial Advisers in the UK: Lessons for Australia' (2021) 44(1) *University of New South Wales Law Journal* 424, 445 <<https://doi.org/10.53637/QTZF1576>>.

61 Australian Securities & Investments Commission, *Shadow Shopping Study of Retirement Advice* (Report No 279, March 2012) 8 [18].

62 Ibid 9 [28].

63 *Ripoll Report* (n 23) 85–6 [5.69]–[5.70], citing Australian Securities & Investments Commission, Submission No 378 to Parliamentary Joint Committee on Corporations and Financial Services,

Although ASIC's review was based on a small sample,⁶⁴ scandals dating back to the global financial crisis ('GFC') warranted a re-evaluation of the appropriate advice rule.⁶⁵ This re-evaluation was needed to address the rule's failure to ensure that advice was based on the client's relevant circumstances.⁶⁶ The significance of this defect was instigated in *Cassimatis*, where Edelman J discussed Storm Financial Limited's ('Storm') contravention to ascertain the subject matter of the advice (under section 945A(1)(b)), and provide appropriate advice (under section 945A(1)(c)).

Cassimatis related to the collapse of Storm, a financial advice company operated by Mr and Mrs Cassimatis, in their capacity as directors.⁶⁷ Storm was a highly profitable company with \$77 million annual revenue.⁶⁸ ASIC commenced proceedings against Storm in the Federal Court, alleging that they breached their duties of care and diligence under section 180 of the *Corporations Act*.⁶⁹ ASIC claimed that the provision of financial advice through the Storm model, contravened the appropriate advice rule.⁷⁰

The Storm model operated by providing advice to investors in a standardised document or template SOA, that had minimal tailoring to an investor's circumstance.⁷¹ Storm applied this 'one-size-fits-all' approach to advice, irrespective of the client's circumstance, and their ability to pay or need the underlying investments.⁷² Investors primarily consisted of retirees with little income, limited superannuation, and no prospect of rebuilding their financial position in the event of a significant financial loss.⁷³ Almost 90% of clients were recommended to take out loans against their own homes, to generate a lump sum investment in an advised indexed share fund.⁷⁴ Clients were also advised to take out margin loans,⁷⁵ to magnify the size of their investment portfolio.⁷⁶

Parliamentary Joint Committee Inquiry into Financial Products and Services in Australia (Report, August 2009) 6 ('ASIC Submission 378').

64 See above nn 61–3 and accompanying text.

65 *Banking Royal Commission Final Report* (n 1) 127.

66 *Ibid.*

67 *Cassimatis* (n 53) 217–18 [1]–[3].

68 *Ibid.* See also *Banking Royal Commission Final Report* (n 1) 127–8.

69 *Cassimatis* (n 53) 221–3 [23]–[25], [26]–[32].

70 *Ibid.*

71 *Ibid* 1033 [9], 1045 [81]–[82]. See also *Banking Royal Commission Final Report* (n 1) 127.

72 The Parliamentary Joint Committee ('PJC') expressed that the overwhelming characterisation of Storm's operations was that the 'majority of Storm clients were given the same, or substantially similar, financial advice' and were adopting a 'one-size-fits-all approach to advice': *Ripoll Report* (n 23) 27 [3.33].

73 *Cassimatis* (n 53) 219 [18].

74 *Ibid* 232 [82].

75 Prior to October 2009, the PJC outlined that margin lending was an unregulated financial product under the *Corporations Act* (n 4). Margin lending was a practice of lending for the purpose of investing, where the loan is secured against the value of the borrower's investment portfolio. If the value of the equity portfolio falls below an agreed threshold, known as the loan-to-value ratio, a margin call is made requiring the borrower to contribute additional equity to rectify it: see, eg, *Ripoll Report* (n 23) 14–15 [2.31]–[2.33].

76 *Cassimatis* (n 53) 232–3 [82]–[83], [85]. The PJC emphasised the cost–benefit analysis of leveraged investment strategies. In a rising market, it can magnify financial gains. 'However, the converse is also true: in the case of a sudden market fall, losses will be magnified too. Unfortunately, as the market

As the global financial markets collapsed in 2008, the value of Storm's investments decreased and were in negative equity positions.⁷⁷ The decrease in investment value, combined with the fixed loan-to-value ratios, caused their accounts to enter margin call territory.⁷⁸ Unable to rectify or repay their margin calls, clients lost their investments, homes, and life savings and still had outstanding debts.⁷⁹ The losses suffered by investors that followed the Storm model were estimated to be \$830 million.⁸⁰

Edelman J held that Mr and Mrs Cassimatis should have been 'reasonably aware that the application of the Storm model would have likely to (and did) cause contraventions of section 945A(1)(b) and section 945A(1)(c)'.⁸¹ Storm breached section 945A(1)(b) of the *Corporations Act* by failing to reasonably consider or investigate a client's subject matter of advice, as was 'reasonable in the circumstances'.⁸² Edelman J's broad interpretation of the 'subject matter' demonstrated that entities, such as Storm, are obligated to assess 'all matters (and more) upon which the advice will ultimately be based'.⁸³ This placed a broad obligation on advisers to investigate what financial products can achieve the client's reasons for seeking advice, such as maximising wealth retirement 'over the next ten years and beyond'.⁸⁴ The significance of this decision is that it set a precedent on what constitutes a reasonable investigation.⁸⁵ Edelman J concluded that an investigation into the 'subject matter of advice' is not limited to considering only one financial product.⁸⁶

collapse of late 2008 unfolded, Storm's strategy ultimately proved catastrophic for many': *Ripoll Report* (n 23) 23 [3.22].

77 *Ripoll Report* (n 23) 23–5 [3.23]–[3.24]. See also *Banking Royal Commission Final Report* (n 1) 127–8.

78 *Ripoll Report* (n 23) 23–5 [3.23]–[3.24].

79 The PJC outlined that some investors, if given the opportunity, would have been able to rectify their margin call. However, when some investors found out their portfolio moved into a negative equity position, their portfolios were sold at the bottom of the market without their knowledge and consent 'thereby crystallising and maximising their losses. Clients remain unclear as to who sold their portfolios and at whose direction': *Ripoll Report* (n 23) 24–5 [3.24]–[3.25].

80 *Banking Royal Commission Final Report* (n 1) 128.

81 *Cassimatis* (n 53) 221–2 [23]–[24].

82 *Ibid.*

83 *Ibid* 326 [609].

84 *Ibid* 325–6 [604]–[605]; Edelman J agreed with ASIC's submission that the subject matter of advice of Storm's clients consisted of the statement listed in its SOAs – that

Storm's clients] have asked [for Storm's] advice on the best ways to continue [their] wealth building over the next 10 years and beyond. Important financial goals for the future include building a solid financial base that will aid [clients'] wealth creation, allowing [clients] to maintain a comfortable lifestyle into [their] retirement.

85 A reasonable investigation is defined as an investigation into 'financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered relevant to advice on the subject matter': *Corporations Act* (n 4) s 961D.

86 *Cassimatis* (n 53) 326 [607]. Mr and Mrs Cassimatis pleaded that the 'subject matter of the advice was the investment in the index funds and cash management trust referred to in the SOA': at 325 [603]. Furthermore, Edelman J expressed that the extrinsic material does not support the limited reading of the 'subject matter' of the advice to a particular financial product, particularly as Mr and Mrs Cassimatis argued that their submission was supported by the Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth). However, Senior Counsel for the defendant conceded during oral submissions that evidence was not put before Parliament, but rather in a

Failing to reasonably investigate and consider a client's subject matter (under section 945A(1)(b)) makes it unlikely that an adviser will meet the standard of 'appropriate advice' (under section 945A(1)(c)). While the expression 'appropriate' is not defined under legislation or by Edelman J, its ordinary meaning is that it must be 'suitable or fitting for a particular purpose'.⁸⁷ This means that personal advice must satisfy the client's needs based on their relevant circumstance.⁸⁸ Through the Storm model, Storm gave the same or substantially similar advice to its investors, regardless of their needs and personal circumstances.

The concerning application of the appropriate advice rule is that the interpretation of 'appropriate' did not require advice to be 'ideal, perfect or the best'.⁸⁹ The Parliamentary Joint Committee on Corporations and Financial Services ('PJC') emphasised that, as 'long as disclosure requirements are met, it is legally permissible for an adviser to recommend a product ... knowing it is not the best option'.⁹⁰ This standard effectively undermined the underlying objective of the financial advice framework, to ensure that clients with little or no financial literacy could confidently rely on an adviser's recommendations, to best achieve their goals and needs.⁹¹

Furthermore, the standard of compliant 'appropriate' advice was dependent on how an adviser expressed their recommendations.⁹² For instance, if an adviser recommended a financial product, and purported that it is better suited for the client relative to other products, the advice would not be appropriate unless that product was indeed better.⁹³ Alternatively, if an adviser recommends a product, without discussing its merits relative to other financial products, that advice would be considered appropriate.⁹⁴ This standard permitted advisers to provide recommendations, without conducting a reasonable investigation into other available products, that may be better for a client. This essentially rendered an adviser's requirement to consider a client's circumstance useless, because any product could be deemed appropriate.

draft Explanatory Memorandum. Edelman J concluded that '[t]here is nothing in the admissible context to the section which confines the subject matter of the advice to be only the financial product': at 326–7 [611]–[612].

87 Serpell, 'Re-evaluating the Appropriate Advice Rule' (n 51) 45, quoting Australian Securities & Investments Commission, 'Licensing: Financial Product Advisers' (Regulatory Guide 175, May 2007) 38.

88 'Re-evaluating the Appropriate Advice Rule' (n 51) 45. The PJC provides an example of what would not constitute 'appropriate' advice, where – for example – a recommendation to invest in a speculative investment would not be appropriate if the client's risk profile was low. With respect to superannuation financial product advice, it would not be appropriate to recommend a replacement product, if the providing entity knew that 'the overall benefits likely to result from the new product (or option) would be lower than under the old product (or option)': see also Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *The Structure and Operation of the Superannuation Industry* (Final Report, August 2007) 137–8 [7.4]–[7.5] ('*PJC Superannuation Report*').

89 Serpell, 'Future of Financial Advice Reforms' (n 55) 243, quoting Australian Securities & Investments Commission, 'Licensing: Financial Product Advisers' (Regulatory Guide 175, April 2011) 41.

90 *PJC Superannuation Report* (n 88) 137 [7.3].

91 See, eg, *Reforms in the Regulation of Financial Advice* (n 36) 1–2.

92 Serpell, 'Future of Financial Advice Reforms' (n 55) 243–4.

93 Ibid.

94 Ibid.

The PJC criticised the shortcomings of the appropriate advice rule, expressing that it is unjustifiable for advisers to comply with section 945A, and ‘provide advice not in their clients’ best interests’.⁹⁵ As will be seen below, the appropriate advice rule was later replaced by the best interests duty in the FOFA reforms.

1 Regulating Financial Product Advice: Justifying a Framework That Prioritises Consumer Protection

The emergence of financial advisers saw them play a dual role in providing professional guidance to clients on investment decisions, and acting as a ‘sales force’ for product manufacturers.⁹⁶ Financial advisers acted as a critical distribution channel for product manufacturers through their advisory roles.⁹⁷ Advisers were heavily incentivised to push specific products to consumers through vertically integrated business models,⁹⁸ or remuneration-based commission.⁹⁹ This created significant concern for an adviser’s capacity to provide unbiased and non-conflicting advice.

Nevertheless, the GFC and *Cassimatis* demonstrated that in times of financial distress, investors were prompted to seek assistance from financial advisers to make critical financial decisions.¹⁰⁰ This may include determining whether to sell any financial products, review their superannuation investment portfolio, or rollover to an alternative superannuation fund.¹⁰¹ In this circumstance, it became evident that the pre-FOFA appropriate advice rule was unable to protect consumers from financial harm and misconduct.¹⁰²

Considering the above, two key reasons exist that justify having strong consumer safeguards in the financial services industry. First, ordinary consumers are dependent on advisers to navigate complex financial products.¹⁰³ This creates a power disparity between consumers and providing entities.¹⁰⁴ Regulation can ease the potential unjust consequences of this relationship, by demanding providing entities to disclose how their recommendations are best suited to an investor’s circumstances. Second, having a strong consumer protection framework can restore

95 *Ripoll Report* (n 23) 110 [6.28].

96 *Ibid* 69–70 [5.1]–[5.9].

97 *Ibid*.

98 Commissioner Hayne explains the concept ‘vertical integration’ as a ‘one stop shop’, where product sales and financial advice are combined, so that financial advice can be provided along with traditional services, such as loan and deposit services with Westpac: *Banking Royal Commission Final Report* (n 1) xxvi, 124–5.

99 *Ripoll Report* (n 23) 69–70 [5.6].

100 He and Liu (n 60) 445.

101 *Ibid*. A rollover is when a member of a superannuation fund, transfers some, or all their existing super between super funds, including self-managed superannuation funds: see, eg, ‘Rollovers for SMSFs’, *Australian Taxation Office* (Web Page, 2 April 2025) <<https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/contributions-and-rollovers/rollovers>>.

102 See above nn 60–80 and accompanying text.

103 Liu et al (n 3) 38.

104 *Banking Royal Commission Final Report* (n 1) 490.

trust and confidence in a well-functioning market for financial services.¹⁰⁵ This can promote stability, growth, and efficiency in the Australian financial services industry and the economy.¹⁰⁶

The power disparity between consumers and providing entities arises from a number of sources. Most Australians that seek financial assistance are retail investors, and have limited financial literacy about complex and unfamiliar topics, such as investing and saving for retirement.¹⁰⁷ In comparison, financial advice providers must have a sophisticated and specialised understanding of their financial products,¹⁰⁸ and how they operate domestically and internationally.¹⁰⁹ Empirical evidence demonstrated that during the GFC, 71% of Australian consumers did not understand the risks involved with complex products.¹¹⁰ Unless an investor has a strong understanding or exposure to financial investing, an asymmetry of knowledge is created, that forces ordinary members of the public to be dependent on advisers to make decisions in their best interests.

This power disparity is exacerbated by a number of aggravating factors that render regulatory intervention of financial product advice necessary. Possibly, the most significant is in the context of retirement planning and compulsory superannuation contributions.¹¹¹ Advisers have an essential role in assisting consumers to maximise their retirement income, and navigate superannuation and pension regulations.¹¹² This is particularly important for older Australians who require assistance to manage their retirement and pension income strategies to achieve their desired retirement lifestyle.¹¹³

105 Organisation for Economic Co-operation and Development, *G20/OECD High-Level Principles on Financial Consumer Protection* (Report, 12 December 2022) 4.

106 Ibid.

107 ASIC's submission to the PJC Inquiry expresses that empirical studies show that investors find 'investment concepts difficult to understand and apply and that some investors do not take an active interest in their investments': ASIC Submission 378 (n 63) 76 [263]–[267].

108 AFS licensees may restrict their advisers to only recommend specific products authorised by them, known as an 'approved product list'. This restriction serves several purposes: ensure products meet minimum legal standards, ensure advisers are adequately trained on the products, and to comply with the terms and restrictions of professional indemnity insurers for negligent advice: see, eg, *Ripoll Report* (n 23) 84 [5.62]. See also Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 54 [3.63].

109 The Australian Government imposed education requirements on financial advisers through the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* (Cth) to have a qualified degree, pass a financial adviser exam, and undertake a professional year to be authorised to provide unsupervised personal advice to a retail client: *Reforms in the Regulation of Financial Advice* (n 36) 16–17. See also *Corporations Act* (n 4) ss 921B–921BA.

110 It is important to note that this study was conducted on industry participants, consumers and financial literacy specialists who believed that Australian citizens did not understand their financial product recommendations and its implications: Financial System Inquiry Committee, Parliament of Australia, *Financial System Inquiry* (Final Report, November 2014) 209 ('*Murray Inquiry*').

111 He and Liu (n 60) 424, citing Richard Batten and Gail Pearson, 'Financial Advice in Australia: Principles to Proscription; Managing to Banning' (2013) 87(2–3) *St John's Law Review* 511, 512.

112 *Financial Planning and Investment Advice in Australia* (n 34) 25, 30.

113 Ibid.

In addition, compulsory superannuation renders financial advice vital to the Australian economy.¹¹⁴ Superannuation and retirement advice comprises the largest segment of revenue in the financial planning and investment advice industry in Australia, generating \$2.2 billion annually, with self-managed superannuation fund ('SMSF') advice following it with \$1.4 billion.¹¹⁵ However, distrust towards financial advisers has become a significant barrier to utilising financial services.¹¹⁶ Empirical evidence demonstrates that 49% of consumers agreed that financial advisers generally do not prioritise their best interests and were more interested in 'making themselves rich'.¹¹⁷ Bernie Ripoll's PJC Inquiry ('*Ripoll Report*') effectively summarised distrust towards financial advisers, highlighting that advisers failed to meet consumer expectations of professionalism:

It appears that there is a mismatch between the client's expectation that the adviser is providing a 'professional service' (eg, advice that is in their best interests) and the obligations of the adviser under the *Corporations Act* (that the adviser provides advice that is appropriate to the client and manages conflicts). Investors may see advisers as similar to lawyers and accountants in terms of duties and professionalism.¹¹⁸

If properly implemented professional advice was utilised by the entire Australian population, it could provide the economy with a monetary uplift of \$630.3 billion per year.¹¹⁹ However, without such confidence, consumers may be likely to purchase illegal financial products¹²⁰ or rely on erroneous and unqualified sources of information.¹²¹ This can have long-term economic and social consequences that may result in underinsured consumers, insufficient retirement savings, and a higher reliance on social security.¹²² Therefore, implementing a legislative framework that restores trust and confidence in the financial services industry through adequate consumer protection provisions, is critical to economic growth, and enhancing the financial position of consumers.

Given the nature of the relationship between a financial adviser and a consumer, it is evident that some degree of intervention is required to protect consumers from unfair treatment and misconduct. Given that the proposed reforms and recommendations seek to transition the current advice framework from a

114 Batten and Pearson (n 111) 512.

115 *Financial Planning and Investment Advice in Australia* (n 34) 29–30.

116 Australian Securities & Investments Commission, *Financial Advice: What Consumers Really Think* (Report No 627, August 2019) 8 [19]–[20] ('*What Consumers Really Think*'). The PJC Inquiry outlined that Storm advisers strongly downplayed the risk of losing a client's home, and told their clients that they 'had always told us that our home and investments would be safe, and we felt secure in that from day one': *Ripoll Report* (n 23) 28–9 [3.39]–[3.40].

117 *What Consumers Really Think* (n 116) 8 [19]–[20].

118 *Ripoll Report* (n 23) 86 [5.69].

119 CPA Australia, 'The Value of Advice' (Research Report, 25 November 2020) 20.

120 Illegal financial products comprise of financial products that do not comply with the provisions of the *Corporations Act* (n 4) or other relevant legislation. An example of this may be failing to comply with the initial or ongoing requirements of setting up a self-managed superannuation fund under the *Superannuation Industry (Supervision) Act 1993* (Cth) or investing in a managed investment scheme that does not comply with chapter 5C of the *Corporations Act* (n 4).

121 Serpell, 'Future of Financial Advice Reforms' (n 55) 241–2.

122 *Ibid.*

prescriptive to a principles-based framework, its prospective impact on consumer protection must be examined, and whether its purported benefits are justified.¹²³ This is analysed in Part V below.

B The Best Interests Duty and Related Obligations

1 *Origin and Purpose*

Following the repercussions of the GFC and the associated collapse of several financial advisory firms, the PJC conducted an inquiry into the regulation of financial product advice.¹²⁴ The objective of the *Ripoll Report* was to make recommendations to raise the standard of advice, and restore trust and confidence through stronger consumer protection provisions.¹²⁵ The *Ripoll Report* identified multifaceted issues that, *inter alia*, required reform – specifically including the need to:

1. improve the standard of advice offered to consumers, to increase consumer confidence in financial services, by enhancing the ‘legislative requirements about the standard of advice’, or through enhanced enforcement, or both;
2. better inform consumers about the products signed up for, so that consumers only buy products that entail a comfortable level of risk; and
3. ensure that advisers are better informed about the products being sold.¹²⁶

The *Ripoll Report* identified that a financial adviser’s relationship with its product manufacturer was a serious conflict of interest, that impeded their ability to prioritise a client’s interests and provide tailored advice.¹²⁷ This was a significant policy concern because product manufacturers would remunerate advisers for their client’s decision to invest in its products.¹²⁸

Notably, there was a prevailing perspective that the framework’s failure to protect investors was due to a lack of enforcement.¹²⁹ Industry stakeholders cautioned against the risk of imposing excessive legal and administrative burdens

123 See Part III(B).

124 *Ripoll Report* (n 23) vii. For instance, following the GFC, Storm was placed into voluntary administration in 2009: see *Banking Royal Commission Final Report* (n 1) 127–8.

125 Latimer (n 47) 15.

126 *Ripoll Report* (n 23) 30 [3.44].

127 *Ibid* 74 [5.24]. ASIC expressed that ‘while increased intervention could impact market efficiency’, increased investor protection and confidence may cause investors to re-enter the market and outweigh its impact on market efficiency: at 74–5 [5.26].

128 *Ibid* 75 [5.29]. The *Ripoll Report* (n 23) identified that advisers may be remunerated for recommending a product manufacturer’s product through trail commissions, up-front commissions, volume bonuses and sales target rewards, and soft dollar incentives (soft dollar incentives refer to non-monetary rewards such as holidays, tickets to sporting events, or golf days). The PJC Inquiry noted that the concerns expressed by the Industry Super Network that ‘Storm Financial and other collapses [presented] the committee and the broader community with the most egregious examples of the effects of conflicted financial advice on the savings of Australians’. This was evidence of “structural corruption” caused by conflicted remuneration practices’: at 71–2 [5.12].

129 *Ibid* 94 [5.104]–[5.105]. For instance, the Association of Financial Advisers suggested that the issues exposed by Storm need to be kept in proportion, as 16,000 advisers are taking a far more onerous path to do the right thing: at 94 [5.106].

on financial advisers, for the misconduct of a small number of rogue advisers.¹³⁰ For instance, CPA Australia expressed that:

[T]he vast majority of advisers and licence holders are doing the right thing. The level of abuse or people breaking the rules is relatively small. Admittedly, we have had some pretty high, public incidences where advisers, business models or products have fallen over, with Storm and so on, but ... we are seeing serious issues with [only] a handful. The vast majority of our members are doing the right thing.¹³¹

To address these issues, the *Ripoll Report* recommended, inter alia, introducing a statutory fiduciary duty based on the general law, to ensure that a client's interest is prioritised.¹³² The then Labor Government's response in 2010 foreshadowed the implementation of the statutory fiduciary duty to act in the best interests of their clients.¹³³ This duty would be accompanied or subject to a 'reasonable steps' qualification, to ensure that the duty is consistently discharged and that recommendations are not conflicted.¹³⁴ However, key industry stakeholders, such as the Australian Financial Markets Association, expressed their concerns with the proposed amendment, that the reformulation inadvertently prioritises the process of advice, rather than the quality of the adviser's recommendations, or the client's outcome.¹³⁵

In 2012, the *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth) ('*FOFA Act*') eventually introduced a nuanced and complicated set of loyalty obligations, comprising the statutory duty to act in the best interests of a client, and its related obligations.¹³⁶ The statutory best interests duty derives from equity's established duties of undivided loyalty to beneficiaries.¹³⁷ However, the invocation of the equitable concept in statutory form was criticised, as an inapposite way of capturing the PJC's proposed fiduciary duty.¹³⁸ Instead, the *FOFA Act* created fiduciary-like duties.¹³⁹ Part II(C) below will expand on the criticisms of the attempted fiduciary-like obligations. This will include an analysis of a financial

130 Ibid 94 [5.104].

131 Ibid 94–5 [5.107], citing Evidence to Joint Committee on Corporations and Financial Services, Parliament of Australia, Melbourne, 26 August 2019, 62 (Michael Davison, Senior Policy Adviser, Superannuation, CPA Australia).

132 *Ripoll Report* (n 23) 110 [6.28], 150 [7.10]. ASIC supported the imposition of a legislative fiduciary duty as it 'would likely change remunerative practices', and 'lead to higher quality of advice and the emergence of a professional advice industry': at 103–4 [6.3]–[6.4].

133 Chris Bowen, 'Overhaul of Financial Advice' (Media Release No 036, 26 April 2010).

134 Ibid. See especially Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 54 [3.63].

135 Liu et al (n 3) 43, citing Australian Financial Markets Association, Submission No 4 to Australian Securities & Investments Commission, *Consultation Paper 182: Future of Financial Advice* (5 October 2012).

136 Walpole, Donald and Langford (n 49) 362. See also *Corporations Act* (n 4) ss 961B, 961G, pt 7.7A div 2. See above nn 10–14 and accompanying text.

137 David Millhouse, 'Best Interest Duties of Financial Advisers: More Law, More Confusion' (2020) *Enterprise Governance eJournal* 1:1–14, 1–2 <<https://doi.org/10.53300/001c.12046>>. See also Pamela F Hanrahan, 'The Relationship Between Equitable and Statutory "Best Interests" Obligations in Financial Services Law' (2013) 7(1) *Journal of Equity* 46, 60 ('Equitable and Statutory Best Interests Obligations').

138 Walpole, Donald and Langford (n 49) 362.

139 See especially Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 72 [3.127]. See also *QAR* (n 2) 27 [2.2.2].

adviser's fiduciary obligations under the general law. This will clarify how a true statutory fiduciary duty to act in a principal's best interests would operate.

2 *Functionality: Understanding the Advice Process*

Having discussed the rationale of the best interests duty, it is appropriate to examine how it and its related obligations operate throughout the advice process, to provide a client with an SOA document. The overarching regulatory objective of the best interests duty is to increase the quality of financial advice and restore trust in the industry, by prioritising a client's interest.¹⁴⁰ To achieve this, section 961B(1) of the *Corporations Act* requires an adviser to 'act in the best interests of the client in relation to the advice'.

As previously discussed, the concept of the best interests duty is undefined in the *Corporations Act*,¹⁴¹ however, section 961B(2) states that this duty may be discharged if a financial adviser completes the safe harbour steps outlined in sub-sections (a)–(g).¹⁴² It is important to note that financial advisers may comply with the best interests duty without relying on the safe harbour provisions.¹⁴³ However, the safe harbour steps provide an 'indication of what, as a minimum, is expected of providers, to be considered to have acted in the best interests of the client'.¹⁴⁴ This means that it is more prudent for providing entities to ensure the safe harbour provisions are ticked, or satisfied, to minimise the risk of non-compliance.¹⁴⁵ The safe harbour steps can be briefly summarised as:

1. identifying a client's objectives, financial situation, and needs;
2. identifying a client's reasons for seeking advice or their subject matter;
3. making reasonable inquiries to obtain complete and accurate information of the client's circumstance;
4. assessing whether the adviser has the required expertise to advise on the subject matter;
5. conducting a reasonable investigation into relevant financial products that are based on the client's reasons for seeking advice or subject matter;
6. basing all judgments or recommendations on the client's relevant circumstances; and
7. taking 'any other step that ... would reasonably be regarded as being in the best interests of the client'.¹⁴⁶

140 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 3.

141 See above n 10.

142 See also Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 9 [1.21].

143 Ibid 10 [1.25].

144 Ibid. Financial advisers that wish to rely on the safe harbour provisions to comply with the best interests duty must prove on the balance of probabilities that they satisfied each step in sections 961B(2)(a)–(g) of the *Corporations Act* (n 4): at 11 [1.28].

145 Wigney J used the safe harbour provisions as a basis to determine whether Westpac Banking Corporation contravened the best interests duty: see, eg, *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147, [70], [103], [135], [166].

146 *Corporations Act* (n 4) ss 961B(2)(a)–(g).

The first step, before commencing the advice process, is the requirement to provide a ‘financial services guide’ (‘FSG’).¹⁴⁷ The purpose of an FSG is to ensure that prospective clients are adequately informed about an adviser’s services, fees, and potential conflicts of interests.¹⁴⁸ This ensures that consumers are fully informed when deciding to engage a financial adviser by executing a client service agreement.¹⁴⁹

After providing an FSG, financial advisers can begin the advice process by completing the safe harbour provisions. The first step is to collect accurate information about the client’s ‘relevant circumstances’.¹⁵⁰ This is typically conducted through a client conference or the completion of a ‘fact find’.¹⁵¹ Advisers must conduct reasonable inquiries into three key areas: the client’s needs or objectives, financial and personal circumstances, and reasons for seeking advice, known as their ‘subject matter’.¹⁵² Adequately assessing a client’s subject matter is essential because it forms the basis for determining what a client’s objectives are, and what recommendations may best achieve them.

The extent of an adviser’s inquiries is not defined, but is based on whether it is ‘reasonably apparent’¹⁵³ that the information about the client’s relevant circumstances is incomplete or inaccurate.¹⁵⁴ The Explanatory Memorandum of

147 Ibid s 941A. An FSG must be provided to a client ‘as soon as practicable after it becomes apparent to the providing entity that a financial service will be, or is likely to be, provided to that client’ and before a financial service is provided: ‘RG 175’ (n 8) 29 [175.99].

148 *Corporations Act* (n 4) ss 942A–942C. See also ‘RG 175’ (n 8) 28–38 [175.110]–[175.136]; *Corporations Regulations* (n 4) ch 7 pt 7.7 divs 2–3.

149 See, eg, Alexa Bowditch, ‘Essentials of Common Services Agreements in Financial Service’, *Holly Nethercote* (Blog Post, 25 March 2021) <<https://www.hnlaw.com.au/essentials-of-common-services-agreements-in-financial-service/>>.

150 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 12 [1.35]. The Explanatory Memorandum outlines that a client’s ‘relevant circumstances’ refers to a client’s objectives, financial situation and needs that would be ‘reasonably be considered as relevant’ to the identified subject matter of advice: at 12 [1.35].

151 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 11 [1.31]. A ‘fact find’ is a document to be completed by a client that details their personal and financial information, their instructions, goals and objectives, and other relevant information to assist in the advice process. This would typically require a declaration, to be executed by a client, to ensure that the information provided is accurate and complete: Australian Securities & Investments Commission, ‘Tips for Giving Limited Advice’ (Information Sheet No 267) <<https://asic.gov.au/regulatory-resources/financial-services/giving-financial-product-advice/tips-for-giving-limited-advice/>> (‘Tips for Giving Limited Advice’).

152 A client’s ‘subject matter’ may be as simple as the client’s request to determine what deposit account is suitable for the client’s lifestyle, and risk profile, or as complex as determining what investment portfolio would be appropriate for their superannuation investments to maximise their retirement wealth in the long term: Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 11–12 [1.31]–[1.33]. See also *Corporations Act* (n 4) s 961B(2)(c).

153 Section 961C of the *Corporations Act* (n 4) expresses that the standard of ‘reasonably apparent’ is relative to an adviser’s ‘reasonable level of expertise in the subject matter of the advice’ sought, when an adviser is objectively assessing the information provided by the client in the advice process. The Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) expresses that what is ‘reasonably apparent’ is an objective test based on the specific subject matter of the advice in question, and the professional standards in the industry. This means that the test is of a higher standard when the subject matter of the advice is highly complex and technical in nature: at 12 [1.37].

154 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 12 [1.35]–[1.36].

the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) explains:

The provider cannot solely rely on the instructions from the client, but is also obligated ... to make further inquiries in situations where it is reasonably apparent that the information provided by the client about their relevant circumstances is incomplete or inaccurate. This is only necessary if the information is considered relevant to the client's relevant circumstances.¹⁵⁵

Once an adviser has collected sufficient information, an adviser must conduct a 'reasonable investigation' into the financial products that might achieve the client's goals and objectives.¹⁵⁶ This investigation underpins an adviser's recommendations in an SOA document.¹⁵⁷ The extent of this investigation will be dependent on the adviser's judgment, on what financial products may be suitable for the client's relevant circumstances.¹⁵⁸ The Labor Government attempted to clarify what constitutes a 'reasonable investigation' under section 961D of the *Corporations Act*, by stating that, 'an investigation into every financial product available' is not required. However, this leads to significant regulatory uncertainty, because advisers may be expected to investigate products that are not on their approved product list.¹⁵⁹

It is evident that the objective of the safe harbour provisions is to ensure that advisers consistently consider, and base their recommendations on 'the objectives, financial situation and needs of the client'.¹⁶⁰ However, this framework has been criticised for inadvertently making advisers focus more on the process, than the substance, of their advice.¹⁶¹

155 Ibid 12 [1.36].

156 Ibid 13 [1.40].

157 Ibid 13–14 [1.42]. See also *Corporations Act* (n 4) s 961B(2)(f).

158 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 13 [1.41].

159 'Regulation Impact Statement' (n 28) 10 [34]–[35], 14–15 [67]. A key aspect of ensuring that providing entities have professional indemnity insurance coverage is recommending products within their approved product list. Depending on the terms of the insurance, most professional indemnity insurance policies will only cover products that are included in an AFS licensee's approved product list: see 'Approved Product List (APL)', *Licensee Solutions* (Web Page) <<https://web.archive.org/web/20220302024205/https://www.licenseesolutions.com.au/publication/approved-products-list-apl>>. Providing financial product recommendations within an AFS licensee's approved product list is essential to minimise the risk that a licensee is unable to provide compensation to a retail client, because of insufficient financial resources following a breach. Having adequate professional indemnity insurance is a legal requirement prescribed under section 912B of the *Corporations Act* (n 4): see Australian Securities & Investments Commission, 'Compensation and Insurance Arrangements for AFS Licensees' (Regulatory Guide No 126, 2022) 4–5 [126.1]–[126.7]. The Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) expresses that a 'reasonable investigation' will depend on the nature of the client's goals and objectives, and advisers are expected to exercise professional judgement to determine whether an investigation goes beyond their approved product list: at 13 [1.41].

160 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 9 [1.22].

161 Gerard Craddock, 'The Ripoll Committee Recommendation for a Fiduciary Duty in the Broader Regulatory Context' (2012) 30(4) *Company and Securities Law Journal* 216, 236.

In response, the Explanatory Memorandum emphasised that the safe harbour provisions are not an exhaustive list.¹⁶² Section 961B(2)(g) of the *Corporations Act* is designed to discourage the ‘tick-a-box’ exercise that is fostered by the safe harbour provisions.¹⁶³ This section intends to achieve this by requiring advisers to ‘take any step necessary’, given the client’s relevant circumstances.¹⁶⁴

Following that, a brief discussion of the framework’s related obligations is required.¹⁶⁵ Regardless of whether an adviser follows the safe harbour steps, the resulting advice must be reasonably appropriate.¹⁶⁶ This is prescribed in section 961G of the *Corporations Act*. The Explanatory Memorandum outlines that, section 961G mimics the requirements under the preceding suitability rule.¹⁶⁷ Moshinsky J in *Australian Securities and Investments Commission v NSG Services Pty Ltd* confirmed that section 961G is concerned with the ‘content or substance of that advice’, whereas section 961B is concerned with ‘the process or procedure involved in providing advice’.¹⁶⁸

‘Appropriate’ is not defined in the *Corporations Act*, however, ASIC’s Regulatory Guide No 175 (‘RG 175’) provides some interpretive guidance: it clarifies that advice is appropriate if the advice places the client in a better position with respect to their goals and objectives, and will likely satisfy their needs.¹⁶⁹ Importantly, the design of this provision assumes that an adviser has complied with the best interests duty in section 961B(1).¹⁷⁰ This means that if an adviser does not satisfy the best interests duty, the advice is likely to be inappropriate.¹⁷¹ This arises because the recommendations must be based on the client’s relevant circumstances.

162 Ibid, citing Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 10 [1.25].

163 Craddock (n 161) 236.

164 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 14 [1.43]. Taking ‘any other steps’ under section 961B(2)(g) of the *Corporations Act* (n 4) is measured on an objective standard, ‘based on the client’s relevant circumstances, the provider’s relevant expertise and the subject matter of the advice sought’. Taking that additional step would be regarded as reasonable in the client’s best interests if, a person with a ‘reasonable level of expertise in the subject matter, exercising care and objectively assessing the client’s relevant circumstances’ would take that step: at 14 [1.44].

165 See also above n 48 and accompanying text.

166 *Corporations Act* (n 4) s 961G.

167 He and Liu (n 60) 445, citing Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth), 16–17. ‘RG 175’ (n 8) outlines that section 961G of the *Corporations Act* (n 4) imposes a higher standard of advice than the previous obligation under section 945A, because an adviser is required to make extensive inquiries into the client’s relevant circumstances: ‘RG 175’ (n 8) 93 [175.376]–[175.377].

168 *NSG Services* (n 11) [21]. Moshinsky J states that on ‘first blush’ the text of section 961B(1) did not appear to be concerned with process or procedure. However, its legislative history and materials supported his view that section 961B was concerned with process and procedure: at [21]. See also Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 9–10 [1.23]; *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170, 263 [405] (O’Byrne J) (‘*Westpac Securities*’).

169 ‘RG 175’ (n 8) 92 [175.375].

170 *NSG Services* (n 11) [18], [20] (Moshinsky J).

171 ‘RG 175’ (n 8) 92 [175.372]–[175.374].

When completing the advice process, advisers are required to warn their client if the information on which the advice is based appears incomplete or inaccurate.¹⁷² This is complemented by the ‘conflicts priority rule’, which requires advisers to prioritise a client’s interests over their own or related parties.¹⁷³ Lastly, section 961L of the *Corporations Act* imposes a general obligation on AFS licensees, to ‘take reasonable steps’ to ensure that their representatives comply with the best interests duty and its related obligations.¹⁷⁴

The preceding discussion indicates that the development of the best interests framework has been subject to criticism regarding its regulatory clarity. Before the application of the best interests duty is evaluated in Part III, it is necessary to analyse a financial adviser’s fiduciary obligations under the general law. This will be relevant for Part V of this article, which will evaluate the prospective effects of designing a statutory fiduciary duty, from equity’s interpretation of acting in a principal’s best interests.

C Is the Australian Best Interests Duty a Fiduciary Duty?

As discussed in Part II(B) of this article, the *Ripoll Report* recommended imposing a statutory fiduciary duty on financial advisers to regulate financial product advice.¹⁷⁵ The objective of this recommendation was to ensure that financial advisers prioritise their client’s interests, in the presence of conflicted remuneration.¹⁷⁶ The Labor Government’s implementation of this recommendation was, however, more akin to an adviser’s duty of care at general law, rather than an explicit fiduciary duty.¹⁷⁷ This criticism was heavily based on the prescriptive safe harbour steps in section 961B(2) of the *Corporations Act*, because it failed to reflect the essential nature of a fiduciary duty, as a principles-based obligation.¹⁷⁸ This was elaborated by key industry and consumer stakeholders that expressed:

A fiduciary obligation is a principle based on undivided loyalty and trust to act in good faith and in the best interests of a client. ... The best interest duty as expressed in the Bill is a prescriptive duty and will cause confusion and uncertainty in the industry. It is confusing a duty of care on one hand with a duty of loyalty on the other. The Bill attempts to address a duty of loyalty by using standards and rules which are associated with the duty of care.¹⁷⁹

172 *Corporations Act* (n 4) s 961H(1), as inserted by *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) sch 1 item 23. See also ‘RG 175’ (n 8) 8 [175.20].

173 *Corporations Act* (n 4) s 961J. ‘RG 175’ (n 8) clarifies that section 961J requires an adviser to not act to further their interests, or one of their related parties, over their clients. To comply with this obligation, ‘RG 175’ (n 8) expresses that advisers should consider what a reasonable advice provider without a conflict of interest would do: at 57 [175.211], 99–100 [175.407]–[175.411]. See also *Corporations Act* (n 4) s 912A(1)(aa).

174 See also ‘RG 175’ (n 8) 103–4 [175.429].

175 *Ripoll Report* (n 23) 110 [6.29].

176 *Ibid* [6.28]–[6.29].

177 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporations Amendment (Future of Financial Advice) Bill 2011 and Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Digest No 96 of 2011–12, 29 February 2012) 47–8 [4.18]–[4.19] (‘*PJC Digest*’).

178 *Ibid*.

179 *Ibid* 47 [4.16]–[4.17].

It is evident that the best interests duty is an attempted codification of a fiduciary's undivided loyalty to a principal in equity.¹⁸⁰ However, to understand the impacts of imposing a statutory fiduciary duty that mimics the equitable concept of undivided loyalty, its interpretation and application under the general law must be analysed. Part II(C)(1) will demonstrate what it means to act in a client's best interests within the context of financial services in equity.

1 The Equitable Concept of Acting in a Client's Best Interests: The Scope of an Adviser's Duty as a Fiduciary and the Current Statutory Duty to Act in One's Best Interests

The equitable concept to act in a principal's best interests derives from the equitable duty of loyalty.¹⁸¹ This duty imposes two interrelated proscriptions, known as the 'no conflicts rule' and 'no profits rule'.¹⁸² These rules aim to ensure that a fiduciary has 'disinterested and undivided loyalty' to a client.¹⁸³ In the context of financial services, this precludes providing entities from providing financial advice to clients, where there is a real and sensible possibility that an interest or duty to another person, may conflict with their duty to a client.¹⁸⁴

The relationship between a financial adviser and its client is not recognised as an accepted status-based fiduciary relationship, relative to a solicitor and client, and a trustee and beneficiary.¹⁸⁵ However, it has been accepted that a fact-based fiduciary relationship can exist outside these accepted categories.¹⁸⁶ Although

180 *Australian Securities and Investments Commission v Forex Capital Trading Pty Ltd* [2021] FCA 570, [39] (Middleton J), citing *Westpac Securities* (n 168) 206 [151] (Allsop CJ). See also *Australian Securities and Investments Commission v RI Advice Group Pty Ltd* [No 2] [2021] FCA 877, [386] (Moshinsky J), citing *Westpac Securities* (n 168) 206 [151] (Allsop CJ). See further Latimer (n 47) 9–10; M Scott Donald, "'Best" Interests?" (2008) 2(1) *Journal of Equity* 245, 255–6.

181 *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* [No 4] (2007) 160 FCR 35, 78 [289]–[290], 79 [292] (Jacobson J) ('*Citigroup*').

182 Hanrahan, 'Equitable and Statutory Best Interests Obligations' (n 137) 49. The author expresses that the duty of undivided loyalty translates into two proscriptions: to ensure fiduciaries avoid placing themselves in a conflict of interest, and not to profit from their position: *Corones and Galloway* (n 10) 10, citing *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 67 (Gibbs CJ) ('*Hospital Products*').

183 Finn, Stone and Perram JJ express that the duty of loyalty and acting in one's best interests forms part of modern Australian fiduciary law, to ensure a fiduciary is not in a position where there are 'conflicts between duty and undisclosed personal interest, conflicts between duty and duty and misuse of a fiduciary position for personal gain or benefit': *Grimaldi v Chameleon Mining NL* (2012) 200 FCR 296, 345 [174] ('*Grimaldi*'). Gaudron and McHugh JJ described Australian fiduciary law as 'proscriptive fiduciary duties' rather than prescriptive in nature: *Breen v Williams* (1996) 186 CLR 71, 113 ('*Breen*').

184 Hanrahan, 'Equitable and Statutory Best Interests Obligations' (n 137) 53.

185 *Hospital Products* (n 182) 68 (Gibbs CJ), 96 (Mason J), 141 (Dawson J). See also *ibid* 48.

186 Millhouse (n 137) 8. Commissioner Hayne expressed that 'depending on the nature of a client's interaction with a financial adviser, a general law duty of care may also arise, as may a fiduciary duty': *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, 100, citing Pamela Hanrahan, 'Legal Framework for the Provision of Financial Advice and Sale of Financial Products to Australian Households' (Background Paper No 7, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 5 April 2018) 29–37.

there is no ‘generally agreed and unexceptionable definition’, a person may be recognised as a fiduciary if they have agreed to perform a function that, reasonably leads another person to expect that they will act in that person’s interest, to the exclusion of their or a third party’s interests.¹⁸⁷ This concept has been linked to the inherent characteristics of an adviser-client relationship, as a client seeks to utilise an adviser’s expertise to receive personalised financial advice.¹⁸⁸ This relationship exhibits the critical feature of a fiduciary relationship described by Mason J in *Hospital Products Ltd v United States Surgical Corporation*, where a fiduciary’s discretion will ‘affect the interests of that other person in a legal or practical sense’.¹⁸⁹ The fiduciary characteristics of a financial adviser were also recognised by Brennan J in *Daly v The Sydney Stock Exchange Ltd* (*‘Daly’*), which expressed:

The duty of an investment adviser ... is to furnish the client with all the relevant knowledge which the adviser possesses, concealing nothing that might reasonably be regarded as relevant to the ... investment decision including ... to give the best advice which the adviser could give if he did not have but a third party ... financial interest in the investment to be offered.¹⁹⁰

Rares J’s judgment in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* describes financial advisers as a ‘well recognised’ category of fiduciary agents that attracts undivided loyalty.¹⁹¹ However, it is not prudent to assume that anyone described as a financial adviser is a fiduciary under Australian law. Understanding the particular relationship or nature of the service provided by a financial adviser is paramount to determining whether a fiduciary relationship arises.¹⁹² This was discussed by Brennan J in the landmark High Court judgment of *Daly*, which established that a financial adviser would owe fiduciary obligations to their client for the provision of personal financial advice.¹⁹³ His Honour held that where a financial firm holds themselves out as having expertise in advising on

187 Hanrahan, ‘Equitable and Statutory Best Interests Obligations’ (n 137) 48, quoting *Grimaldi* (n 183) 345 [177]. See also Justice Ashley Black, ‘Fiduciary Duties in the Financial Sector’ (Speech, Supreme Court of New South Wales, 20 September 2024) 4–5.

188 The author expresses that there is a common expectation by investors that a relationship with a financial adviser is fiduciary, as a result of an investor’s innate trust in a professional person, and their poor financial literacy: Millhouse (n 137) 7.

189 *Hospital Products* (n 182) 96–7 (Mason J). The author argues that unlike a trustee, director, or agent, an adviser does not exercise any power or discretion, it simply advises, and the client chooses to either accept or reject their recommendations. Cf Pamela F Hanrahan, ‘ASIC v Citigroup: Investment Banks, Conflicts of Interest, and Chinese Walls’ (Research Paper No 349, University of Melbourne, July 2007) 10 <https://doi.org/10.1142/9781860948497_0006>.

190 (1986) 160 CLR 371, 385 (*‘Daly’*). Corones and Galloway analyse the nature of the relationship between a stockbroker and its clients, described in *Daly* (n 190), to illustrate what would constitute a fiduciary relationship: see also Corones and Galloway (n 10) 10–11.

191 (2012) 301 ALR 1, 196 [733] (*‘Wingecarribee Shire Council’*).

192 *Citigroup* (n 181) 75 [266], 77 [281] (Jacobson J).

193 *Daly* (n 190) 385. Brennan J also expresses that a financial adviser in a fiduciary position must not be in a ‘position where his self-interest might conflict with the honest and impartial giving of advice’: at 385. See also Hanrahan, ‘Equitable and Statutory Best Interests Obligations’ (n 137) 49.

certain financial products, and proceeds to give such advice, the ‘adviser stands in a fiduciary relationship’.¹⁹⁴

The provision of personal advice is a fundamental component that dictates whether a fiduciary relationship exists. This was confirmed in *Bathurst Regional Council v Local Government Financial Services Pty Ltd [No 5]*, where Jagot J held that a financial firm owed fiduciary obligations because it placed its clients in a vulnerable position.¹⁹⁵ The financial firm led its clients to believe that ‘it would act in their best interests in advising and making recommendations about financial products’.¹⁹⁶ Importantly, this fiduciary obligation could arise, despite the lack of a formal investment agreement to provide financial services.¹⁹⁷ Throughout the advice process, the financial firm ‘moved beyond the role of a mere salesman’, by considering the client’s interests, and not its own.¹⁹⁸

Under the operation of the general law, financial advisers that provide personal advice would attract proscriptive fiduciary duties.¹⁹⁹ This would require advisers to avoid being in situations that would conflict with their duty to act in their client’s interests.²⁰⁰ As discussed, however, these proscriptive obligations will only arise if, it is reasonably apparent that a providing entity is holding itself out as an expert, and provides personalised financial recommendations in a client’s interests.²⁰¹

Following the above discussion, the best interests duty in section 961B of the *Corporations Act* may be seen as the development of an adviser’s proscriptive fiduciary duties in equity. The Federal Court may look to the equitable proscriptive

194 *Daly* (n 190) 385. Austin J applied the judgment in *Daly* (n 190) stating that the ‘fiduciary relationship between financial adviser and client arises because the financial adviser, having held itself out as an adviser on matters of investment, undertakes a particular financial advisory role for the client’: see also *Aequitas Ltd v Sparad No. 100 Ltd* [2001] NSWSC 14, [307].

195 [2012] FCA 1200, [2306] (Jagot J) (*‘Bathurst Regional’*).

196 *Ibid.* Jagot J expressed that the financial firm, Local Government Financial Services Pty Limited (‘LGFS’) knew how the client (Bathurst Regional Council) operated, and knew that the client perceived that the financial firm was acting in their interests, and not in their own: at 964 [2324]. On appeal, Jagot J’s first instance judgment in *Bathurst Regional* (n 195) was upheld, and confirmed that the relationship between the financial firm (LGFS) and the client (Bathurst Regional Council) constituted a fiduciary relationship: *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 212 [1068]–[1071] (Jacobson, Gilmour and Gordon JJ).

197 Delany J summarised the applicable principles from *Wingecarribee Shire Council* (n 191) in orthodox terms, stating that ‘a fiduciary relationship can be found or implied from the circumstances. There is no requirement that there be any form of contract (such as a retainer) or formal legal relationship between the parties to establish a fiduciary duty’: *Porter v Mulcahy & Co Accounting Services Pty Ltd* [2021] VSC 572, [488]–[489]. See also Justice Ashley Black (n 187) 9.

198 The financial firm held itself out as an entity on which the clients, Bathurst Regional Council, could rely on the financial firm for their expertise to evaluate products that were suitable for the client. In doing so, the financial firm ‘acted as an investment adviser and thereby attracted to itself fiduciary duties to avoid conflicts of interests or duties to disclose and obtain consent to such conflicts’: *Bathurst Regional* (n 195) [2324] (Jagot J).

199 Hanrahan, ‘Equitable and Statutory Best Interests Obligations’ (n 137) 53, citing *Breen* (n 183) 113 (Gaudron and McHugh JJ).

200 Pamela Hanrahan describes fiduciary proscriptions as ‘prophylactic’, to ensure fiduciaries are not placed in a position where their ability to discharge their duty or undertaking is compromised: Hanrahan, ‘Equitable and Statutory Best Interests Obligations’ (n 137) 54.

201 *Citigroup* (n 181) 77–8 [282]–[284] (Jacobson J).

concepts discussed, to assist in interpreting what acting in a client's 'best interests' means.²⁰² However, the prescriptive obligations stated in section 961B(2) of the *Corporations Act* are expressed as a series of positive steps, that dictate how advice should be prepared.²⁰³ It does not reference an obligation to avoid conflicts of interest proscribed by fiduciary law. This demonstrates that the Australian best interests duty is not a true fiduciary duty, and is a significant departure from the undivided loyalty obligations, that apply to financial advisers in equity.

2 Evading Fiduciary Obligations: Full Frank Disclosure

Given the proscriptive fiduciary obligations imposed on financial advisers under the general law, it is important to acknowledge its limitations. In contrast to statutory provisions, fiduciary duties may be modified or excluded by mutual consent.²⁰⁴ *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd [No 4]* confirmed this by establishing that a 'person occupying a fiduciary position will be absolved from liability for ... a breach of duty by obtaining a fully informed consent'.²⁰⁵ Interestingly, Jacobson J outlines that the scope of fiduciary obligations is determined by the 'character of the venture or undertaking' by the parties.²⁰⁶ This means that an undertaking by an advisory firm to act in the best interests of a client, throughout an advice process, can be contracted out.²⁰⁷

Considering the above, implementing a statutory fiduciary duty that mimics the general law, becomes more attractive to investors for two significant reasons. First, fiduciary obligations will apply to regulated entities in situations where the factors or facts that constitute a fiduciary relationship are not present, under the general law.²⁰⁸ Second, a statutory fiduciary obligation cannot be excluded or modified by contract.²⁰⁹ This can guarantee that any undertaking to act in a client's best interests

202 Hanrahan, 'Equitable and Statutory Best Interests Obligations' (n 137) 72–3.

203 Corones and Galloway (n 10) 16.

204 Millhouse (n 137) 4. See also Walpole, Donald and Langford (n 49) 356. Jacobson J outlines that mutual consent may be expressed or implied: see also *Citigroup* (n 181) 79 [295]. Obtaining fully informed consent requires a fiduciary to give full and frank disclosure of all materials. This requirement also considers the 'sophistication and intelligence' of the principal: at 79 [293]–[296].

205 *Citigroup* (n 181) 79 [293]. Jacobson J restated the principle that a person subject to fiduciary obligations must obtain fully informed consent of the other person, to exclude or modify those obligations: at 80 [307]. In *Citigroup* (n 181), fully informed consent to exclude any fiduciary obligations by the financial firm (Citigroup) to its client (Toll) was achieved by a mandate letter, that was executed by both parties, which stipulated that the relationship between the parties was not fiduciary: at 59 [145]. Jacobson J concluded that 'but for the express terms of the mandate letter, the pre-contractual dealings between Citigroup and Toll would have strongly pointed towards the existence of a fiduciary relationship to Citigroup as an adviser': at 83 [325].

206 Ibid 78 [287].

207 Ibid 56 [119]. Carnegie Wylie & Co Pty Ltd was another financial advisory firm that undertook an engagement with Toll to act in their best interests throughout their relationship, but was able to exclude the existence of a fiduciary relationship and operate as an independent contractor.

208 Justice Ashley Black (n 187) 4. Factors critical to attracting a fiduciary relationship include whether it is reasonably apparent that the adviser is acting in the client's interests.

209 Ibid 9.

will not be excluded. The implications of replacing the best interests duty with a statutory fiduciary duty will be discussed further in Part V of this article.

III DEFICIENCIES OF THE CURRENT FRAMEWORK: EVALUATING THE OPERATION OF THE AUSTRALIAN BEST INTERESTS DUTY

A Introduction

The best interests framework has a number of defects that deem legislative reform necessary. First, as previously discussed, the term ‘best interests’ in section 961B(1) is undefined.²¹⁰ The lack of an explicit definition of ‘best interests’ has transformed regulatory compliance into a tick-a-box exercise.²¹¹ By prescribing what steps must be taken to comply with the principle duty, a complete assessment of the client’s relevant circumstances is diminished.²¹² Second, the objective of the prescriptive safe harbour steps is to ensure advisers provide tailored financial advice.²¹³ However, the design and requirements of the safe harbour steps are unclear and complex. Finally, compliance with the safe harbour steps does not guarantee the provision of quality financial advice or mitigate misconduct.

Each of these concerns raises significant doubts as to the effectiveness of the best interests duty to provide tailored advice and protect consumers. In combination, the issues associated with the current framework demonstrate the disregard of a well-designed prescriptive regulatory framework.²¹⁴ The following discussion will evaluate the best interests framework in its application. This will illustrate the importance of designing a framework that is clear, precise, and simple. The issues discussed will lay the groundwork for the analysis in Part V, which will explore how the proposed reforms and recommendations may address these problems.²¹⁵

B Observations: Operation and Effectiveness of the Best Interests Framework

Regulatory compliance with the best interests duty has become a lengthy and cumulative checklist.²¹⁶ The lack of a statutory context or background from the general law to guide the interpretation of ‘best interests’, has caused the safe harbour provision to become the primary method to determine compliance. In

210 Moshinsky J expressed that if an adviser can prove that they have completed each of the seven things in section 961B(2) of the *Corporations Act* (n 4), the best interests duty will be satisfied: *NSG Services* (n 11) [17]. See also above n 10.

211 *ALRC Report 137* (n 23) 537 [13.145], citing *Banking Royal Commission Final Report* (n 1) 177.

212 *ALRC Report 137* (n 23) 537 [13.145], citing *Banking Royal Commission Final Report* (n 1) 177.

213 See above nn 145–7 and accompanying text.

214 The Australian Law Reform Commission express that developing a regulatory framework that achieves precision and clarity for stakeholders requires a balance of rules-based and principles-based regulation. Each theory has its inherent limitations and benefits, however, solely adopting one approach may result in further complexity and uncertainty in application: *ALRC Report 137* (n 23) 74–5.

215 See above Part I(C).

216 *QAR* (n 2) 28 [2.2.3]. See also Walpole, Donald and Langford (n 49) 364; *Banking Royal Commission Final Report* (n 1) 177–9.

Australian Securities and Investments Commission v Wealth & Risk Management Pty Ltd [No 2], the Federal Court used the safe harbour steps as a proxy, to assess compliance with the best interests duty.²¹⁷ The Court accepted evidence from a financial services expert that assessed Wealth & Risk Management Pty Ltd's ('WRM') compliance with the safe harbour provisions.²¹⁸ The expert concluded that WRM failed to satisfy the best interests duty, by failing to identify its client's objectives, and have a reasonable basis for its financial product recommendations.²¹⁹ Consequently, the safe harbour provisions have become the primary means of assessing compliance with the best interests duty.²²⁰ This arises regardless of its statutory context expressing that, the safe harbour provisions are a guide to an adviser of the minimum things that are necessary to satisfy the best interests duty.²²¹ The design of section 961B ultimately incentivises advisers to focus on the process, rather than the substance of the advice, to guarantee regulatory compliance.

Although the safe harbour steps are process-driven, it does incorporate key elements that can have a direct impact on the quality of financial advice.²²² As mentioned above, the safe harbour provisions guide advisers on the minimum requirements to provide tailored financial advice. This includes requiring an adviser to identify and base all recommendations on a client's 'objectives, financial situation and needs'.²²³ However, the design of the safe harbour steps is highly uncertain in its interpretation and application.²²⁴ ASIC's Regulation Impact Statement confirmed that the failure to define key obligations such as 'reasonable investigation' and 'best interests', confuses advisers on how they may satisfy these obligations.²²⁵ The consequences of this were evident in ASIC's compliance check, which reviewed the advice files of firms that relied on the statutory safe harbour steps.²²⁶ ASIC concluded that 75% of advisers did not comply with the best interests duty.²²⁷ Given the prescriptive nature of the safe harbour steps, the lack of explicit definitions undermines the underlying purpose of the safe harbour steps, to provide greater guidance on how to act in a client's best interests.

217 [2018] FCA 59, 15–17 [60]–[63], [113] (Moshinsky J) ('WRM').

218 Ibid. The Federal Court accepted an expert's compliance report that assessed the financial firm's adherence to the safe harbour steps. The report concluded that the firm failed to identify its client's objectives and did not make reasonable enquiries: see also *NSG Services* (n 11) [52]–[69] (Moshinsky J).

219 *WRM* (n 217) [62] (Moshinsky J).

220 The *QAR* outlines that when ASIC undertakes file reviews or audits, they look at whether the safe harbour steps have been followed and where they have not. Whether the advice is in the best interests of the client is determined by considering whether the safe harbour steps have been followed in substance: *QAR* (n 2) 100.

221 See above n 145 and accompanying text. See also Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 10 [1.25]. See also Kaplan Professional, 'Complying with the Best Interests Duty' (Paper, January 2016) 4 <https://ontrack.mykaplan.edu.au/app/uploads/2015/12/Complying-with-the-best-interests-duty-article_final.pdf>.

222 Liu et al (n 3) 51.

223 *Corporations Act* (n 4) ss 961B(2)(a)–(f).

224 Walpole, Donald and Langford (n 49) 364.

225 'Regulation Impact Statement' (n 28) 10 [34]–[36].

226 Australia Securities & Investments Commission, *Financial Advice: Vertically Integrated Institutions and Conflicts of Interest* (Report No 562, January 2018) 5–6 [10]–[14].

227 Ibid 8–9 [21]–[22].

Furthermore, the safe harbour provisions are not an effective safeguard against poor financial advice. One of the main effects of the safe harbour steps is that it transforms the advice process into a static and rigid model, that promotes minimal compliance and advice.²²⁸ In *Australian Securities and Investments Commission v Dixon Advisory & Superannuation Services Ltd*, McEvoy J held that Dixon Advisory breached its best interests duty, by failing to consider its client's relevant circumstances.²²⁹ Notably, Dixon Advisory purported that its advice process was dependent on following the safe harbour steps.²³⁰ The consequence of the safe harbour steps is that it can encourage providing entities to prioritise efficiency in the advice process through minimal compliance.²³¹ By focusing on the safe harbour steps, providing entities may neglect to completely consider a client's circumstances.²³² This can not only result in harmful advice, but can persuade advisers that their advice is in the interests of their client.²³³ Following this mechanical and rigid model does not ensure that a firm will provide good advice, that is in the best interests of a client.²³⁴

1 Prescriptive Regulation: A Justification to Overregulate Financial Advisers

As discussed in Part III(B), the failure to define key terms in the best interests duty has caused regulatory ambiguity in the financial advice industry.²³⁵ To remedy this, ASIC's publication of regulatory guides, specifically RG 175,²³⁶ aims to clarify how advice providers can comply with the best interests duty and its related obligations.²³⁷ However, ASIC's regulatory guides have enabled it to take on a dual role as both enforcer of the financial framework and interpreter of legislation.²³⁸ ASIC's regulatory guides allow it to interpret the law, and dictate how it will be enforced.²³⁹

228 Latimer (n 47) 13.

229 [2022] FCA 1105, [26]–[28], [57]–[58] (*'Dixon Advisory'*). Dixon Advisory contravened the best interests duty by failing to conduct a reasonable investigation into financial products that might be relevant to its client's circumstance. Dixon Advisory's advice model was a mechanical and rigid process, where Dixon Advisory's Investment Committee would provide recommendations in relation to a client's circumstance, and risk profile. Dixon Advisory's Investment Committee would present the recommendations to its authorised representatives. Its representatives were then given limited time to review the recommendations and decide whether it should be overridden: at 15–16 [29].

230 *QAR* (n 2) 85, citing *Dixon Advisory* (n 229).

231 For instance, Dixon Advisory's Investment Committee recommended a 'disproportionally high percentage' of high-risk products in a client's SMSF: *Dixon Advisory* (n 229) [26]. McEvoy J observed that the client's SMSF were 'insufficiently diversified, and exposed to an inappropriate risk of capital loss'.

232 *QAR* (n 2) 85–6 [6.1.4].

233 *Ibid.*

234 ASIC's audit review of superannuation advice files demonstrated that there were 51% of files that failed to comply with the best interests duty, despite the presence of the safe harbour steps: see Australia Securities & Investments Commission, *Financial Advice by Superannuation Funds* (Report No 639, December 2019) 30 [109]–[111].

235 See above nn 224–7 and accompanying text. See also Walpole, Donald and Langford (n 49) 364. See especially 'Regulation Impact Statement' (n 28) 10 [34]–[36].

236 See generally 'RG 175' (n 8).

237 'Regulation Impact Statement' (n 28) 29 [148]–[150].

238 *QAR* (n 2) 24.

239 *Ibid.*

It is important to note that ASIC's regulatory guides are not legally binding, and do not compel AFS licensees to act in accordance with its prescriptive provisions.²⁴⁰ Notwithstanding that, regulatory guides have been considered in judicial and administrative decisions. For instance, the Administrative Appeals Tribunal in *Re Seagrim and Australian Securities and Investments Commission*, stood in the shoes of ASIC, and considered the provisions of RG 175 appropriate to determine the issues at hand.²⁴¹ Relevantly, the Tribunal incorporated the provisions of RG 175 into its reasoning when determining whether the applicant had breached its obligation to have a reasonable basis for advice under section 945A(1)(a)(ii) of the *Corporations Act*.²⁴² As a result, ASIC regulatory guides are treated by AFS licensees as the law, and are incorporated into their operations to mitigate the risk of regulatory non-compliance and the need for regulatory enforcement.²⁴³

Considering the above, the failure to codify a true fiduciary duty in the best interests provisions has permitted ASIC to operate under the guise of fiduciary duties, and write its own rules.²⁴⁴ ASIC's attempt to clarify the best interests duty through its regulatory guides has created an overly prescriptive state of regulation and enforcement.²⁴⁵ The prescriptive nature of the regulatory guides not only discloses how ASIC interprets the law, but how it will be enforced. This has created widespread fear in the financial industry of regulatory action for minor breaches of the framework.²⁴⁶ Moreover, such an approach undermines the ethos of a principles-based regime – one in which a prescriptive, black-letter, rules-based regime is eschewed. The effect is that the lack of an explicit definition of 'best interests', and key terms in the safe harbour provisions, have rendered achieving

240 'RG 175' (n 8) 2.

241 [2012] AATA 583, [63] (Jarvis DP) ('*Seagrim*'). The Tribunal noted that both parties to the proceedings referred to 'RG 175' (n 8), and how the guide considers how certain conduct and disclosure obligations in part 7.7 of the *Corporations Act* (n 4) apply to the provision of financial product advice to retail clients. See also *Re Nguyen and Australian Securities and Investments Commission* [2012] AATA 156, [5]–[7] (Senior Member Ettinger). The Tribunal also took into account the factors outlined in ASIC's Regulatory Guide No 98 as part of its enforcement considerations when determining whether to impose a banning order: at [150]–[151]. See Australian Securities & Investments Commission, 'ASIC's Powers to Suspend, Cancel and Vary AFS Licenses and Making Banning Orders' (Regulatory Guide No 98, 17 November 2022) Table 2.

242 *Seagrim* (n 241) [68] (Jarvis DP). Section 945A of the *Corporations Act* (n 4) required financial advisers to have a reasonable basis for the advice provided based on the client's circumstances. This required advisers to make reasonable inquiries about whether the information already held about a client's relevant personal circumstance is up-to-date and complete. The FOFA reforms repealed section 945A and transferred this requirement in the safe harbour provisions in section 961B(2)(c) of the *Corporations Act* (n 4).

243 *QAR* (n 2) 24 [2.1.6]. This aligns with the QAR's consultation findings, which noted that many licensees and advisers treat ASIC guidance as if it were law, often relying on ASIC to interpret legal requirements. However, as the QAR rightly observed, ASIC is appropriately cautious in doing so, as the interpretation of the law ultimately falls within the jurisdiction of the courts.

244 Yazbeck (n 38).

245 *QAR* (n 2) 184. ASIC outlines in 'RG 175' (n 8) that 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': at 66 [175.255].

246 *QAR* (n 2) 33 [2.3.2], 45, 184 [11.2.1].

regulatory compliance significantly unclear.²⁴⁷ Without a clear understanding of how to comply with the best interests duty, financial advisers are forced to incorporate, and comply with ASIC's regulatory guides.

Furthermore, the open-ended nature of the catchall provision of 'any other steps' in section 961B(2)(g) of the *Corporations Act* has contributed to the ongoing concerns of regulatory complexity and uncertainty.²⁴⁸ This provision requires advisers to take any other steps that 'would reasonably be regarded as being in the best interests of the client'.²⁴⁹ The rationale behind this provision is to ensure that the best interests duty is not an 'exhaustive and mechanical checklist'.²⁵⁰ Notwithstanding that, the issue associated with this provision is that it renders regulatory compliance through the safe harbour provisions uncertain.²⁵¹ This means that even if an adviser satisfies the steps of the safe harbour provisions, ASIC may seek enforcement action against an adviser for the failure to act in a client's best interests. The lack of a clear definition, or indication of acting in the 'best interests', forces advisers to take additional precautions, to mitigate the risk of non-compliance. Arguably, this open-endedness could be an effective measure to ensure that advisers exercise their subjective judgement, to provide advice that is, in their view, best for a client.²⁵² However, the limits of what a court or ASIC may consider as 'any other steps' is undefined.²⁵³ As a result of this uncertainty, financial advisers may face enforcement action for the failure to take 'any other steps' that ASIC deems necessary.²⁵⁴

247 He and Liu (n 60) 441.

248 Latimer (n 47) 13. See also *ALRC Report 137* (n 23) 77 [2.109]–[2.110]. Corones and Galloway express that the open-endedness of 'any other step' in section 961B(2)(g) removes the static and inflexible box ticking approach that may fail to take into account all of the client's relevant circumstances: Corones and Galloway (n 10) 26.

249 *Corporations Act* (n 4) s 961B(2)(g). See also Latimer (n 47) 20.

250 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 10 [1.25]. This links with ASIC's proposed guidance or expectations that advisers are expected to exercise their own judgment to act in the best interests because each case is different: see also Australian Securities & Investments Commission, *Future of Financial Advice: Best Interests Duty and Related Obligations* (Consultation Paper 182, 9 August 2012) 42 [175.A40].

251 Corones and Galloway (n 10) 20. See also Latimer (n 47) 13.

252 Liu et al (n 3) 50.

253 Ibid 49, citing *WRM* (n 217).

254 Financial services experts expressed that no-one knows what section 961B(2)(g) means. The guidance that has been given is 'quite broad in terms of considering any other requirements that ASIC deems appropriate'. It was also expressed that, 'what we have been told is that ASIC is waiting for things to be tested in court so we can actually have some precedence on how the provision would be reviewed'. The 'catch-all provision has introduced an element of uncertainty that is potentially problematic, should there be an adviser-client dispute': 'Complying with the Best Interests Duty' (n 221) 4.

IV PROPOSED AMENDMENTS OF TRANCHE 2 DBFO REFORM PACKAGE

Having discussed the functionality of the best interests duty, it is appropriate to examine the main motivations of the Tranche 2 DBFO reform package. The objective of the reform is to increase the accessibility, and affordability of quality financial advice.²⁵⁵ The Australian Government aims to achieve this by streamlining the financial advice process, and removing ‘onerous red tape that adds to the cost of advice with no consumer benefit’.²⁵⁶ Part IV(A) below, will analyse what onerous red tape means, and how it contributes to the cost and time of financial advice.

It is also important to reiterate how the Australian Government proposes to increase the affordability, and accessibility of financial advice. The proposed changes of the Tranche 2 DBFO package are relatively straightforward. The package proposes to introduce a ‘modernised and flexible best interests duty’, by removing the existing safe harbour steps in section 961B(2) of the *Corporations Act*.²⁵⁷ This updated framework intends to retain the existing related obligations.²⁵⁸ This would provide advisers with a principles-based framework, and an opportunity to focus on the substance and outcome of their advice rather than ticking off the safe harbour steps, to achieve regulatory compliance.²⁵⁹

A Motivation for Change: Removing Onerous Red Tape

Legislators face a significant challenge in developing a financial advice framework that effectively balances the need for appropriate consumer protection, and access to quality and affordable advice.²⁶⁰ The prescriptive disclosure and conduct requirements imposed on financial advisers, requirements that must be clearly documented in an SOA,²⁶¹ have created a significant regulatory burden that increases the cost of financial advice.²⁶² This has created an advice gap that prevents

255 Explanatory Memorandum, Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024 (Cth) 1, 10 [1.4]. See also ‘Albanese Financial Advice Laws’ (n 30).

256 Explanatory Memorandum, Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024 (Cth) 10–11 [1.5].

257 *Final Government Response to QAR* (n 21) 1.

258 *Ibid.* As discussed in Part II(B)(2), the related obligations of the best interests duty comprise of sections 961G–961J, 961L of the *Corporations Act* (n 4).

259 See, eg, *Banking Royal Commission Final Report* (n 1) 177–9.

260 CPA Australia, *Regulatory Burden Report* (Report, 1 October 2019) 8 (‘*Burden Report*’). See also *Reforms in the Regulation of Financial Advice* (n 36) 1.

261 The current disclosure and conduct obligations: creating an SOA document, disclosing fees and conflicts of interest, and managing ongoing fee arrangements, overlap and increase the cost of providing advice. Industry stakeholders find it challenging to produce an SOA that is ‘clear, concise, and effective’ because fulfilling all the required disclosures makes the SOA document lengthy – often over 60 pages. This includes detailed product comparisons necessary for a thorough investigation: see, eg, *QAR* (n 2) 42.

262 Industry stakeholders have expressed that the best interests obligations and the ban on conflicted remuneration provisions introduced by the FOFA reforms are overlapping, and have increased the regulatory burden on the industry: *QAR* (n 2) 41, 127–8.

Australian consumers from seeking financial advice.²⁶³ Industry stakeholders have expressed that the current framework is weighed down by unnecessary, and costly red tape that can be streamlined to increase access to advice.²⁶⁴

First, the prescriptive requirements of the safe harbour provisions are a significant factor that contributes to the rising cost of financial advice.²⁶⁵ The tick-a-box approach to compliance has demanded advisers to dedicate more time to an SOA document, to ensure it evidences compliance with the safe harbour steps, regardless of the scale or complexity of advice provided.²⁶⁶ Empirical data has demonstrated that median fees have increased 58% from 2018, and are expected to increase with higher interest rates and inflation.²⁶⁷ This is particularly significant for limited or scaled advice that requires complete compliance with the best interests duty and its related obligations, regardless of the scope of the requested advice.²⁶⁸ As a result, increasing adviser fees have prevented consumers from seeking advice, as the expected cost is disproportionate to its perceived value.²⁶⁹

In addition, the increasing compliance costs from excessive regulation have had consequential effects on financial advisers, and consumers that require advice.²⁷⁰ Excessive regulation has had disproportionate effects on smaller financial firms that lack the resources to comply with the current framework.²⁷¹ This has led to a rapid decline in the number of financial advisers in the industry from 27,953 in 2018, to 15,623 in 2023.²⁷² As a result of fewer advisers, advice fees have inflated

263 Increasing cost of living pressures and the inability to afford high adviser fees have widened the advice gap in Australia, and has prevented consumers from seeking financial advice: *Financial Planning and Investment Advice in Australia* (n 34) 19.

264 Financial Services Council, 'Government Commits to Reduce Financial Advice Red Tape' (Media Release, 13 June 2023) <<https://fsc.org.au/news/media-release/gov-commits-to-reduce-financial-advice-red-tape>>.

265 Empirical studies demonstrate that section 961B(2)(g) of the *Corporations Act* (n 4), requiring financial advisers to take 'any other step', forces advisers to insert information into an SOA document that does not add any value to their clients: see especially *QAR* (n 2) 41–2, 86–7 [6.1.5]. 'RG 175' (n 8) clearly documents that an SOA must contain evidence of complying with the safe harbour provisions such as considering whether advice is appropriate: at 30 [175.104]–[175.105]. ASIC's Regulatory Guide No 90 provides detailed guidance on the design and structure of an SOA, particularly for scaled advice scenarios, such as personal insurance for a new retail client: Australian Securities & Investments Commission, 'Example Statement of Advice: Scaled Advice for a New Client' (Regulatory Guide No 90, 7 December 2017) 7–8 [90.21].

266 *QAR* (n 2) 127–9.

267 AdviserRatings, *2024 Australian Financial Advice Landscape Report* (Report, 27 June 2024) 34 ('2024 Landscape Report').

268 Limited or 'scaled advice' is personal advice that does not cover all possible topics relevant to a client. It is not intended to be lesser quality advice, but is advice on a single or specific topic. The best interests duty and related obligations apply regardless of whether the advice is limited, or comprehensive: 'Tips for Giving Limited Advice' (n 151).

269 *QAR* (n 2) 49.

270 *Financial Planning and Investment Advice in Australia* (n 34) 19.

271 *Burden Report* (n 260) 8.

272 *2024 Landscape Report* (n 267) 26. See also AdviserRatings, *2022 Australian Financial Advice Landscape Report* (Report, April 2022) 9, 18. The number of financial advisers in Australia, for the year ended 30 June 2024, reported by ASIC, was 15,390. The number of AFS licensees, authorised to provide personal financial advice, was 4,126. The number of AFS licensees, authorised to provide general advice, was 934: Australian Securities & Investments Commission, *Australian Securities & Investments*

to account for the time required to complete the advice process.²⁷³ This has led to circumstances where advisers restrict their services to high-net-worth individuals who are more likely to pay ongoing advice fees.²⁷⁴

To summarise, the *QAR* and Tranche 2 DBFO reforms identify the safe harbour provisions, inter alia, as onerous red tape that have no value and add to the cost of advice. The rigorous and prescriptive nature of the best interests framework has contributed to the rising cost of financial advice. The scarce and expensive availability of advice is a dilemma that the Tranche 2 DBFO reforms aims to ameliorate by removing the safe harbour provisions. However, given this motivation, an implication may be raised as to whether removing these provisions is likely to compromise the effectiveness of the framework's ability, to prioritise a consumer's interest and protection.

V CRITICAL ANALYSIS OF PROPOSED AMENDMENTS AND RECOMMENDATIONS

A Introduction

There are a number of issues with the DBFO's proposal to remove the safe harbour provisions, and transition to a principles-based framework. First, this amendment will increase regulatory uncertainty, because it is unclear how acting in the 'best interests' will be interpreted. This is significant given the Federal Court's reliance on the safe harbour provisions to determine compliance with the principles-based duty. Second, transitioning to a principles-based framework will grant advisers greater autonomy to exercise their personal judgement. This will likely increase the quality of financial advice, because advisers will be required to focus on the outcome of their advice. However, the flow-on effect of this amendment is that consumer protection will be substantially diminished. The lack of an explicit definition or operative guide to interpret acting in the 'best interests', will not require an adviser to provide tailored advice. Finally, given the Australian Government's choice to not redesign the entire best interests duty, a question is raised as to the prospective value of ASIC's regulatory guides, to provide regulatory clarity.

These concerns raise serious doubts as to the appropriateness of the DBFO's proposed amendment. In combination, the amendment demonstrates a disregard for a well-designed principles-based framework. If passed, the ability of this amendment to improve the current state of regulation is highly improbable. Without a complete redesign of the best interests duty, the decision to remove the safe harbour provisions should be reconsidered. The outcomes identified will be considered in turn in Part V(B).

Commission Annual Report 2023–24 (Report, 8 October 2024) 237. In comparison, the number of financial advisers for the year ended 30 June 2019, reported by ASIC, was 26,793. The number of AFS licensees authorised to provide personal financial advice was 4,199. The number of AFS licensees authorised to provide general advice was 1,760. Cf Australian Securities & Investments Commission, *Australian Securities & Investments Commission Annual Report 2018–19* (Report, 1 October 2019) 21.

²⁷³ *Financial Planning and Investment Advice in Australia* (n 34) 19. See also *QAR* (n 2) 42.

²⁷⁴ *QAR* (n 2) 45.

Furthermore, rather than removing the safe harbour provisions, a question arises as to whether redesigning the best interests duty, in accordance with the *QAR*'s recommendation, is valuable. The *QAR* recommends replacing the best interests duty and its related obligations with a statutory fiduciary duty, to act in a client's best interests.²⁷⁵ This duty is intended to be a true fiduciary duty that reflects the general law.²⁷⁶ The *QAR*'s objective is to design a flexible principles-based framework that regulates the provision of non-conflicting, and tailored financial advice.²⁷⁷ A significant defect of the *QAR*'s proposed design is that it has misconstrued the general law's requirements of a fiduciary to act in a client's 'best interests'. This design will substantially diminish consumer protection in terms of a consumer's ability to receive tailored financial advice. This will be discussed in Part V(C).

To address the *QAR*'s issue, key features from South Africa's regulatory framework can be incorporated into Australia's best interests duty. Unlike in Australia, financial advisers in South Africa are held to a general duty of care, good faith, loyalty, and diligence.²⁷⁸ This article submits that Australia should adopt South Africa's regulatory design by incorporating multiple fiduciary principles. Specifically, this article recommends incorporating Australia's duty of good faith to act in the best interests of a principal, and the duty of undivided loyalty.²⁷⁹ This design will ensure that advisers are adequately regulated to provide non-conflicting tailored advice, that is appropriate to the client's relevant circumstances.

B Tranche 2 DBFO Reforms: Removal of Section 961B(2) Safe Harbour Provisions

One of the deepest-running issues of Australia's best interests framework is the lack of an explicit definition of 'best interests', or a general law context to guide its interpretation.²⁸⁰ The detrimental impact of this decision is apparent when considering the posited justifications for removing the safe harbour provisions. One argument in favour of this amendment is that transitioning to a principles-based framework will provide greater regulatory certainty, flexibility for compliance, and quality advice.²⁸¹ However, it is argued that the Australian Government's decision to solely remove the safe harbour steps is illogical, and a poor attempt to establish a principles-based framework. This amendment will create greater regulatory confusion, and uncertainty for compliance.

275 Ibid 6, 183.

276 Ibid.

277 Ibid.

278 Daleen Millard and Monray Marsellus Botha, 'Something's Got to Give: The Future of Financial Advisors and Intermediaries as Employees' (2012) 75 *Journal of Contemporary Roman-Dutch Law* 41, 43. See also *General Code of Conduct for Authorised Financial Services Providers and Representatives 2003* (South Africa) s 2 ('GCC').

279 See below Parts V(C)(1)–(2).

280 See, eg, *NSG Services* (n 11) [17] (Moshinsky J). See also Corones and Galloway (n 10) 24.

281 See, eg, Serpell, 'Future of Financial Advice Reforms' (n 55) 241–2. To reiterate, certainty in regulation refers to whether those interpreting and applying a rule, regulators, regulated entities, courts or tribunals agree on what a rule means: Black, 'Risks, Challenges and Opportunities' (n 24) 8.

1 Clarifying the Duty to Act in a Client's 'Best Interests': Illogical Removal of the Safe Harbour Provisions

The removal of the safe harbour provisions will likely increase regulatory uncertainty because of the lack of an operative guide or context to interpret 'best interests'. If the safe harbour provisions were removed, it is unclear how the judiciary, or regulated entities will interpret the 'best interests' duty.²⁸² This is particularly significant given the Federal Court's reliance on the safe harbour provisions. As discussed in Part III(B), rather than defining the 'best interests' duty, the courts used the safe harbour steps as the primary means to assess compliance.²⁸³ Given this dependence, removing the safe harbour provisions will make it challenging to define an adviser's expected behaviour, to act in a client's 'best interests'. The Federal Court may be required to look to other sources within its statutory context to interpret 'best interests'.

The Federal Court may be prompted to read the best interests duty, in line with its fiduciary origins in equity.²⁸⁴ However, two significant reasons demonstrate why the equitable context cannot assist the judiciary in interpreting 'best interests'.

First, interpreting 'best interests' in line with the equitable concept of loyalty is inconsistent with its FOFA legislative history.²⁸⁵ The FOFA reforms formulated the best interests duty as a fiduciary-like obligation, not an obligation that complements a fiduciary principle.²⁸⁶ The best interests duty did not intend to impose the same stringent requirements as a fiduciary duty. Instead, it aimed to ensure that financial advisers act in a manner that prioritises and considers a client's interests and relevant circumstances, without necessarily adhering to the full scope of fiduciary responsibilities.²⁸⁷

Second, the concept of a fiduciary duty in Australian law is proscriptive, not prescriptive.²⁸⁸ As previously discussed, the equitable concept of undivided loyalty imposes a negative duty on an adviser, to refrain from being in a conflict of interest.²⁸⁹ Alternatively, section 961B of the *Corporations Act* imposes prescriptive obligations on advisers, to ensure the consideration of the client's relevant circumstances.²⁹⁰ This provision requires regulated entities to take positive steps to satisfy the minimum expected requirements of the principle best interests duty.²⁹¹

Considering the issues discussed, transitioning to a principles-based framework without a statutory or equitable context to interpret 'best interests' will undermine

282 Liu et al (n 3) 57. See also He and Liu (n 60) 449.

283 See above nn 217–221.

284 Han-Wei Liu et al argue that the Federal Court may use section 961J of the *Corporations Act* (n 4), the requirement to prioritise a client's interest, as a basis to interpret the best interests duty with the general fiduciary law: Liu et al (n 3) 57–8.

285 See above Part II(C)(2) and accompanying text. See also Liu et al (n 3) 58.

286 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 54 [3.63], 72 [3.127].

287 Ibid.

288 Corones and Galloway (n 10) 16.

289 See above nn 181–4 and accompanying text. See also Corones and Galloway (n 10) 10, 17.

290 Corones and Galloway (n 10) 22. See also Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 9–10 [1.22]–[1.23].

291 Corones and Galloway (n 10) 17.

its effectiveness. An effective principled-based framework requires a purposive approach to statutory interpretation.²⁹² In the context of the best interests duty, this means that its statutory context should allow entities to ascertain what its meaning is, and how compliance may be achieved.²⁹³ The Australian Government's decision to not redesign the entire best interests duty is illogical, and disregards the fundamentals of a principles-based framework. As mentioned above, this is significant given the Federal Court's reliance on the safe harbour provisions to determine regulatory compliance.²⁹⁴ Without a clear operative guide to interpreting 'best interests', its ordinary meaning or proposed objective cannot be ascertained.²⁹⁵ This creates significant ambiguity within the proposed regulatory regime, and increases the risk of misinterpretation.²⁹⁶ Overall, the decision to remove safe harbour provisions, without ensuring a method to interpret 'best interests', will be problematic for the judiciary, and regulated entities.

2 Prospective Increase in Quality of Advice

A key benefit of transitioning to a principles-based framework is that it directs advisers to focus on the substance and outcome of their advice. The broad nature of a principles-based regime would require advisers to make subjective judgements on what constitutes as compliant conduct in line with 'best interests'.²⁹⁷ This stems from the uncertainty in interpreting and enforcing broad principles, as well as the risk of enforcement action.²⁹⁸ The flow-on effect of this design is that it removes the

292 Julia Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75(6) *Modern Law Review* 1037, 1042–3 <<https://doi.org/10.1111/j.1468-2230.2012.00936.x>> ('New Governance Techniques'). See also Julia Black, Martyn Hopper and Christa Band, 'Making a Success of Principles-Based Regulation' (2007) 1(3) *Law and Financial Markets Review* 191, 194 <<https://doi.org/10.1080/17521440.2007.11427879>>.

293 Alice Lloyd expresses that the purposive approach to statutory interpretation is the 'modern approach', and should permit users to determine the purpose of legislation through its statutory context. This approach is also prescribed in section 15AA of the *Acts Interpretation Act 1901* (Cth): Alice Lloyd, 'A Purposive Approach to Interpreting Australia's Complementary Protection Regime' (2019) 43(2) *Melbourne Law Review* 654, 669–70. A true purposive approach requires a provision's context to determine its meaning and purpose: at 671.

294 See above nn 217–221 and accompanying text.

295 Lloyd outlines that interpreting the ordinary meaning of a word in legislation must be determined, at first instance, with its statutory context and purpose: Lloyd (n 293) 669. Lloyd states that the 'ordinary meaning of a word should be rejected where that meaning is not consistent with the identified context and purpose' from the High Court case of *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362: Lloyd (n 293) 670.

296 Julia Black expresses that under a principles-based regime, there is a greater exposure to interpretative risk – where the 'ultimate arbiter of interpretation (regulatory, tribunal, or court) does not agree': Julia Black, 'The Rise, Fall and Fate of Principles Based Regulation' (Working Paper No 17/2010, London School of Economics and Political Science, 2010) 6 <<https://doi.org/10.2139/ssrn.1712862>> ('The Rise, Fall and Fate').

297 Black, Hopper and Band (n 292) 195. See also Julia Black, 'Forms and Paradoxes of Principles Based Regulation' (Working Paper No 13/2008, London School of Economics and Political Science, 2008) 33 <<https://www.lse.ac.uk/law/research/working-paper-series/2007-08/WPS2008-13-Black.pdf>> ('Forms and Paradoxes').

298 Black, 'Forms and Paradoxes' (n 297) 35.

static and tick-a-box exercise from the safe harbour provisions.²⁹⁹ By removing the safe harbour steps, the advice process becomes a dynamic and flexible model, that demands a meticulous consideration of a client's circumstance, to provide personal advice. Therefore, the uncertainty surrounding the interpretation of 'best interests' is likely to increase the quality of financial advice.

3 *Diminished Consumer Protection: A Compromise for Greater Flexibility*

The safe harbour steps, as described above, are intended to provide advisers with a framework to ensure the provision of tailored financial advice in accordance with a client's objective, situation, and needs.³⁰⁰ The removal of the safe harbour provisions substantially diminishes consumer protection because it eliminates that framework. The transition to a principles-based framework provides advisers with greater flexibility for compliance, through its high level of generality.³⁰¹ However, a significant risk of this framework is that it places substantial trust in regulated entities to interpret and apply the principle appropriately.³⁰² Commissioner Hayne cautioned that trusting financial advisers to act in a client's interest, in line with their perceived norms and integrity, is a major risk.³⁰³ Commissioner Hayne expressed:

Experience ... shows that conflicts cannot be 'managed' by saying, 'Be good. Do the right thing'. People rapidly persuade themselves that what suits them is what is right. And people can and will do that even when doing so harms the person for whom they are acting.³⁰⁴

The issue associated with removing the safe harbour provisions is that an adviser's integrity does not guarantee a complete assessment of the client's relevant circumstances. Advisers will not be required to evidence their compliance with fundamental provisions in an SOA document, such as conducting a 'reasonable investigation' into products relevant to a client's circumstance.³⁰⁵ As illustrated in *Cassimatis*, larger entities may exploit the principles-based framework, and adopt a 'one-size-fits-all' advice model to prioritise efficiency and profits.³⁰⁶ The consequence

299 Corones and Galloway (n 10) 26.

300 See above nn 145–7 and accompanying text.

301 A key feature of principles-based regulation is that it is drafted with a high level of generality, with the intention that they should be applied flexibly to a rapidly changing industry: Black, 'Risks, Challenges and Opportunities' (n 24) 4. See also *ALRC Report 137* (n 23) 72 [2.89].

302 Black, Hopper and Band (n 292) 201.

303 *Banking Royal Commission Final Report* (n 1) 120.

304 Ibid 178. The Committee expresses that the issue with the principles-based approach is that it does not work with people with no principles: see also Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investment Commission* (Final Report, June 2014) 27–8 [4.9].

305 See above nn 156–9 and accompanying text. Removing the safe harbour provisions would mean there would be no reference in chapter 7 of the *Corporations Act* (n 4) that obligates advisers to conduct a 'reasonable investigation' into financial products, that might achieve the objectives and needs of a client, as specified by section 961B(2)(e) of the *Corporations Act* (n 4).

306 See above nn 71–2. Dixon Advisory contravened the best interests duty by failing to conduct a reasonable investigation into financial products that might be relevant to its client's circumstance. Their advice model became a mechanical and rigid process that did not consider a client's circumstance and risk profile: *Dixon Advisory* (n 229) [29] (McEvoy J).

is that, without any guiding context or regime to interpret acting in a client's best interests, investors risk receiving advice that is not tailored to their circumstances.

4 Designing an Effective Principles-Based Framework: Potential Guidance from ASIC's Regulatory Guides

Given the issues concerning the interpretation of 'best interests', a legitimate question is raised as to whether the Australian Government's transition to a principles-based framework will be clear or certain.³⁰⁷ Developing a framework that is precise and clear for stakeholders requires an appropriate balance of principles-based, and rules-based regulation.³⁰⁸ Establishing an effective principles-based framework is dependent on whether regulators clearly communicate a principle's intended objective, and if enforcement is predictable.³⁰⁹ This raises the question as to whether ASIC's regulatory guides are useful for regulating financial product advice. A thorough assessment of ASIC's regulatory guide is beyond the scope of this article; however, a few relevant comments may be made.

The standard criticism of principles-based regulation is its lack of certainty.³¹⁰ Regulated entities generally seek greater clarification, or prescription, to ensure their activities will not be subject to enforcement action.³¹¹ Regulators can publish guides to minimise interpretative risk – the risk that entities will make a wrong assessment of legislation.³¹² However, having extensive prescriptiveness can undermine the flexibility of a principles-based system.³¹³ It is essential that new principles-based regimes have some degree of guidance or prescription on how principles such as 'best interests', apply to real-world practices.³¹⁴

However, given the industry's pressure for certainty and clarity, there is a general susceptibility that greater detail will lead to greater complexity and over-prescriptiveness.³¹⁵ This concern aligns with the discussion in Part III(B)(1) of this article, which outlined ASIC's dual role as an enforcer, and interpreting the best interests duty through its regulatory guides.³¹⁶ As discussed above, the practical

307 To reiterate, certainty of rules or principles refers to whether those applying the rule (including courts, regulators and regulated entities) agree on what the rule means: *ALRC Report 137* (n 23) 75 [2.101].

308 *Ibid* 71 [2.80], 75–76 [2.104].

309 *Ibid* 69 [2.74]. See especially Black, 'Forms and Paradoxes' (n 297) 4, 9.

310 Black, 'Risks, Challenges and Opportunities' (n 24) 14.

311 Black, 'The Rise, Fall and Fate' (n 296) 6. The Stockbrokers and Investment Advisers Association have expressed their concerns for regulatory clarity on how the best interests duty will be satisfied once the safe harbour provisions are removed: see, eg, Chris Dastoor, 'Give Us Guidance If There's No Safe Harbour: SIAA', *Professional Planner* (Blog Post, 14 May 2024) <<https://www.professionalplanner.com.au/2024/05/give-us-guidance-if-theres-no-safe-harbour-siaa/>>.

312 Black, 'The Rise, Fall and Fate' (n 296) 6.

313 Black, 'Risks, Challenges and Opportunities' (n 24) 17.

314 *Ibid* 5. Substantive principled-based regulation rarely relies on just principles. In practice, they are accompanied by guidance, written explanations, and more detailed rules. *ALRC Report 137* (n 23) outlines that detailed rules should not be removed from principles-based regulation, but rather a tiered approach should be adopted where principles are underpinned by detailed rules in some areas: at 75–6 [2.104].

315 Andrew Godwin, Vivienne Brand and Rosemary Teele Langford, 'Legislative Design: Clarifying the Legislative Porridge' (2021) 38(5) *Company and Securities Law Journal* 280, 281.

316 See Part III(A)(1).

reality is that regulated firms treat ASIC's regulatory guides as binding.³¹⁷ Unless great care is taken with removing the safe harbour provisions, ASIC's regulatory guides could simply reintroduce a prescriptive regulatory regime. This could ultimately compromise the objective of the DBFO reforms to provide greater flexibility through principles-based regulation.

C A New Framework? Implementing a Statutory Fiduciary Duty to Act in the Best Interests of a Client

The *QAR*'s recommendation to implement a statutory fiduciary duty is a viable reform to regulate financial product advice.³¹⁸ The design of the recommendation, however, demonstrates a lack of understanding of the general law that governs fiduciary principles and concepts. The *QAR* asserts that implementing a statutory fiduciary duty will allow advisers to freely exercise their judgment, and provide tailored financial advice.³¹⁹ The issue with this recommendation is that the *QAR* has misconstrued the requirements of a fiduciary to act in the 'best interests' of a client under the general law. If this recommendation was implemented, consumer protection would be diminished in terms of an investor's ability to be provided with tailored advice.

First, the *QAR*'s recommendation to codify the general law's requirement to act in a client's best interests is misconceived. As discussed in Part II(C)(1), a duty to act in one's best interests is based on the fiduciary concept of loyalty. This imposes a proscriptive, or negative duty on advisers to avoid positions that may conflict with their client's interests.³²⁰ In comparison, the *QAR* proposes to impose a positive obligation on advisers by requiring them to form an 'honest view of what product ... is likely to serve the objectives and needs of their client best'.³²¹ This is substantially different from what equity requires from a fiduciary. This issue arises because of the *QAR*'s proposed design of the fiduciary concept in statutory form. If the *QAR*'s recommendation was implemented, the general law would only require advisers to refrain from being in a conflicted position.³²² This statutory design may prevent advisers from giving conflicted advice, but it will not require advisers to provide tailored advice, or conduct a subjective assessment of what products are best to meet a client's needs.³²³

Furthermore, a statutory fiduciary duty to act in the 'best interests' of a client will have severe ramifications on consumer protection, and the provision of tailored advice. Consumer protection will substantially diminish because the *QAR*'s recommendation removes the framework's safe harbour provisions

317 Ibid.

318 *QAR* (n 2) 97 [6.4.1], 102 [6.5.3].

319 Ibid 102.

320 Hanrahan, 'Equitable and Statutory Best Interests Obligations' (n 137) 54. See also *Grimaldi* (n 183) 344–5 [174] (Finn, Stone and Perram JJ).

321 *QAR* (n 2) 102.

322 *Corones and Galloway* (n 10) 17. There is no obligation under the general law that requires fiduciaries to act for the utmost for the client: *Batten and Pearson* (n 111) 521.

323 *Corones and Galloway* (n 10) 17, 22.

and related obligations.³²⁴ The safe harbour provisions have an essential role in regulating the advice process, such as requiring an adviser to conduct a reasonable investigation.³²⁵ Additionally, the related obligations are necessary for assessing the quality of financial advice.³²⁶ If the Federal Court were to interpret the statutory fiduciary duty, they would look to the equitable principles of undivided loyalty to establish its contents.³²⁷ This fiduciary concept does not impose a standard to assess whether an adviser's recommendation is appropriate to a client's circumstance. If advice is given without adequately understanding a client's personal and financial situation, the adviser fails to act with the necessary skill and care expected. Without the safe harbour provisions and related obligations, advisers could recommend products that are inappropriate to a client's needs.

It is evident from this discussion that designing a statutory fiduciary duty that follows equity's interpretation of best interests is not appropriate. Following this proscriptive regime will not require advisers to take proactive steps to adequately consider a client's relevant circumstances, or to provide what they believe is the best possible advice. This poses a significant threat to a consumer's protection, and their confidence in the industry to receive tailored recommendations. To address this, the question arises as to whether a statutory fiduciary framework can be developed that regulates an adviser's quality of advice, and requires them to prioritise a client's interests. As will be seen below, South Africa's regulatory framework can assist in redesigning Australia's best interests framework. This can be achieved by codifying Australia's fiduciary principles of loyalty, and good faith to act in a principal's best interest, under the general law.

1 A Guide Forward for Australia? A Statutory Fiduciary Best Interests Duty in South Africa

The provision of financial services in South Africa is governed by the *Financial Advisory and Intermediary Services Act 2002* ('*FAIS Act*').³²⁸ The regulatory scope of the *FAIS Act* is centred on the rendering of financial advisory, and intermediary services to clients.³²⁹ The Act is enforced by the Financial Sector Conduct Authority ('FSCA').³³⁰ The FSCA is authorised to determine whether a financial services

324 QAR (n 2) 102.

325 *Corporations Act* (n 4) s 961B(2)(e). See Part II(B)(2).

326 Importantly, the Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice) Bill 2011 (Cth) 10 [1.24] outlines that

[t]o a certain extent, the process of providing advice (as regulated in section 961B), the quality of advice (as regulated in section 961G) and conflicts of interests (as regulated in section 961J) are interrelated issues. Together, the provisions operate to implement the policy framework for ensuring financial advisers act in all circumstances in the best interests of the client.

327 Hanrahan, 'Equitable and Statutory Best Interests Obligations' (n 137) 72.

328 *Financial Advisory and Intermediary Services Act 2002* (South Africa) ('*FAIS Act*').

329 Ibid.

330 Millard and Botha (n 278) 42. While this source refers to the now-defunct Financial Services Board ('FSB'), the body that has taken on its supervisory function is the FSCA: *FAIS Act* (n 328) s 1. See also 'About Us', *Financial Sector Conduct Authority* (Web Page) <<https://www.fsc.co.za/About-Us/>>.

provider is fit and proper to render financial services.³³¹ Whether an adviser is fit and proper requires assessing whether they have integrity, honesty, and competence.³³² This is essential in ensuring that a consumer receives suitable financial advice, and adequate information to make informed financial decisions.

Before the introduction of the *FAIS Act*, the relationship between advisers and clients was governed by South Africa's general law of agency.³³³ This placed fiduciary duties on advisers to act with reasonable care and skill, and in good faith.³³⁴ In particular, the duty to act in good faith imposed three separate duties, namely, to act in the best interests of a client, be open and honest, and not to make a secret profit.³³⁵ Understanding how the *FAIS Act* integrated these duties is important to understand how Australia may design its statutory fiduciary duty.

The *FAIS Act* did not alter or replace an adviser's fiduciary duties under the general law.³³⁶ Rather, the Act adopted these fiduciary principles as a minimum standard to regulate conduct.³³⁷ This means that an adviser's wilful or negligent failure to act with reasonable care, or in good faith, is actionable under the same criteria as the general law.³³⁸ This also means that non-compliance with the *FAIS Act* will entitle an aggrieved client to seek redress from South Africa's Ombud of Financial Services Providers ('FAIS Ombud').³³⁹

These fiduciary principles are prescribed in section 16(1)(a) of the *FAIS Act*, and section 2 of its subordinate legislation, the *General Code of Conduct for Authorised Financial Services Providers and Representatives 2003* (South Africa) ('GCC'). These provisions prescribe that a provider 'must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the

331 Millard and Botha (n 278) 42. But see n 330 for a discussion of the relationship between the now-defunct FSB and the FSCA. See also *FAIS Act* (n 328) s 8(1).

332 *FAIS Act* (n 328) ss 6A(2), 8(1). Compliance with section 8(1) requires an adviser to have operational ability, financial soundness, integrity, and competency: at s 6A(2). This renders an adviser fit and proper. Competency refers to whether an adviser has the knowledge to render the financial services it is authorised and licensed: Millard and Botha (n 278) 46.

333 Millard and Botha (n 278) 43.

334 Ibid. See also Anton Swanepoel, 'Assessing Suitability with Regard to Investment Advice in South Africa' (Conference Paper, Financial Planning Institute of Southern Africa, 14 June 2016) 20 [6.5].

335 Daleen Millard, 'Bespoke Justice? On Financial Ombudsmen, Rules and Principles' (2011) 44(2) *De Jure Law Journal* 232, 237.

336 Ibid. See also Millard and Botha (n 278) 43.

337 Section 16(1)(d) of the *FAIS Act* (n 328) is similar to section 961J of the *Corporations Act* (n 4) as it requires advisers to prioritise a client's interests. An adviser must 'act with circumspection and treat clients fairly in a situation of conflicting interests': *FAIS Act* (n 328) s 16(1)(d).

338 Any conduct by the adviser that fell short of these fiduciary standards is actionable by a client who suffered damage or prejudice under the *FAIS Act* (n 238): Millard (n 335) 237. Non-compliance with these fiduciary principles can warrant disbarment or banning under section 14 of the *FAIS Act* (n 328).

339 *FAIS Act* (n 328) s 20. The objective of the FAIS Ombud is to 'promote consumer protection and enhance the integrity of the financial services industry through resolving complaints impartially, expeditiously and economically': see also 'Ombud for Financial Services Providers', *National Government of South Africa* (Web Page) <<https://nationalgovernment.co.za/units/view/262/ombud-for-financial-services-providers-fais-ombud>>.

interests of clients and the integrity of the financial services industry’.³⁴⁰ The phrase ‘must at all times’ imposes an overarching obligation on regulated entities to take any step to ensure compliance with these fiduciary principles.³⁴¹

In addition to what the general law provides, the *GCC* imposes prescriptive requirements to ensure that an adviser’s recommendation is suitable to a client’s relevant circumstances.³⁴² Known as the suitability rule, this requires an adviser to analyse the client’s relevant circumstances and needs, and disclose the implications of the recommended financial product.³⁴³ This provision is essential in ensuring that consumers receive appropriate and tailored financial advice.

Furthermore, the Australian safe harbour provisions and the suitability rule have a similar design and function.³⁴⁴ Both sections prescribe how the advice process should be conducted, to ensure an adviser considers a client’s personal and financial needs.³⁴⁵ This includes taking reasonable steps to identify a client’s objectives, and conducting a reasonable investigation into relevant products, that would be appropriate to a client’s circumstance.³⁴⁶ A distinct difference between these frameworks is that the safe harbour provisions are a possible method to complying with the best interests duty.³⁴⁷ In contrast, the suitability rule is a legal requirement of South Africa’s regulatory framework. Importantly, as discussed above, the lack of an explicit definition, or equitable context to interpret ‘best interests’ has created a dependence on section 961B(2) to assess compliance with the principle duty.³⁴⁸ In comparison, the suitability rule operates as a separate duty, and its prescriptive requirements are governed by the overarching fiduciary principles prescribed in section 2 of the *GCC*.

Furthermore, the significance of South Africa’s framework is that its statutory fiduciary duties in section 2 of the *GCC* guide compliance with the framework’s prescriptive requirements.³⁴⁹ For instance, when determining compliance with the suitability duty, the fiduciary concepts in section 2 of the *GCC* guide the FAIS

340 *FAIS Act* (n 328) s 16(1)(a); *GCC* (n 278) s 2. Section 2 of the *GCC* (n 278) reiterates exactly what is stipulated in section 16(1)(a) of the *FAIS Act* (n 328); Daleen Millard and CJ Maholo, ‘Treating Customers Fairly: A New Name for Existing Principles’ (2016) 79 *Journal of Contemporary Roman-Dutch Law* 594, 599.

341 *Ibid.* See, eg, *GCC* (n 278) s 2. The adviser’s dishonesty, lack of integrity and good standing was assessed throughout the advisory process. The South African Financial Services Tribunal concluded that the adviser did not meet the requirements of section 2 of the *GCC* (n 278), due to his fraudulent behaviour when forging the client’s signatures for advice documents: see, eg, *Bongoza v Standard Bank of South Africa Ltd* [2023] ZAFST 158, [17], [19]–[20], [24.2] (Judge Harms and KD Magano) (Financial Services Tribunal).

342 *GCC* (n 278) s 8(1).

343 *Ibid.*

344 See above nn 343–4 and accompanying text.

345 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 9 [1.20]–[1.22]; *GCC* (n 278) s 8(1). See also Swanepoel (n 334) 13–14.

346 *Corporations Act* (n 4) ss 961B(2)(a)–(c), (e). See also ‘RG 175’ (n 8) 87 [175.350]; *GCC* (n 278) ss 8(1) (a)–(d).

347 Explanatory Memorandum, Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 (Cth) 9 [1.20]–[1.22].

348 See above nn 217–221.

349 Swanepoel (n 334) 12–13.

Ombud's determination of appropriate advice.³⁵⁰ As a result, these fiduciary concepts require advisers to consider the quality, and outcome of their recommendations.

2 Incorporating the South African Regulatory Framework into Australia's Best Interests Duty

As discussed in Part V(C), a defect of the *QAR*'s recommendation is its misconception of Australia's fiduciary concept of loyalty. Designing a statutory fiduciary duty based on this principle will not adequately assess the quality of an adviser's recommendations.³⁵¹ To address this issue, South Africa's integration of multiple fiduciary principles in section 2 of the *GCC*, can serve as a viable guide for Australia's regulatory framework. This article advocates designing a statutory fiduciary duty that incorporates a duty to act in good faith in a principal's best interests, and a duty of loyalty.³⁵² Together, these duties will require advisers to take proactive steps to provide non-conflicting and appropriate tailored advice. This will also achieve the *QAR*'s objective of designing a framework that regulates an adviser's subjective and honest assessment of products, that are best for a client's needs and objectives.³⁵³

First, designing a statutory duty that incorporates the duty to act in good faith in a principal's best interest will require advisers to take proactive steps to provide tailored financial advice.³⁵⁴ Although fiduciary duties are proscriptive, the undertaking required by an adviser to comply with this duty imposes positive steps. This equitable duty requires a fiduciary to make a 'reasonable attempt to pursue the best interests of the principal'.³⁵⁵ The significance of this duty is that it

350 Ibid. The financial adviser breached section 8(1)(c) of the *GCC* (n 278) to 'identify the financial product or products that will be appropriate to the client's risk profile and financial needs'. The adviser recommended investing in a highly risky portfolio. This recommendation exposed the client's retirement funds. The adviser recommended this despite the client's risk assessment demonstrating that he had no tolerance to losing his retirement savings. As a result of market downturn, the client's investment value decreased by 57%. By doing so, the FAIS Ombud concluded that the financial adviser breached section 2 of the *GCC* (n 278) by failing to render financial services with the requisite due skill, care and diligence required: see, eg, *Schutte vs R & S Walsh Investment Consultants CC* (Ombud of Financial Services Providers, Case No 03984/09–10/EC1, 17 August 2012) 3 [7], 4 [12], 16 [49], 16–17 [51]–[52]. See also, eg, *Inch v Impact Financial Consultants CC* (Ombud of Financial Services Providers, Case No 04971–12/13–MP 1, 19 June 2014). See generally Financial Planning Institute of Southern Africa and Financial Intermediaries Association of Southern Africa, *Professional Investment Advice: Risk Profiling as a Component of Suitability* (Report, 5 August 2021).

351 See Part V(C).

352 The duty to act in good faith in the principal's best interests is frequent in company law. This duty imposes a subjective standard on a fiduciary to make a reasonable attempt to pursue the best interests of the principal: Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (Hart Publishing, 2011) 54–5. The duty of good faith involves, at least, subjective honesty which is the subjective belief of the fiduciary that the decision or action is in the interests of the person to whom it is owed: see also Hanrahan, 'Equitable and Statutory Best Interests Obligations' (n 137) 61, citing Pamela Hanrahan, 'The Responsible Entity as Trustee' in Ian Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essay in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 227, 236–9.

353 *QAR* (n 2) 102 (emphasis added).

354 Hanrahan, 'Equitable and Statutory Best Interests Obligations' (n 137) 61.

355 Conaglen (n 352) 54. The author expresses that the concept of acting in good faith in the interests of a principal can be understood as a composite of the duties to 'act in good faith, with the requisite degree of

would impose a subjective standard on advisers to act in a client's interests.³⁵⁶ This means that, given the relative expertise of an adviser, compliance with this duty will be achieved, if the adviser honestly believes that their recommendations are in the client's best interests.³⁵⁷ Similar to section 2 of the *GCC*, this would place an adviser in a client's position, and consider whether their recommendations would, in their view, be in their best interests.³⁵⁸ This aligns with the *QAR*'s objective to design a framework that regulates an adviser's honest view of what products will likely serve the needs of their client best.³⁵⁹

Second, the equitable context of fiduciary principles will provide stability, regulatory certainty, and public confidence in the interpretation and application of the proposed statutory duty. A key characteristic of designing a principles-based framework is communicating and understanding a principle's intended outcome and objective.³⁶⁰ Unlike the current design of Australia's best interests duty, South Africa's statutory fiduciary duties complement its equitable duties from the general law. The significance of this design is that it provides regulated entities with the required context and flexibility to determine how to best achieve the statutory fiduciary outcome, namely, to provide non-conflicting advice that is, in their view, best for a client. Accordingly, Australia's equitable context will foster stability and predictability in the uniform application of the law.

Furthermore, if regulated entities require greater clarification or prescription from the proposed design, reconsidering the function of the safe harbour provisions could be a viable solution.³⁶¹ The safe harbour provisions could be separated into its own mandatory section, similar to the suitability rule in the *GCC*. This would remove its box-ticking exercise highlighted by Commissioner Hayne, as it would be regulated by the overarching statutory fiduciary duty.³⁶²

As discussed above, the significance of the *GCC*'s design is that its statutory fiduciary duty oversees the advice process. This would include compliance with the regime's prescriptive rules prescribed in the suitability rule.³⁶³ This recommended design would remove the tick-a-box exercise to compliance because it would require an adviser to consider the outcome of their advice.³⁶⁴ Accordingly, this would require an adviser to conduct an appropriate assessment of their client's financial circumstance, and then apply their expertise with good faith, and undivided loyalty.³⁶⁵

care, and only for proper purposes': at 55–6.

356 Ibid 55.

357 Ibid.

358 Ibid.

359 See above n 353.

360 Black, 'Forms and Paradoxes' (n 297) 4, 9.

361 Ibid. Black expresses that a paradox of principles-based regulation is that a lack of certainty of 'what enforcers will accept as compliance can lead firms to adopt quite conservative behaviour': at 4.

362 *Banking Royal Commission Final Report* (n 1) 177 [3.2.4]. See, eg, He and Liu (n 60) 447.

363 Section 2 of the *GCC* (n 278) states that a provider 'must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients'.

364 Black, 'Forms and Paradoxes' (n 297) 3.

365 Swanepoel (n 334) 13.

VI CONCLUSIONS

This article identified a series of interrelated objectives.³⁶⁶ First, to assess whether the safe harbour provisions can effectively satisfy a financial adviser's best interests duty. Second, to evaluate the impact of removing the safe harbour provisions with respect to the Australian Government's objective to balance improvements in the quality of advice and providing certainty in applying the law. Third, to assess whether the proposed reforms and recommendations eliminate the 'tick-a-box exercise' to satisfying the best interests duty. Finally, to evaluate whether the proposed reforms and recommendations will compromise consumer protection.

The Australian best interests framework has several defects that deem regulatory reform necessary.³⁶⁷ The root cause of these defects is the absence of an equitable or statutory context to guide the interpretation of 'best interests' in section 961B(1) of the *Corporations Act*. This has caused the safe harbour provisions to become the primary method of achieving compliance with the best interests duty. As a result, the advice process has been reduced to a checklist that incentivises advisers to prioritise compliance over the substance of the advice and its relevance to a consumer's relevant circumstance.

Furthermore, the lack of an operative guide to interpret 'best interests' will have significant flow-on effects that render the DBFO reforms suboptimal. In particular, the decision to remove the safe harbour provisions without considering how the best interests duty will be interpreted is illogical and will create more problems than it attempts to solve. Consequently, the DBFO reforms demonstrate a disregard for a well-designed principles-based framework. If enacted, these reforms risk undermining the consumer's best interests and the quality of financial advice. The safe harbour provisions should not be removed, unless a viable solution for interpreting 'best interests' is established.

Removing the safe harbour provisions and implementing a statutory fiduciary duty to act in a client's best interests is a viable reform. By requiring advisers to assess whether their personal advice is effectively tailored to a consumer's relevant circumstance, the advice process can become a fluid and flexible model that eliminates the 'tick-a-box' approach to compliance.

However, a significant issue with the *QAR*'s recommendation to implement a statutory fiduciary duty is that it has misconceived the general law's interpretation of acting in a client's best interests. If the *QAR*'s design was implemented, equity's interpretation of the best interests duty would impose less onerous obligations on advisers. This would only require advisers to preclude themselves from being in a conflicting position. Importantly, this design will not impose a standard to regulate whether advice is appropriate or tailored to a client's relevant circumstance. Granting advisers greater autonomy without establishing a framework that evaluates the substance and quality of advice risks undermining consumer protection.

366 See Part I.

367 See Part III.

In response, this article argues that South Africa's codification of its general law fiduciary principles can address the *QAR*'s defective design. Specifically, this article recommends codifying Australia's fiduciary duties of loyalty, and good faith to act in a principal's best interest. The equitable context of these principles will provide the regulatory certainty needed to ensure advice is in the 'best interests' of a client and remains non-conflicting. Most importantly, the advocated statutory design encourages further research to determine which fiduciary principles best align with the objectives and outcomes of Australia's financial advice industry and regulatory framework.