8 April 2020

Australian Securities and Investment Commission
GPO Box 9827
Sydney NSW 2000

Email: feeconsentsandindependence@asic.gov.au

Dear Sir/Madam,

The SMSF Association is unfortunately unable to devote resources to produce a detailed submission on Consultation Paper 329: Implementing the Royal Commission recommendations: Advice fee consents and independence disclosure.

However, we write a short note which details the position of the SMSF Association which represents the SMSF sector and the professionals who advise them. We also attach our submission to Treasury **(See Appendix 1)** which provides further information on the SMSF Association's general position.

We support the need to improve standards of behaviour and service in the financial services industry and recognise the issues highlighted and reflected in the recommendations made by Commissioner Hayne.

We urge caution in rushing to implement the recommendations without regard to industry consensus where there is evidence that implementation could be amended to improve consumer protections, especially as individuals, industry and government are focussed on navigating COVID-19.

Advice fee consents

Possible flexibility provisions that could be included Australian Securities and Investments Commission (ASIC) guidance instrument include:

- Advisers should have the opportunity to consolidate the required documents where appropriate or provide other approved appropriate client engagement documents which reflect the principles in the recommendation.
- Commencement should begin at 1 January 2021 to provide licensees and advisers an appropriate transition time and retain their existing review arrangements

Disclosure of lack of Independence

We believe it is extremely important that ASIC's guidance ensure that this disclosure is meaningful, practical and not onerous. A disclosure that is easy to be worked around through a manipulation of licensee policy or remuneration will not meet the policy intent of the Financial Services Royal Commission recommendation. It should include:

- Clear, effective and meaningful disclosure which describes how the adviser is not independent. This may be from being indirectly restricted in relation to the financial products

they offer or from conflicts of interest arising from a connection with an issuer of financial products
    - A blanket disclosure of lack of independence will not provide meaningful disclosure to consumers and could encourage licensees to use work arounds to allow their advisers to claim they are independent when they still may be 'aligned'.
    - We would prefer open and meaningful disclosure which explains that an adviser is aligned with certain product offerings as highlighted earlier in our Treasury submission. This allows consumers to understand an adviser can still be acting in their best interests and not be fully independent.

- Disclosure requirements that ensure that the majority of advisers are not declared to have a lack of independence due to the fact they receive legally compliant commissions which do not encourage use of one product over the other. For example, this would include life insurance commissions received by an adviser which do not encourage use of one product over another.

We are happy to discuss elements of the consultation at any time and if you have any questions please do not hesitate in contacting us.

Yours sincerely,

John Maroney
CEO
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have over $700 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.

Appendix 1

2 March 2020

Manager
Financial Services Reform Taskforce
Treasury
Langton Cres
Parkes ACT 2600

Email: FSRCconsultations@treasury.gov.au

Dear Sir/Madam,

SMSF Association submission on the Financial Services Royal Commission draft legislation

The SMSF Association welcomes the opportunity to make a submission on the draft legislation implementing the Financial Services Royal Commission recommendations.

We support the need to improve standards of behaviour and service in the financial services industry and recognise the issues highlighted and reflected in the recommendations made by Commissioner Hayne. However, we urge caution in rushing to implement the recommendations without regard to industry consensus where there is evidence that the draft legislation could be amended to improve consumer protections.

We have provided comment on the recommendations relevant to the SMSF sector which encompasses a significant number of financial professionals, SMSF trustees and superannuation assets. We seek to provide input regarding implementation of these recommendations to ensure they are as effective as possible in achieving their original intent.

The SMSF Association has also consulted and engaged with other key professional bodies and we support the recommendations made by these bodies where they are also reflected in this submission.

Recommendations	Included
Recommendations 2.1 and 2.2 - Ongoing fee arrangements and disclosure of lack of independence	Yes
Recommendation 3.4 and 4.1 - No hawking of superannuation and insurance products	Yes
Recommendations 3.2 and 3.3 - Advice fees in superannuation	Yes
Recommendations 1.6, 2.7, 2.8, 2.9 and 7.2 - Strengthening breach reporting	Yes
Recommendation 3.8, 6.3, 6.4 and 6.5 - Superannuation regulator roles	Yes

Recommendation 1.15 - Enforceability of financial services industry codes	Yes
Recommendation 6.14 - Financial Regulator Assessment Authority	Yes
Additional commitment in response to recommendation 4.2 - restricting use of the term 'Insurance' and 'Insurer'	Yes
Recommendation 4.5 - Duty to take reasonable care not to make a misrepresentation to an insurer	Yes
Recommendation 3.1- Trustees of Registrable Superannuation Entities (RSE) should hold no other role or office	No
Recommendation 4.3 - Deferred sales model for add-on insurance	No
Recommendation 4.4 - Cap on vehicle dealer commissions	No
Recommendation 4.6 - Limiting avoidance of life insurance contracts	No
Additional commitment in response to recommendation 7.2 – ASIC directions power	No

Ongoing fee arrangements and disclosure of lack of independence

- draft legislation to insert new specific obligations in the *Corporations Act 2001* (Corporations Act) in relation to fee recipients (a financial services licensee or authorised representative) providing personal financial product advice to retail clients under ongoing fee arrangements; and
- draft regulations relating to the new record-keeping requirements (recommendation 2.1); and
- draft legislation amending the Corporations Act to require entities (a financial services licensee or authorised representative) who are authorised to provide personal advice to a retail client to disclose in writing to the client where they are not independent and why that is so (recommendation 2.2).

Ongoing fee arrangements

The SMSF Association supports ongoing fee arrangements. A successful financial advice profession must ensure that individuals who seek and obtain advice are not charged ongoing fees for services that are not provided or they have not authorised.

As highlighted by the Financial Services Royal Commission, fees were deducted automatically from clients' accounts, in many cases without the licensee asking, or knowing, whether services had been provided or if services could have even been delivered at all. In cases where there was no adviser, the licensee kept the fees.

The premise that ongoing fee arrangements must be renewed annually, in writing and at the client's authority is therefore supported.

However, this must be conducted on a practical basis from the both the perspective of the adviser and the consumer. The SMSF Association has concerns that the draft legislation creates a process that is too rigid to effectively promote the provision of efficient and affordable advice.

The SMSF sector is well built for annual arrangements as most SMSF members seek advice from their trusted licensed adviser at least once a year. In doing so, they manage this process in a flexible way. Clients who seek ongoing advice expect a level of flexibility in ongoing advice arrangements.

For example, it is common for clients to reschedule meetings because of an unexpected event, losing and tracking important documents, or be away travelling (especially retired SMSF trustees). Unintentionally, clients fail to periodically stick to a rigid structure and unintentionally may fail to meet the rigid opt-in process outlined in the draft legislation.

A rigid process also has the negative consequence of increased administration from advisers who must chase and track their client's renewal intensely. Not only will this increase the fees charged to clients but also reduces the amount of time advisers are able to spend on providing quality financial advice.

We believe the proposed 30-day period post a renewal date is extremely limited and too short, particularly when it may be common for many clients to be bundled near the end of a financial year or at a particular time. In addition, the proposal now results in three distinct documents and timing points in addition to the existing client service agreement. Financial advisers will now need to prepare an agreement, a Fee Disclosure Schedule (FDS), an Opt-in notice and one or more consent forms.

We also note the potential grey area with regards to how fees are charged in-between the 60 day deadline to issue a FDS and renewal notice and then the 30 day deadline for signing. This creates a level of unnecessary complexity to the process.

Despite our support for annual opt-ins and improved consumer outcomes, we believe a level of flexibility should be included in the current draft legislation for ongoing fee arrangements. Generally, both parties to a fee arrangement are acting in good faith and we expect the legislation to reflect this.

We suggest that licensees should have the flexibility to comply with the obligations, provided they meet all best practice requirements, a focus on the best interests for their client and the client is clearly informed and agrees to the fees as recommended in the Financial Services Royal Commission recommendation.

Possible flexibility provisions that could be included in the legislation or an Australian Securities and Investments Commission (ASIC) guidance instrument include:

- Clients should have 90 days prior and post a 'set agreed renewal date' to renew for 12 months post the 'set agreed renewal date'.
    - This approach achieves a genuine 12 month renewal.
    - It also provides flexibility for the client and adviser to sign anywhere between the 9th and 15th month.
    - As long as signed consent is provided in this period, the date of signing does not affect the renewal date.
- Advisers should have the opportunity to consolidate the required documents where appropriate or provide other approved appropriate client engagement documents which reflect the principles in the recommendation.
- Commencement should begin at 1 January 2021 to provide licensees and advisers an appropriate transition time and retain their existing review arrangements.

Disclosure of lack of Independence

The SMSF Association supports the fundamental principle behind the disclosure of independence. We believe consumers should be able to fully comprehend the services their financial adviser is offering them and how they are paid.

We believe it is extremely important that legislation and ASIC's legislative instrument ensure that this disclosure is meaningful, practical and not onerous. A disclosure that is easy to be worked around through a manipulation of licensee policy or remuneration will not meet the policy intent of the Financial Services Royal Commission recommendation.

Currently, the rise of vertically integrated firms has caused many advisers to be aligned with a financial institution that develops and sells financial products to consumers. Vertical integration of selling financial products and the provision of financial advice can result in a firm's advice arm being used to distribute its financial products. While these products may be the best fit for a consumer, the comingling of product sales and financial advice can impair the independence of advice being provided to consumers.

The SMSF Association does not contend that vertical integration of financial services is inappropriate or should be prevented. In fact, the benefit of economics of scale and capacity to deal with consumer problems should be acknowledged. However, we believe that there could be some improvements to the current financial advice environment to protect consumers and promote high quality, independent financial advice. We believe in enhanced transparency of vertical integration ownership structure.

The SMSF Association believes that improved disclosure requirements would assist consumers in understanding whether they are receiving advice which is provided on an independent basis or whether it is provided on the basis of an approved product list or through a vertically integrated firm. Mandatory disclosure as to whether advice is independent would allow consumers to be more informed in deciding whether the financial advice they are receiving is fit for purpose and offers them good value. Providing consumers with this information will also allow them to judge whether the information or recommendations made to them are in their best interest and will assist them achieve their financial goals.

During the Productivity Commission's 'Financial System Round Table', ASIC research highlighted that one major banked owned 100% of three large aggregators which accounted for 30% of mortgage brokers in Australia. These aggregators directed 22% of home loans to that bank, yet the bank's overall market share was only 13.2%. Consumers may think they are using wealth management and mortgage broker services that are independent when that might not be the case. The mixing of product distribution and financial advice can impair the independence of advice that is provided to consumers, whilst the corporate strategy behind vertical integration could lead to product bias and potential conflicts of interest. In this context, multi-brand strategies can disguise the level of consumer choice and competition that exists.

Transparency needs to be clearer, in order for consumers to have greater information and choice about whom they are dealing with. If a financial planner is associated with a particular financial services organisation such as a large bank, then clients can expect to be recommended products manufactured by this particular financial service organisation. It gives consumers choice and

knowledge about who they are dealing with. Specifically, in the SMSF market, most trustees are very engaged, informed and understand the industry. Problems primarily arise when there is no competition in the market and choice cannot easily be exercised.

The draft legislation also requires to ASIC to issue a legislative instrument to determine the requirements for the disclosure of independence statement.

The SMSF Association recommends the draft legislation and ASIC Legislative instrument should require:

- The lack of independence disclosure statement in the FSG should commence six months after the ASIC Legislative Instrument comes into effect. We believe effective implementation is dependent upon this instrument being developed and issued and advisers need appropriate time to reflect this change.
- Clear, effective and meaningful disclosure which describes how the adviser is not independent. This may be from being indirectly restricted in relation to the financial products they offer or from conflicts of interest arising from a connection with an issuer of financial products
    - A blanket disclosure of lack of independence will not provide meaningful disclosure to consumers and could encourage licensees to use work arounds to allow their advisers to claim they are independent when they still may be 'aligned'.
    - We would prefer open and meaningful disclosure which explains that an adviser is aligned with certain product offerings as highlighted earlier in the submission. This allows consumers to understand an adviser can still be acting in their best interests and not be fully independent.
- Disclosure requirements that ensure that the majority of advisers are not declared to have a lack of independence due to the fact they receive legally compliant commissions which do not encourage use of one product over the other. For example, this would include life insurance commissions received by an adviser which do not encourage use of one product over another.

No hawking of financial products

- Recommendation 3.4 prohibits the hawking of superannuation products.
- Recommendation 4.1 prohibits the hawking of insurance products.

The SMSF Association strongly supports the recommendations relating to the prohibition of hawking of financial products. Financial products should not be treated as commodities in a 'sales culture'. They should only be offered when an individual is seeking advice or has generally inquired about products which will benefit their financial wellbeing.

We strongly support the draft legislation's exclusion of personal financial advice. Individuals who have sought financial advice are protected by the fact that their adviser must act in their best interests.

The balance between ensuring SMSFs are an option and prohibiting unsolicited SMSF property spruiking

The prohibition of hawking has the potential to be an extremely effective measure to prohibit property spruikers which aid SMSF one-stop property shops. We would support draft legislation that limits the ability for property spruikers to hawk superannuation products but still provides the ability for financial professionals to provide SMSFs as an option when appropriate.

Inappropriate advice provided by 'one-stop property shops' and other unscrupulous advisers is an area of fundamental concern to the SMSF Association. We believe the prevalence of this is low across SMSF sector, but the detrimental impact to any one individual SMSF member can be very significant.

The 'one-stop property shop' advice model typically occurs when a firm or property spruiker will source a property, organise financing services and a client's SMSF accounting and audit either for a commission or for ongoing fees. These businesses have inherent conflicts of interest, lack of specialised advice and SMSF skills, and take advantage of customers with limited knowledge of SMSFs.

Property seminars are the main source of this unscrupulous behaviour. Property agents issue emails to people who have visited one of their displays or responded to an advertisement. Properties are floated as an investment and superannuation gearing as the method to acquire. Typically, a financial adviser may be in attendance to provide the superannuation advice.

Noting the exclusion of financial advice, we believe the legislation and explanatory memorandum should be express enough to prohibit the link between a client inquiring about property and the offer of a superannuation product to facilitate that. This is clearly a 'hawking' procedure. We think it is clear that an attendee at a property seminar would not expect to be offered a superannuation product and therefore the offer a superannuation product is made because of an unsolicited contact relating to superannuation. An example of this behaviour could be included in the Explanatory Memorandum (EM).

However, as highlighted, draft legislation must also allow an individual to be informed about SMSFs when they are inquiring about superannuation and retirement products.

While we strongly advocate that SMSFs are not for everyone, SMSFs play a key competitive role in superannuation. Raising barriers to SMSF establishment would be detrimental to overall outcomes for consumers. A key competitive pressure that SMSFs contribute within the superannuation industry is providing flexibility and adaptability to cater for unique circumstances. We believe individuals should be given the ability to engage and manage their retirement savings in ways that suit their retirement goals.

This is particularly important not only to licensed advisers but the many accountants who are the trusted advisers of the SMSF sector. We believe it is appropriate for accountants to provide information regarding SMSFs and superannuation products as per their 'traditional' accountant services and exempt SMSF financial services as legally allowed under ASIC information sheet 216. It is our opinion that these services and the general client-accountant relationship is not unsolicited contact.

Therefore, we encourage the legislation and EM to explain these scenarios as clearly as possible through guidance and examples.

Advice fees in superannuation

- Draft legislation to remove a superannuation trustee's capacity to charge advice fees from MySuper products. Superannuation trustees would still be permitted to charge fees in relation to intra-fund advice as administration fees.
- Draft legislation to remove the capacity of a superannuation trustee to charge advice fees to a member (other than fees for intra-fund advice) unless certain conditions are satisfied. For ongoing fee arrangements, the new conditions would include the new requirements outlined in Recommendation 2.1 (annual renewal, identification of services that will be provided and consent to the charging of fees).

The SMSF Association supports advice fees only being charged from superannuation when they relate specifically to superannuation advice and when the client has expressly authorised that advice and expense.

The consent forms and process used by the advice industry (both advisers and superannuation trustees) should be a simple and consistent as possible so consumers understand the disclosure and compliance isn't significant. Our position is highlighted in our comments relating to recommendation 2.1.

However, we have concerns with potential adverse outcomes for individuals that have a MySuper product. The Financial Services Royal Commission recommended that if a MySuper member sought financial advice about their superannuation, that these members should pay for that advice directly. The draft legislation implements this recommendation.

Most likely at the period of retirement or approaching retirement, Australians will become engaged with their superannuation and seek a form of financial advice. Superannuation members may not know or care if their accumulation account has been in a MySuper product or other superannuation product. However, they may seek advice on (which may by beyond intra-fund advice):

- How and when they can access their superannuation.
- Integration with the age pension.
- Consolidation of superannuation funds.
- Whether their current superannuation product is the most appropriate.
- Contribution options.

We believe this recommendation may:

- Create incentives to provide advice from advisers to move out of MySuper so individuals can pay for superannuation financial advice inside their new superannuation account.
- Exacerbate advice issues because individuals will not want to pay for financial advice, especially when it can be unaffordable, from their own pocket.

This issue is not typically of concern to the SMSF sector who have members who are engaged with their superannuation. However, unmet advice needs due to regulatory complexity and affordability, particularly regarding retirement, is an issue for the entire advice framework. Treasury should consider this in any potential safeguard that may be considered to mitigate the risks highlighted above.

We understand a potential solution flagged to mitigate these risks is to allow one-off 'retirement advice' to be paid through MySuper. This may ensure that there are less incentives for an adviser to move a client out of a MySuper amount. Treasury could consider a safeguard or best practice guideline that if a financial adviser demonstrates that it is in the client's best interest for a consumer to keep their current MySuper product and pay for that advice from MySuper product rather than personally or from another superannuation product then the prohibition will not apply. For example, this may be because the costs of rolling over superannuation products are not beneficial, the consumer gains greater tax and financial benefit paying from advice in the superannuation system, or their current MySuper product is performing well.

However, we would be concerned this adds another area of complexity and carve out to the already complicated advice framework. In addition, this would become a quasi-form of agreed service with agreed fees similar to the consumer requirements outlined in recommendation 2.1. As highlighted by many submissions to the Retirement Income Review, the retirement advice framework needs review to ensure the ageing Australian population can access affordable and efficient advice. [1]

The SMSF Association does not support a blanket acceptance of this recommendation because we are not convinced it will increase consumer outcomes and protections. We believe if a member wishes to seek advice (which must be in the best interest of the member) about the types of issues raised above, these can be charged from any superannuation account where the member provides express consent and it is related to their retirement and superannuation.

We also note that the sole purpose test is currently under review and improved clarity is being sought. We would support a review of the sole purpose test ensuring that if an individual seeks advice that is sufficiently relevant to all their retirement savings and issues, the advice framework should support an affordable and efficient way of obtaining and paying for this advice.

[1] For example, see section 1.7 on Financial Advice in Rice Warner's Submission to the Retirement Income Review, https://www.ricewarner.com/wp-content/uploads/2020/02/Rice-Warner-Submission-to-Retirement-Income-Review.pdf

Strengthening breach reporting

- Recommendations 2.8 and 7.2 will strengthen breach reporting requirements for Australian financial services licensees.
- Recommendation 2.7 will establish a compulsory scheme for checking references for prospective financial advisers. This is modelled on the existing ABA Reference Checking Protocol.
- Recommendation 2.9 will require Australian financial services licensees to investigate misconduct by financial advisers and appropriately remediate clients affected by the misconduct.
- Recommendation 1.6 will apply the new obligations under recommendations 2.7, 2.8, 2.9 and 7.2 to Australian credit licensees in relation to conduct by mortgage brokers. This will also introduce breach reporting requirements for Australian credit licensees more generally.

The SMSF Association welcomes the strengthening of breach reporting. We believe a robust professional discipline model is essential for a financial advice profession.

We note the establishment of a single disciplinary body as per recommendation 2.10 is an essential component of breach reporting and should be considered with regards to recommendations 2.7, 2.8, and 2.9. The draft legislation which implements breach reporting must work in conjunction with this body in a simple and streamlined way to provide necessary information.

Reference checking

We support licensees being subject to reference checking and information sharing regarding a former, current or prospective employee. This is a positive reform and we believe the draft legislation implements the intent of the Financial Services Royal Commission recommendation.

As recommended by other key professional bodies, we are in agreement with the following proposals:

- Protections for financial advisers where a negative reference is provided that is unfounded, not objective nor based on fact.
    - An avenue for recourse should be considered for representatives who notify their current licensee of their intent to leave the organisation for the purposes of the reference checking requirements, including against the sharing of vexatious information and repercussions for the individual.
- One-off funding provided by the Government to ASIC to make amendments to the existing Professional Register for licensees, to include nominated contact for reference checking.
    - Flexibility should be given to the means by which licensees make available relevant information about the 'designated reference checker'. Funding could be provided for ASIC to make a register available if it is currently outside their capabilities. ASIC should be responsible for the 'designated reference checker' register as it is imperative that the Information Sharing and Reference Checking Protocol works well and consistently in order to deliver extra protection for consumers.

Reporting requirements to regulator

The SMSF Associations supports the reporting of 'serious compliance concerns' by licensee holders to ASIC becoming formalised. We believe reforming the breach requirements to foster a culture of reporting, proactive compliance and a focus on improving advice and outcomes for consumers can only be beneficial to the ongoing provision of financial advice.

The Financial Services Royal Commission recommended that licensees should be required to report such concerns to ASIC on a quarterly basis. Draft legislation intends to impose a 30-day requirement after a licensee reasonably knows a matter has arisen. Therefore, the reporting requirement process must be efficient and clear to meet this deadline.

We therefore believe reporting requirements should be made as simple as possible. The higher the level of subjectivity in the process, the greater inconsistency may arise and increased administration will be required. However, this must be balanced with potential over-reporting if the requirements are too broad.

The SMSF Association, in agreement with other industry bodies, has concerns around the potential for licensees to misunderstand the new requirements and the potential creation of onerous obligations for licensees and ASIC which are disproportionate to the breach or likely breach.

Significance test/proportionately

There is ongoing concern with the existing subjective significant test and the consideration of whether certain breaches which result or are likely to result in loss or damage to the client are actually of a 'significant' nature. The current test potentially increases the number of reportable events to a substantial number.

We believe the proposed test requires licensees to undertake an investigation and report to ASIC for administrative errors and matters resulting in low value consumer loss which otherwise could have been resolved quickly. ASIC would also need to employ resources to respond to licensees and filter through reports efficiently to identify breaches which require further action.

We question if the time and resource needed under the proposed test will exceed the loss incurred by the client. It is our opinion that not all consumer losses are significant breaches as outlined by Commissioner Hayne.

Many examples of these reporting requirements for small losses and administrative errors are outlined in submissions from other key professional bodies.

Therefore, we support amendments which ensure the investigation and subsequent reporting must be proportionate to the breach, or likely breach, and the significance of the beach and allow licensees to take reasonable steps to achieve the intent of the legislation. This may include consideration that the loss must be material to a client or group of clients as a whole to be reported, or that minor errors or losses must be unable to be resolved quickly or have occurred with malicious intent.

We also believe some of these risks can be mitigated by the introduction of different reporting requirements for initial investigations as mentioned below allowing small errors to be resolved without excessive reporting.

Investigations

The SMSF Association also supports proposals to place reporting requirements on investigations that disclose reasonable grounds that a breach or likely breach has occurred. This would involve definition of initial investigations which are undertaken to determine if a breach has occurred and confirmed investigations for actual breaches.

We believe reducing the reporting requirements for 'initial investigations' would reduce the risks arising from unnecessary and excessive reporting for investigations that result in no breach.

Reporting on other licensees

The SMSF Association supports the premise where licensees should report to ASIC on advisers of other licensees where they suspect that a reportable situation has arisen. This allows the industry to be accountable for the entire profession and the quality of advice provided by professionals.

The reportable requirements for reporting on other licensees are a of a lower threshold then the reporting requirements for licensees regarding their own advisers. We understand that this proposal is based on the fact that licensees will not necessarily have the relevant information to satisfy a higher threshold. However, we also note that this lower threshold may also result in more reporting by licensees to ASIC which may result in the same administrative issues raised earlier.

Treasury should also consider the impact of implementing a low reporting threshold and the nature of relationship between licensees. For example, licensees might not want to report on the other licensees to 'protect each other' and will rely on the defence that they did not suspect a reportable situation because they did not have the information available. In contrast, some licensees may want to report on other licensees vexatiously in order to 'hurt their competition' and will rely on the lower threshold to justify the reporting.

A lower threshold also means that it may be easier for ASIC to prove fault on a licensee for not reporting a suspected reportable situation despite the fact a licensee genuinely did not believe they had the amount of information necessary to report to ASIC.

These are all potential issues of implementing a lower threshold which may invoke significant reporting to ASIC.

The SMSF Association suggests that the first iteration of this reporting regime should have a higher threshold for reporting on other licensees then currently drafted. We believe there either must be:

- some form of 'sufficient nexus' between the licensee (E.g. products from the original licensee sold by an adviser under a different licensee) and the suspected reportable breach; or
- the draft legislation uses 'the reasonable grounds to believe' definition as it does for licensees reporting on their own advisers

In addition, we support removal of inconsistent legislation in s912DAC(8) which can occur when a licensee who is suspected of a breach may only incur a maximum of a financial penalty or infringement

notice depending on the provision it has breached, yet the reporting licensee could incur a civil penalty for failing to report on the suspicion that a breach occurred.

Notifying clients affected by certain reportable situations

The draft legislation seeks to formalise the requirement for licensee holders to investigate misconduct and, where necessary, notify and remediate clients. We note that while this does occur in many cases, it is not universal and mandating prompt investigation can ensure that misconduct is not allowed to continue.

The SMSF Association believes it is important that clients are notified appropriately for their consumer protection. Current draft legislation requires licensees to notify affected clients that a reportable situation has arisen prior to an investigation confirming that there are reasonable grounds to believe a breach has occurred, and how the client may be affected by the breach. In scenarios where an investigation does not result in finding a breach, the adviser-client relationship may be strained, the adviser may lose the client and also further referrals and reputation. We do not believe this is an appropriate outcome for advisers before confirming that a breach has occurred or is very likely to have occurred.

We support proposals which ensure there is an appropriate balance when notifying clients that their adviser is under investigation. We believe clients should only be notified after a swift 'initial investigation' has confirmed that a breach or likely breach has occurred.

Superannuation regulator roles

- Recommendation 3.8 and 6.3 will adjust APRA and ASIC's roles in relation to superannuation to accord with the principles that APRA is the prudential regulator and ASIC the conduct and disclosure regulator.
- Recommendation 6.4 will give ASIC joint responsibility for enforceable provisions in the SIS Act which have consumer protection as their touchstone.
    - In addition, the coverage of the Australian financial services licensing regime in superannuation will be extended. This will ensure ASIC has access to appropriate powers and enforcement tools and can successfully perform its role as superannuation conduct regulator under the recommendations above.
- Recommendation 6.5 ensures that APRA's role is unchanged. APRA remains responsible for prudential and member outcomes regulation in superannuation

The SMSF Association supports ASIC's role in superannuation being expanded to include protecting consumers from harm and market misconduct. Under the draft legislation ASIC will be responsible for consumer protection, market integrity, disclosure and the keeping of reports.

We believe the inclusion of superannuation will impart a level of consistency in regulation across the entire financial industry in the provision of financial advice.

For example, the application of the Design and Distribution obligations will now have application across the superannuation industry.

Enforceability of financial services industry codes

- Recommended that certain provisions of financial services industry codes be made 'enforceable code provisions' and that the law provide for the establishment of mandatory financial services industry codes.

The SMSF Association supports certain provisions of financial services industry codes to be made enforceable code provisions. This provides certainty to industry in the event they wish to create codes of conduct which are backed by the enforcement of the law.

Financial Regulator Assessment Authority

- Recommendation 6.14 will establish an independent assessment authority to review the effectiveness of APRA and ASIC, and report on its findings to the Minister.

We support creation of a financial regulator assessment authority to review the effectiveness of APRA and ASIC. The authority will only be effective it if is transparent and compels accountability on the regulators.

Therefore, the authority should be able to inquire and access extensive information as necessary from APRA and ASIC. In addition, the authority's reports should be made public as soon as possible after completion.

Insurance recommendations

- The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry recommended that section 29(3) of the Insurance Contracts Act be amended so that an insurer may only avoid a contract of life insurance on the basis of non-disclosure or misrepresentation if it can show that it would not have entered into a contract on any terms (see recommendation 4.6).
- Restricting use of the term insurance and insurer
- Duty to take reasonable care to not make a misrepresentation to an insurer (4.5)

The SMSF Association supports the insurance recommendations and the draft legislation that implements them.

We believe recommendation 4.5 and 4.6 will create positive benefits for consumers and their financial advisers during the application and claims process. The onus should be on the insurer to ask the correct questions of consumers and for the insurer to demonstrate that critical non-disclosure or misrepresentation was fundamental to the contract of life insurance.

If you have any questions about our submission, please do not hesitate in contacting us.

Yours sincerely,

John Maroney
CEO
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing the SMSF sector which is comprised of over 1.1 million SMSF members who have $750 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.