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Australian Securities and Investments Commission (ASIC)
GPO Box 9827
Brisbane QLD 4001

By email: feeconsentsandindependence@asic.gov.au

Dear ASIC,

AFA Submission – CP 329: Implementing the Royal Commission Recommendations: Advice Fee Consents and Independence Disclosure

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for over 70 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The Board of the AFA is elected by the Membership and all Directors are currently practicing financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting their wealth.

Introduction

Thank you for the opportunity to make a submission on advice fee consents and independence disclosure.

The AFA provided an extensive submission in response to the Government's exposure draft on ongoing fee arrangements and lack of independence on 28 February 2020. With respect to ongoing fee arrangements, we put forward a fundamentally different model for how this could work. The model proposed by Treasury was unnecessarily complex and would be confusing for clients and costly to operate. Whilst we acknowledged the Royal Commission recommendations, we certainly believe that the policy intent can be achieved in a much more efficient manner. Our recommendations can be summarised in the following five points:

- Removal of the Fee Disclosure Statement (FDS) requirement. FDSs are prone to issues and errors and this information is already provided in periodical product statements.
- Utilisation of one document combining the Agreement, Renewal Notice and client consent forms for product providers (e.g. trustees), including fees and services for the upcoming year, based upon the client's current situation.
- A fixed 12 month anniversary date for client renewal, not 12 months since the last renewal date, to achieve a genuine 12 month renewal, however with flexibility for the client to sign the agreement to renew anywhere between the 9th and 15th month. Greater flexibility will benefit both clients and advisers.
- Product provider proof of client authorisation every three to five years in an automated electronic format.
- Commencement should be deferred until 1 July 2021 and the transition for all clients should be 2 years, in order to ensure that advisers have sufficient time to meet these new requirements within the client's current review cycle, and taking into account all the other reforms currently impacting financial advisers.

Addressing the Key Factors

Our proposal was to have one document that would cover the financial advice arrangement, the renewal requirement and the client consent form. We can see no reason why the current Government proposal seems to imply that each of these would be a separate process and separate documents.

ASIC seem to have acknowledged that the renewal notice and the consent form could be the same document (paragraph 63), however have added additional complexity to this by suggesting that it may be necessary to complete the renewal notice at a different time to completing a consent form, where for example, the client decides to pay ongoing fees from a new account. We would oppose the prospect of the renewal and consent steps being separated, however there is more context to this view, which we have set out below.

Product providers do not know and do not need to know what services the financial adviser has agreed to provide to the client. They have no capacity to know if an annual review has been done, or whether other agreed services have been provided. The other complexity that arises with a combined client agreement and consent form is for the many clients who have multiple accounts with different product providers. They may, for example, have a managed fund account, an account-based pension, a lifetime/term annuity and a residual superannuation account. It is not appropriate for each product provider to have visibility of the other accounts that the client might have, which would necessitate separate consent forms for each product provider, based upon what ASIC have proposed. This would also be confusing for clients and unnecessarily complex for the advisers to have multiple client consent forms that might, by necessity, each include different services. We have proposed a product provider consent form as a schedule to the agreement and limited it to the basic details on the fees applicable to that product provider. Ideally, we would like to see this distributed to product providers through some automated electronic means or else be limited to an exercise that could be undertaken every three to five years. Product providers primarily need to know that the client consent exists. This overall process will result in additional costs for product providers that will need to be passed on to clients.

Consultation and Regulation Impact Statement

As we have fundamentally disagreed with what the Government has proposed and put forward an alternative more streamlined, efficient and flexible model, we are concerned about the value of participating in consultation with ASIC on a proposal that ultimately we hope will be fundamentally changed. We would like to think that the final outcome would be very different to what was first

proposed and that this therefore impacts the relevance of the CP 329 consultation process. We accept that ASIC needed to undertake this consultation, at this time, given the Governments previous unrealistic expectation that this legislation would start from 1 July 2020. That timeframe was highly problematic, and as a result has led to a suboptimal approach. We would not like to have a situation where ASIC felt that it was not necessary to undertake further consultation in the case that the final legislation was materially different to what was originally proposed.

We note the statement in paragraph 83 about what the Government said in the draft Explanatory Memorandum, that the Royal Commission was a process equivalent to a Regulation Impact Statement. In our view, this statement by the Government is deeply flawed. The Royal Commission failed to comply with paragraph (k) of their own terms of reference, which required them to "have regard to the implications of any changes to laws, that you propose to recommend, for the economy generally, for access to and the cost of financial services for consumers, for competition in the financial sector and for financial system stability". The fact that this was not done, or at least not addressed in the final report, is an undisputable fact. The completion of an Regulation Impact Statement is a critical stage in this reform, and a suggestion by the Government that it is not required, is simply disrespectful to the financial advice profession and the hundreds of thousands of impacted financial advice clients, who will be detrimentally impacted. We equally suggest that ASIC should comply with the best practice discipline of completing a Regulation Impact Statement.

The Impact of Coronavirus on the Solution

The Australian society has changed significantly over the last five weeks as all sectors of the economy and the community have come to terms with the impact of the coronavirus crisis and the requirement for self-isolation and social distancing. This is most strongly applicable for older Australians, who are considered to be at higher risk. The reality is that, on average, financial advice clients are much older than the population as a whole, and self-isolation is much more important. It is also the case that older Australians, in general, are less familiar with home office technology and concepts like electronic signatures or document scanning. The coronavirus crisis has fundamentally challenged many of the constructs of the current model, including practices built around wet signatures or even electronic signatures. With the expectation that this crisis could last for some time, and could in fact be ongoing, we do not want to be tied into an inflexible model that is unlikely to work in this new context.

AFA's Response to Questions Raised in the Consultation Paper

B1Q1. Do you agree with our proposal? If not, why not?

As set out above, we strongly disagree with what the Government have proposed, and we therefore also disagree with what ASIC have proposed. We have proposed a different model for consent forms that are to be provided to product providers. We do not believe that all the additional detail that has been proposed for the client consent form is necessary. We suggest that the schedule for each product provider should be limited to the client name, the adviser/licensee name and details, the financial product accounts and the fee details. In our view the rest is not necessary.

Our specific feedback is as follows:

- There is no need to explain why the adviser is seeking the client's consent. This is an obvious part of the annual renewal process.
- There is no benefit in including services in the document that goes to the product provider. They have no knowledge of the arrangement or ability to confirm that these services have been delivered.
- There is no obvious purpose in including in the consent form for product providers ,the proportion of fees to be deducted from each account. How might this be impacted if the

client is also paying fees that are being taken from a product that is held with another product provider? This is simply adding complexity, for no obvious benefit.

- In terms of item 8 on the implications of fees, we would expect that this would occur in very limited circumstances, and could be treated as a requirement that only needs to be addressed where it is applicable. This should not need to be in the client consent form.
- We understand why ASIC would like to see a clear message on when the consent ends, however it is impossible to specify that date in advance. Section 962V(b) explains that consent comes to an end 30 days after the renewal period. The renewal period, however, starts on the day that the FDS and Opt-in notice is provided. This 30 day renewal period can commence at any point up until 60 days after the anniversary of the renewal. The financial adviser cannot predict this date more than 12 months in advance. This timeline is simply too complex to explain in a succinct manner in a product provider consent form.
- The statement about withdrawal from the agreement could be a part of the overall fee agreement, rather than needing to be included in what is sent to each product provider.
- We suggest that there is inadequate consideration to other forms of electronic approval. Not everyone has access to an electronic signature solution.

Item 6 in Table 2 refers to "beginning on a day within 30 days after the document". We are unsure as to the reasons for this reference to "within 30 days". We would assume that the timing of fees could be a matter for negotiation between the client and the adviser, and if they agree for the payment to come out on a quarterly basis in arrears, then this should be fine.

B1Q2. Should the legislative instrument require the written consent to include information about the services that the member will be entitled to receive under the arrangement? Will this lead to unnecessary duplication given the consent will often be sought at the same time that an ongoing fee arrangement is being entered into or a fee disclosure statement is given?

As stated above, we do not agree with the inclusion of information on the services to be provided, as this is not relevant to product providers and will be unnecessarily complicated where there are multiple accounts with multiple product providers. This information should be included in the primary ongoing fee agreement with the client, not in the product provider consent form. Otherwise there will be an excessive level of duplication across the different forms. This is one more reason why there should only need to be one document for the client to approve and sign.

B1Q3. Should the legislative instrument require any further information to be disclosed in the written consent? If so, what other information should be required?

No, we maintain that a written consent form that is to be provided to product providers should be kept as simple as possible and produced in a manner that enables automatic electronic distribution to product providers.

B1Q4. Should the legislative instrument take a more prescriptive approach to specifying the information required in the written consent? If applicable, please explain where further prescription would help. For example, should we prescribe a maximum length for the consent form?

We are of the view that these product provider consent documents should be kept short, clear and concise. As stated above, we would like to see a model where the provision of these forms to the product providers can be done in an automated electronic fashion, and therefore we believe that to enable this to happen, a standard protocol needs to be developed. This is an important exercise to undertake, as ultimately it will significantly reduce the cost of producing these consent forms and thus reduce the cost of providing financial advice, for the benefit of clients.

There is no apparent benefit or purpose in stipulating a maximum length, however the principle of clear, concise and effective should apply.

B1Q5. Will the requirement for written consent cause practical problems for clients or advisers if a fee is to be deducted from accounts with different third party account providers (i.e. product issuers)? If so, please outline these problems and set out any views on how ASIC or industry can address these problems.

As discussed above we believe that this will result in practical problems. Where a client has multiple accounts with multiple product providers, it will not be possible to include the fees for different product providers on the same consent form. This would be a privacy breach, as product providers should not be able to find out what other accounts a client has. It will also make it difficult, where an adviser might need to split services provided between different product provider consent forms.

We believe that this can be best addressed by having one agreement document with separate schedules for each product provider that contain the minimum information on the product accounts and fee arrangements that apply to that product provider.

We would further suggest that product providers will not know when client consent ends (due to the time between the anniversary date and the issue of the FDS/Opt-in notice), so will not know when fees need to be turned off and other than with respect to super trustees, they do not actually have any responsibility to do anything with these consent forms.

All of the points listed above, impact this written consent process, as the adviser really acts as the conduit between the parties. To address these issues, documentation needs to be streamlined and there needs to be effective and flexible means of getting this consent from the client and then communicating this to a product provider. Therefore, having one standard form, which is universally accepted across all product providers, makes more sense in terms of ensuring the client only needing to sign one form (rather than 3 or more). Ideally, we need to be working towards an automated, electronic solution.

B1Q6. Do you think worked examples of the written consent would be helpful? If so, what examples do you think should be provided?

As noted above, we believe ASIC should provide a standard template to the industry for consultation and with industry agreement, a single template should be implemented across the industry. This will facilitate moving towards an automated, electronic solution.

B1Q7. Do you think ASIC should provide other guidance to help fee recipients comply with the legislative instrument? If so, what guidance?

We support additional guidance, however this will need to await the finalisation of the legislation, and the resolution of other issues as addressed above.

B2Q1. Do you agree with our proposal? If not, why not?

Consultation Paper 329 has not set out what ASIC understands a non-ongoing fee to be, which we believe is important in explaining the objective and the outcome of this obligation. We are also somewhat confused by the apparent message that this Legislative Instrument and the consent form for non-ongoing fee arrangements is focussed on the obligations that apply to the superannuation fund trustees. It is certainly our understanding that this obligation, whilst relevant to the superannuation fund trustee, is in the hands of the financial adviser to meet. To illustrate this, Table 3 does not even include the name or details of the financial adviser. We wonder whether ASIC has

put a focus on the approval of fees for the provision of financial advice where it is provided directly by the super fund.

In our response to the Government on the exposure draft legislation, we suggested that the consent form for non-ongoing fee arrangements should reflect the requirements for consent forms for ongoing fee arrangements, so that there was a standardised approach applied to both. We saw it as problematic to have different requirements that would apply in different situations.

All the points that we have made above with respect to consent forms for ongoing fee arrangements are in our view equally applicable for non-ongoing fees paid through superannuation funds. We would once again argue that these consent forms should be a schedule to the agreement with the client and that they should contain minimalist information. Superannuation fund trustees do not need to have visibility of the specific services that have been agreed between the client and the financial adviser, as they are not in a position to determine whether these services are being provided. If superannuation fund trustees need to take action to confirm the delivery of agreed services, then we think this should be done on the basis of a sample, not a uniform approach to be applied across all members.

B2Q2. Should the legislative instrument require any further information to be disclosed in the member consent form?

No. We already believe that what ASIC has proposed includes unnecessary information and too much detail. The one thing that is obviously missing from this form, is the name of the licensee and the financial adviser.

B2Q3. Should the legislative instrument take a more prescriptive approach to specifying the information required in the member consent form? If applicable, please explain where further prescription would help. For example, should we prescribe a maximum length for the consent form?

In relation to product provider consent, we are of the strong view that there should be a standard template that is used across the financial advice sector and financial services industry. This will allow for standardisation across the industry and enable the development of automated, electronic solutions that will streamline this process and reduce the cost of compliance going forward. As stated above, it is particularly important that the requirements are as streamlined and simple as possible to make the process efficient, clear and concise for the benefit of clients and their adviser.

B2Q4. Do you think worked examples of the written consent would be helpful? If so, what examples do you think should be provided?

As noted above, we believe ASIC should provide a standard template to the industry for consultation, and with industry agreement, a single template should be implemented across the sector, that will facilitate moving towards an automated, electronic solution.

B2Q5. Do you think ASIC should provide other guidance to help superannuation trustees comply with the legislative instrument? If so, what guidance?

We believe ASIC should provide guidance to both superannuation fund trustees and to financial advisers on how to comply with the obligations of the legislation and this legislative instrument. We appreciate that any additional guidance will need to await the finalisation of the legislation, and the resolution of other issues as addressed above.

B3Q1. Do you agree with our proposal? If not, why not?

The AFA supports addressing this Royal Commission recommendation about disclosing lack of independence through making changes to the content of the Financial Services Guide. This is an obligation to explain why an adviser does not comply with the requirements of Section 923A for the use of the terms "independent", "impartial" and "unbiased". The AFA has for a long time argued that the tests included in Section 923A should be subject to review, and we continue to argue that this should be the case. Section 923A was drafted some time back, before the Future of Financial Advice reforms and before the Life Insurance Framework reforms. As an example, life insurance commissions are subject to a cap that is applied consistently across the life insurance industry. Broadly speaking, financial advisers are not paid more, based upon choosing one life insurer above another life insurer. We understand that the receipt of a commission is considered an automatic exclusion under section 923A, however this is no longer a black and white consideration. The risk is that consumers could be led to assume that anyone who does not meet the requirements of Section 923A is providing lower quality advice. We are therefore uncomfortable with the very blunt heading of "Not Independent". This implies a level of black and white, based upon the rules in Section 923A, that is not necessarily reflected in the reality.

We had expected that ASIC would provide guidance on how financial advisers should address this obligation and how they should explain lack of independence in an FSG across a range of issues, including:

- Vertical integration,
- Receipt of life insurance commissions,
- The receipt of non-monetary benefits,
- The attendance at product provider organised training events, and
- Restrictions on approved product lists.

We also expected that this guidance would include consideration of how to address benefits that were received at the adviser level and also only at the licensee level. In addition, we had assumed that this would address the questions that advisers necessarily need to ask their licensees as part of the preparation of the FSG.

We are also very conscious that there are a range of benefits that will disappear over the course of the next nine months as grandfathered commissions and volume bonuses cease. We therefore support a deferral of the commencement of this legislation until after the ban on grandfathered conflicted remuneration comes into force. In the context of the coronavirus crisis, it would now seem more likely that this will in fact be the case.

Ultimately, in our view it is critical that ASIC provide adequate guidance to ensure that financial advisers do not find themselves inadvertently in breach of their obligations. There has been no guidance on how to respond to this new obligation, only very high-level expectations on where this disclosure should be included in the FSG. This is certainly not sufficient to ensure that financial advisers are able to comply with this new requirement.

We do not oppose the requirements that the lack of independence disclosure be included in a prominent position, not be in a smaller font and not be a footnote.

B3Q2. Should the statement appear on the first substantive page of the FSG or Supplementary FSG in all cases? If not, how should we ensure that the statement is 'prominent' in the manner recommended by the Royal Commission?

We understand the objective of ensuring the disclosure on lack of independence is prominent, however we feel that mandating that it be on the first substantive page may unnecessarily impact the way that some licensees design their FSGs. It is also somewhat inconsistent with the lack of expectations on the positioning of other inclusions in the FSG. It is important that the content of an FSG flows in a meaningful and sensible fashion. When you look at the way an FSG is presented, in practice, it is typically done in sections, as indicated below:

- Who is the AFSL and what is the relationship between them and the adviser?
- What services does the AFSL provide?
- Adviser profile – covering the services that the adviser provides
- How are advisers paid?
- Protecting your privacy
- What to do in the case of a compliant or issue

We would suggest that the lack of independence disclosure should be included in the overview section about the AFSL, which would generally be the first or second page of an FSG. This would fit in with the logical flow of the document. A requirement to ensure that it is included in either the first or second substantive page, might address complications that could arise with how some licensees have designed their FSGs.

B3Q3. Will the statement be prominent to clients when the FSG or Supplementary FSG is provided in an electronic form? If not, should different requirements apply to electronic FSGs and Supplementary FSGs?

We do not consider the difference between a hardcopy FSG and an electronic version to be a significant factor. They are typically provided to the client and discussed to some extent in the first meeting, or when they are updated at the next opportunity. The extent to which it is clearly understood depends upon whether it is discussed during the meeting and whether the client actually reads the document. We believe having the lack of independence disclosure in the 'about you' or 'about the company' section at the start of the FSG makes it sufficiently clear.

Generally speaking, an adviser who sends an FSG to a client electronically, will then take the client through the FSG at the initial meeting or the changes to the FSG at the next review meeting, to ensure they have a reasonable understanding.

B3Q4. Should the legislative instrument take a more prescriptive approach to specifying the information required in the statement? If so, why?

As discussed above, we would like to see more guidance on what needs to be included and how it should be addressed in the FSG. At this stage, we are not certain on whether this is best achieved on a principles or prescriptive basis. Our initial preference, however, would be a principles based approach, however this is dependent upon the provision of clear guidance.

B3Q5. Is there a risk that firms will be able to undermine the intent of the obligation? If so, how should ASIC address this risk?

It is our view that achieving the intent of the obligation will depend upon the clarity of the requirements. Further guidance from ASIC will be critical in achieving this objective. We would expect that in the context of clear guidance on what is required, there is little room for firms to

undermine the intent of the obligations without breaching their legal obligations. It is more likely that the intent could be undermined by what is said verbally to the client, rather than what is included in the lack of independence disclosure in the FSG.

As mentioned above, a clearer understanding of the requirements of Section 923A would be beneficial. We think that a review of this Section would be an important exercise to ensure that it is achieving what it is intending to do, rather than Section 923A being used as a vehicle to push certain business models over other models. There remains a risk of misunderstanding, and we believe that more work needs to be done to ensure that this can be avoided.

B3Q6. Do you think ASIC should provide guidance to help a providing entity comply with the legislative instrument? If so, what guidance?

Yes, as outlined above, we believe that guidance is critical. We continue to believe that Section 923A is not achieving the intended objective and that the rules for this Section are being read as a black and white measure, when the reality is that there are shades of grey in many of the factors. We strongly support guidance to help licensees and financial advisers to understand their obligations and to implement this requirement in a broadly consistent and sensible fashion.

C1Q1. Do you agree with our proposal? If not, why not?

We support the provision of additional guidance on ongoing fee arrangements. We recognise that ASIC Report 636 raised a number of important issues. We feel that this guidance could address a range of issues related to ongoing fee arrangements, and we look forward to the opportunity to participate in the consultation as part of the development of this guidance.

We believe that this presents an important opportunity to address a range of issues related to ongoing fee arrangements, and not necessarily those limited to what was covered in ASIC Report 636 on FDS and Opt-in compliance. The implementation of Royal Commission recommendation 2.1 on Annual Renewal and Payment, will also present another key trigger for where there is a need for further guidance. We are conscious that ASIC RG 245 on FDSs already exists, however it does not address a number of issues that have emerged in recent years, and there is no current guidance on the Opt-in obligation. Guidance will also be required on client consent forms.

C1Q2. Are there any additional areas relating to ongoing fee arrangements where we could provide guidance?

Depending upon the agreed scope of the proposed new guidance document, we would suggest that other important issues that could be addressed are:

- An explanation of how agreed services should be presented in an ongoing fee agreement and the requirements for the demonstration of the delivery of those services.
- How an adviser should respond when a client is unavailable to meet, but still wishes to continue an ongoing fee arrangement.
- Consideration of when agreed services must be delivered.
- The preparation of FDSs based upon the fee information included in financial planning software and the implications of timing differences and GST/RITC differences.

Concluding Remarks

The AFA is very conscious that the Government timetable for the commencement of Royal Commission recommendations 2.1 and 3.3 (1 July 2020) forced ASIC to undertake consultation on the basis of draft legislation that had not yet been fully through the consultation phase, or been introduced into the Parliament. This timing for commencement was never realistic, however in the

context of the coronavirus crisis, it is now simply impossible. We have proposed major changes to what has been proposed by the Government in the draft legislation and hope that the Government will give due consideration to these changes. Our proposal will make the renewal process much more consumer focused, more efficient and less costly. There is a great deal of room for improvement in the existing process and in what the Government has proposed. Unless these issues are addressed, a complex annual renewal process will ultimately lead to a significant increase in the cost of financial advice, increasing the risk of making it inaccessible and unaffordable for everyday Australians.

We have provided feedback to the questions raised in this consultation paper. We are, however, seeking for a much simpler, streamlined solution to be developed for client consent forms. We seek detailed guidance on both client consent forms and the lack of independence disclosure.

The AFA welcomes further consultation with ASIC should clarification of anything in this submission be required. Please contact us on 02 9267 4003.

Yours sincerely,

Philip Kewin
Chief Executive Officer
Association of Financial Advisers Ltd