CP 224 and RG 221 submission by Richard Wilkins

I use ‘products’ throughout, to include financial services where relevant.

The definition and terminology of “electronic disclosures” should be limited to written form by email / internet access, and exclude text or voice messages.

Paras 2-5 (and 17) Apart from the CAP consultation mentioned in Para 15, did consumers or their representatives make submissions to REP 391; was the feedback dominated by providers and professional firms? Does ASIC intend to publish the non-confidential submissions on REP391? How are the ‘consumer preferences’ in Para 5 to be ascertained?

Para 8 states “For other methods of delivery (including other methods of electronic delivery), the method must typically be agreed with the client or the client’s agent”

I believe that this principle should continue to be applied.

Paras 11c and 12d state “…a perception that a product issuer cannot produce two versions of a PDS for the same product with different content and presentation”.

Whatever the prevalence of this ‘perception’, the regulatory position needs to be clearly stated in RG221. This is crucial—how much variation in content between different versions of a PDS is permissible before it becomes potentially misleading-since it’s unlikely that a consumer will see more than one version?

There is some ambiguity in the language about the permissible number of PDSs. Paras 11c and 12d rebut the notion of “*cannot* produce two” but this could also mean that many more than two are permissible. The words “any current PDS” in C1 (a) and Para 46 add to the idea that more than two are permitted simultaneously. Please see also my comments later on questions C1 Q1 and C2 Q1

Para 13 states “The requirement for some PDSs to be lodged with ASIC in s1015B is also a practical barrier to electronic PDSs. These are PDSs for managed investment products that are traded on a financial market, or are able to be traded on a financial market, and represent a very small number of total PDSs produced. ASIC cannot currently process electronically lodged PDSs”.

This is an unsatisfactory reason: it seems odd that ASIC is encouraging electronic disclosures through CP224 and RG221, for example, yet cannot process electronically lodged PDSs itself. The obvious solution is that ASIC needs to ensure quickly that it can do so. A less desirable alternative would be to have a carve out in RG221-to state that any PDSs that are required to be lodged with ASIC under s1015B must be only in paper form until ASIC has created the necessary capacity.

Paras 15 & 16 As well as the concerns noted by CAP, there is another significant problem, that of consumers being deluged with offers that they may have no interest in or may not understand. This already happens to some extent by post, even with financial services eg unsolicited credit card and insurance offers. Fortunately, providers are perhaps deterred from sending full PDSs or prospectuses now, because the printing and postage costs would deter indiscriminate marketing, as well the matter of express v implied consent. Even if the consumer has, for example, provided express consent to a provider for one product or service, he/she doesn't necessarily want *other* offers from that provider or its affiliates. It's likely that consumers will receive much more unsolicited material from providers if the consent test is watered down or removed. I believe that consent should continue to be *express* and clearly limited by the consumer to specific groups of products or services. This also matters to providers: if they get a reputation for spamming their existing or potential customers, they may find that consumers ignore all communications from those providers, even regarding offers that they previously had interest in.

Consumers should be asked to opt-in *separately* to receive materials about different groups of products and services from the same provider group, and have the right to opt out of any of those at any time. Perhaps there should also be an automatic expiry of these consents every 24 months, say, so that the consumer consciously has to renew consent and/or expand or reduce the range of products of interest. An exception could be made for periodic statements, eg superannuation statements, where the client is merely receiving personal information about a product that has already been purchased.

Any electronic communication should be clearly labelled and introduced with a statement that "it is sent and authorised by XYZ provider because it reasonably believes that the consumer has provided consent to receive such materials, BUT that the consumer is under no obligation to purchase or even consider the offering—and his decision or inaction will have no affect on any other products and services that he is currently receiving from XYZ provider".

Para 17 states "Feedback to REP 391 supported this proposal. For financial services, one respondent to the report suggested that consent before electronic delivery was a 'very real barrier to achieving a substantial shift towards electronic disclosure'. Another respondent noted that restrictions such as page numbers, content and font size meant that registrable superannuation entities had not been able to apply the same level of innovation as they had been using in other mandated disclosure material".

As I stated above, I believe that consent *should* remain as a real barrier. In contrast, the other limitations mentioned in Para 17, such as page numbers and font size, could justifiably be relaxed so that they were subject only to an overall test of being fully informative and not misleading in content, context or presentation.. How much *consumer* feedback, if any, was received on the subject matter of Paras 16 and 17?

Even though there may be no difference in principle, I think that many consumers (except financially sophisticated investors) would be more likely to be enticed into inappropriate products delivered electronically than would occur through using printed offers.

Para 18a. this is a good proposal: it is better to inform (potential) consumers that a disclosure is *available,* so the consumer has to make some effort to seek it out, rather than the provider spam everyone on its mailing list.

Para 18b. I do not support this proposal: I fear that so-called 'implied consent' would be widely abused. Surely it matters *how* the provider acquired the email address. Eg if a business or charity sells its mailing list to other providers, that does not mean that the consumer has given consent to receive materials from the second provider. Likewise for associates, affiliates and agents of the first provider: even if the first provider has the email address legitimately, that doesn't mean that the consumer wants it to be used by related parties. This is even more problematic if a financial planner or other intermediary like a broker holds the client's contact details—are they to be allowed to pass on those details to other providers without further client consent?

Para 18c. I'm sceptical about "more innovative content". What types of content do providers believe that electronic delivery will enable that they *can't* now give in hard copy? How will ASIC ensure that the extra material still complies with legislation, and especially that it is not prone to mislead or confuse, even if unintentionally? If they are interactive PDSs, or provide calculators or forecasts, how can that be policed? Some years ago, there was quite widespread mis-selling of life/savings products by giving clients unreasonably favourable long term capital gain or income projections. There is an obvious risk that these problems could recur, if consumers can make ill-informed calculations and forecasts through an innovative PDS. Also, how can ASIC be assured that the electronic version is a) in effect identical to the hard copy and b) that the content of the e-version is unchangeable-since it is not 'read only'- and that each consumer receives identical material?

A1 Questions and subsequent paragraphs. This text appears to be slanted towards providers: it seems obvious that *providers* would want to use electronic delivery, especially as the default option, because it would be cheaper for them, and enable them to target (and unfortunately spam) a much wider consumer market. This would be acceptable (only) if consumers truly control the flow of material and communications, by giving express consent for specific product groups; otherwise a proliferation of spam would be predictable and a bad policy result. Many consumers are not financially sophisticated, and could be vulnerable if such proliferation occurs. Has rigorous and substantial evidence been collected (independently of providers) that supports the contention that consumers are currently *not* receiving offers or all the content that they want? Also, one could predict that there would be a higher risk of unregulated or fraudulent material reaching Australian consumers from overseas promoters, even if via Australian shelf companies.

ASIC's guidance could make a useful distinction between disclosures that are being made for the first time, to invite interest in a product or service, and the provision of regular statements, for the cases mentioned in RRG.10 (a) to (e) inclusive, where the client has already committed to the product and merely needs updated *personal* information. This would establish a sensible compromise between the convenience of email messages and its intrusive and indiscriminate use by providers.

Para 25 The commentary in the first sentence is realistic. The second sentence expresses a worthy aspiration, but it may be too optimistic. "more effective" - for whom?

Para 26 states "While the electronic environment can present new and different challenges for both consumers and providers, it can also offer improved ways to convey information and encourage understanding".

This is true, but it may also engender <u>mis</u>understanding.

As a general comment about Part B, please see my suggestion above on Part A—namely that a distinction should be drawn between the regulation of sending periodic or confirmation statements of personal information to a client about a product that the client has *already* adopted (eg in the cases of RG221.10 (a) to (e) inclusive but not 10(f)), and merely soliciting interest in new products that the client does *not* have. ASIC guidance and examples would be welcome, to promote electronic delivery in the former case but encourage moderation and only selective marketing by providers in the latter situation.

B1 Q1 I disagree. A "client' may have provided an email address for only one purpose-why should that be taken to mean a conscious decision to apply for several, or unrestricted, purposes?

B1Q3 A "client" may have willingly given an email address to one part of a large financial group-eg a bank- but that should not be taken to mean that the client has consented to, or wants to, receive communications from related parties, agents or affiliates of that entity. The words "would be able" are likely to be true in many cases—but the client may not want to, and may not even be a "client" in the normal sense of that word.

B1Q4 I disagree- I think that in most cases "clients" would *not* be comfortable. Indeed, the words "potential client" contradict the presumption of consent having already been given. How can someone who is not an *existing* client of an entity be presumed to have given informed consent to that entity? In any case, there would be large parts of the public-eg those in financial hardship, problem gamblers and those not financially literate- who should not receive offers of many categories of financial products and services. For example, would this proposal enable CFD promoters or margin lenders to target wide parts of the public?

The example in the last sentence of RG221.33 is fairly clear cut-and presumably refers to *subsequent* disclosures regarding the same product. However, would provision of contact details regarding one product constitute "nomination" in respect of other products by the same provider? I don't believe that that inference should be permitted.

B1Q5 Yes-definitely. Hence the need to make the consent process more user-friendly for the consumer, to be able to limit the consent to a narrower context.
B1Q6 Probably, but this should include the right *not* to receive any material.
B1Q7 Yes-definitely. Please see my earlier comments- providers must not be allowed to assert that a consumer has provided consent in cases when that would not satisfy a test of reasonable onus of proof.
B1Q8 The example in draft RG 221.35 is perhaps too simplistic, and I would *not* draw ASIC's conclusion in it. *We think that given Rahini recently provided her email address to her financial planner, one of the purposes of providing that email address was to receive disclosures.* I agree it's not an unreasonable conclusion, but it's not persuasive. It would be useful to expand the guidance to say that the planner should agree with the client whether the email address may be used for third party contact. In the example, it's not clear whether Anna is to buy the Big Co bonds on the secondary market or through a new issue document directly from Big Co. If the former, why would Big Co need to contact Rahini at all? If the latter, how would Anna be able to

purchase bonds in the application process-has she given Anna a power of attorney? How would Big Co be able to satisfy itself that it had received the required "nomination", since in this example it is implicit that Rahini has had no previous contact with Big Co. It would be useful to clarify the example, and give guidance on what steps Big Co should take to have reasonable grounds for concluding that nomination had been given.

B1Q9-11. I can't comment on these.
B1Q12. There *should* be such a barrier (for obtaining an address for clients who acquire products through a third party such as an employer or other agent).
B1Q13-14 ASIC's guidance is needed to protect consumers from over-intrusive and inappropriate marketing.
B1Q15-16 I cannot comment on costs; however, I would be sceptical of assertions that providers would pass on a significant part of savings to consumers. It is likely that providers would keep most or all of such savings.

Paras 28 & 29 I disagree with the suggested inference: the use of either postal or email addresses should still require express consent and, when granted, be understood to apply to a limited, specific context.

Para 30 That conclusion is fair, but the crucial test must be in either case – "did the consumer intentionally and directly provide the agreement?"

Para 31 I agree- but the provider should have reasonable grounds to hold that opinion. See my comments on B1Q8 and RG221.35.

Paras 32 & 33 The fundamental point is how widely the inferred consent will be construed: I fear that it will be the thin end of the wedge, and will expand to other products by that provider, and affiliated providers, whether that is inadvertent or deliberate.

Para 35 Although this follows from Para 34, it is expressed rather weakly. Providers <u>must</u> comply with all the law. It would be better to say "In any case, financial services providers must…"

B2Q1 The proposal is fair but I would strongly prefer that it should only advise that a disclosure is available—not to send the product offer in full, initially, until it is clearly requested. Otherwise, that could cause indiscriminate and excessive communications - which could constitute spam for many individuals. Also, how can providers guarantee security of this process, to ensure that it is not hacked by links to criminal phishing scams?

B2Q2 "each time"-of what? In principle the answer should be yes, but it's unclear what the question is driving at. Does it mean- 'should a provider notify a consumer every time it has created an electronic disclosure' or that that should instead be prohibited -or something in between? I feel that it would be wrong and counterproductive to mandate the first of these alternatives. However, once a consumer has indicated serious interest in a product, and requested the complete disclosure document, the provider should be required to send any updates that are materially relevant to that product. Again, a distinction should be made between disclosures relating to an existing product that the client has (eg in RG221.10 (a) to (e) inclusive), where “each time” notification would be desirable and unexceptionable, and unsolicited marketing, where a presumed consent could quickly give rise to spamming. Some guidance by ASIC, through examples of good and bad practice in different cases, would be welcome.

B2Q3 This should permit letter or email only; definitely not SMS or voice calls. There must be an easily accessible record of communications to enable checking, when necessary, by ASIC, FOS or other bodies that the communications complied with relevant law and regulation. Permitting voice calls in conjunction with a completely electronic method of content delivery would risk a proliferation of boiler shop activity.

B2Q4 The question is slanted towards ensuring that consumers receive many opportunities, when in practice most consumers may not want these. There is already too much speculative marketing by banks and other financial services providers; electronic marketing is likely to increase this. ASIC should guide providers to communicate about offers only when they have a well founded belief that the particular ‘client’ would have a genuine interest in that product.

B2Q5 & 7 I cannot comment on these.

B2Q6 I don’t have sufficient knowledge to comment on the technical and security risks- but there does appear to be an obvious risk here regarding hacking and phishing.

B2Q8 Why would consumers incur *any* costs? They should be told clearly that they can obtain a paper copy of the PDS free of charge, if they want one.

Para 37 Please clarify who is the word “they” referring to in the text “client’s express agreement that they will ‘pull’ …”

Para 40 No doubt this is true, but the cost of printing and distributing hard copies shouldn’t be overstated- it would be a small part of the overall cost of product design, marketing and distribution. However, the costs may act as a useful restraint to providers sending out hard copy PDSs etc indiscriminately to too wide a section of the public.

Paras 41& 42. This is acceptable, subject to providers being required to make clear that a free paper copy is available if the client wants it.

Para 43 ASIC appears confident about hyperlink security. I commend the good practice guidance and item 8 about client security risks. This should be emphasised as a fundamental theme. Who would be liable if the link was defective or hacked, and the consumer suffered loss? Although Para 37 appears to be only about SOAs, does ASIC intend that payment methods to purchase the product could also include hyperlinks, or would that element be banned?

C1Q1 this is acceptable in principle, but C1(a) needs to clarify how much difference is permissible between an electronic or paper copy of the PDS. The word “any” (and also in Para 46) suggests that a given product could be the subject of several current PDSs, whereas ASIC *may* intend it to mean only 2 versions-one electronic and one paper—which in all *material* respects are identical. (See my comments on Para 50). If ASIC is merely making the point that a PDS could be electronic or hard copy or both, that is fine---but I am concerned that the word “any” suggests that there could be several live versions of a PDS that might have material differences between them. That interpretation would be consistent with the notion of allowing interactive and “innovative” disclosures.

Perhaps the text does not mean to imply that- but it’s a fundamental point. The desired move away from printed documents must still uphold the principle that each consumer will receive exactly the same material. It is one thing to encourage innovative disclosure, but different methods of delivery could enable some to be misleading, especially if they are interactive. Moreover, how could ASIC ensure that important information is not altered or omitted in electronic versions?

C1Q2 Yes—that limitation should remain. See my concern in the previous answer.

C1Q3 yes, but the text of C1(c) is a bit confusing when combined with the word ‘relief’. Is any “relief” in fact needed? Para 45 of RG 221 also refers to “relief” even though Para 44 says the language can be applied equivalently to both formats. I agree- S 1013B requires only “on the cover of OR at or near the front of”- the cover reference is not compulsory.

C1Q4 is this question, and “your”, addressed to the provider or the consumer?

C1Q5 I agree for FSGs but it’s unclear how it could be applied to SOAs.

C2Q1-7 The comments set out in Paras 49 to 57 are important. Paras 51 and 52 state a significant risk. The problems of distraction (whether inadvertent or deliberate and misleading) described in Paras 54 and 55 present considerable challenges for consumers and the regulator. Para 50 of CP224 does not make explicit (if this is ASIC’s opinion) that <u>no more than two</u> PDSs are permitted. However, RG221.50 does state “two”.

C2Q5-7 The good practice guidance in Part D of RG221 is commendable and clear; points 6, 7 and 8 are especially important. From a consumer standpoint, all the draft good practice guidance is fair and necessary- it would be unreasonable for a provider to assert that it is onerous. I would add that providers should be encouraged to use industry/ sectoral benchmarks where available and appropriate, to promote user understanding. This, however, must be done consistently.

Part D I cannot comment in detail on the credit provisions, but caution that some of the areas of concern identified for PDSs could be even more problematic for credit customers. Moreover, it’s likely that most customers who ask for PDSs of financial products and services are doing so with savings to invest and some degree of understanding (providing the PDS’s marketing has not been indiscriminate) whereas credit matters will apply to many more people, include the disadvantaged or not financially literate. Thus, even greater regulatory scrutiny is warranted for credit.

Part E. I can’t comment on this.