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Dear Ms Hadisutanto

Consultation Paper 385—Proposed update to RG 181 Licensing: Managing Conflicts of interest

This submission has been prepared by members of the Superannuation Committee within the Legal Practice Section and the Financial Services Committee (with input from the Corporations Committee) within the Business Law Section of the Law Council of Australia (the **Committees**).

This submission provides feedback on the terms of draft RG 181, attached to Consultation Paper 385 Proposed update to RG 181 *Licensing: Managing Conflicts of interest*, released by ASIC on 30 July 2025.

As a general observation, the Committees agree that, in the year of the 21st birthday of RG 181, it is an opportune time for ASIC to review and revise the document to reflect developments in case law and financial markets that have occurred since it was prepared by ASIC. The Committees consider that, for the most part and subject to comments which follow, the draft RG 181 is clearly expressed in a way that relevant stakeholders should readily understand and could prove to be useful to assist licensees in better understanding the conflicts management obligation as it applies to their particular business and circumstances.

The Committees agree that it is helpful for the guidance to provide examples of different kinds of conflicts as they may arise for different kinds of financial services businesses. However, the Committees believe that the examples could be improved upon in a number of respects.

This submission is focused on ensuring that statements about the law are reasonably clear and accurate. This submission does not comment on ASIC's suggestions or expectations about what might be 'best practice' or 'prudent practice' by AFS licensees, except to the extent that ASIC's guidance and expectations on those matters might be based on implied or express statements about what the law requires.

Our comments on the terms of draft RG 181 are set out in the **Attachment** to this letter.

The Committees would be happy to engage further with ASIC on this consultation, including to discuss with ASIC the ways in which the examples could be improved upon to ensure that they are clear, relevant and therefore likely to be well understood by the regulated population. Please reach out [redacted] there is anything arising out of this submission which ASIC would like to clarify or discuss further.

Yours faithfully

[redacted]

ATTACHMENT

'Perceived (apparent)' conflicts of interest

1. The Consultation Paper and draft revised RG 181 cite '*apparent*' or '*perceived (apparent)*' conflicts as a third type of conflicts situation,[1] in addition to '*actual*' and '*potential*' conflict situations. Current RG 181 also refers to '*apparent*' conflicts of interests.[2] The meaning of '*perceived (apparent) conflicts'*, and how they differ from 'actual' or 'potential' conflicts is not explained.

2. In our view, the revised RG 181 should only reference 'actual' and 'potential' conflicts. We suggest that these references to a supposed third kind of conflicts situation of 'apparent' or 'perceived (apparent)' should be deleted as they are not supported by the words of Corporations Act s912A, the relevant explanatory material[3] or the general law.

3. The introduction of an 'apparent' conflict of interest also raises the question to whom the conflict would need to be apparent—is it the relevant decision maker, the client or an objective third person?

4. Further in our view, these references do not add to the discussion on 'potential' conflicts, and may, therefore, create confusion and uncertainty.

5. The general law in relation to conflicts is well established and clear. It is concerned with 'actual' and 'potential' conflicts of interest or duty or the '*real and sensible possibility of a conflict*'[4] that a fiduciary may have (as ASIC itself notes in draft paragraph RG 181.29), not with the mere appearance of a conflict. And Corporations Act paragraph 912A(1)(aa) refers to the management of '*conflicts that may arise'*, not conflicts that '*may arise or appear to arise'*.

6. It may be that the references to perceived or apparent conflicts are intended merely to be a synonym for 'potential' conflicts; however, the concept of conflict of interest should not be conflated with the concept of 'apprehended bias'. The concepts of conflict of interest and apprehended bias do have common aspects and, in the case of persons acting in an official or quasi-official capacity,[5] the same fact situation may give rise to both conflict of interest and apprehended bias concerns. However, as a matter of law and legal obligation, they are different concepts and apprehended bias is generally not relevant to Australian financial services licensees (although of course it will usually be in the commercial interests of a licensee to avoid the appearance of conflict).[6]

7. We suggest that deleting these references would clarify the guidance without diminishing ASIC's appropriate message that conflicts management extends to the potential for conflicts to arise.

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[1] See CP 385 paragraph 30 and the Attachment draft RG 181 in the introduction to section C, paragraph RG 181.31 and an example in Table 13 under *Related party transactions.*
[2] RG 181.15.
[3] Being the Explanatory Memorandum to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, especially paragraphs 4.147 to 4.170 and 5.592 to 5.600.
[4] See for example *Australian Securities and Investments Commission v Jones* [2023] WASCA 130.
[5] For example, a judicial officer, company liquidator or trustee in bankruptcy.
[6] See again *ASIC v Jones* (footnote 4) for discussion on conflicts of interest and apprehended bias.

Purpose of the obligation

8. In paragraph RG 181.8 ASIC states that the conflicts management obligation is '*intended to address information asymmetry*'. We consider that information asymmetry is but one of a number of different scenarios that can give rise to a conflict of interest between the licensee and another person who does not have access to the same information as the licensee. ASIC may therefore wish to reconsider this statement.

Preferential or differential treatment of clients

9. An obligation to treat clients impartially is a separate and distinct obligation to the obligation to avoid conflicts. Several statements in draft RG 181 state or clearly imply that a licensee treating some of its clients more favourably or preferentially compared to other clients will necessarily involve a conflict between the interests of the respective clients and must be avoided. While that may be the case in some particular situations (including some of the examples in draft RG 181) where the licensee has an interest in the differential treatment, it is not necessarily the case, and we submit it is not correct as a matter of logic or as a statement of general legal principle. For example, preferential treatment of a person suffering financial hardship and preferential treatment of vulnerable clients should not be considered a conflict.

10. If the giving of favourable or preferential treatment to one client or client cohort does not prejudice or harm the non-preferred client or client cohort, is permitted by the governing document or does not otherwise breach a commitment given by a licensee to a client, then there would not generally be any conflict.

11. The relevant paragraphs of draft RG 181 are RG 181.34 Table 1 (second row) and RG 181.63(a). We suggest that these references be clarified or qualified to reflect what we submit is the correct position.

Reviewing adequacy of conflicts management arrangements

12. Draft RG 181 Section D is about '*Having adequate arrangements'*. The legal obligation in Corporations Act paragraph 912A(1)(aa) is to '*have in place adequate arrangements for the management of conflicts* ...' and, therefore, when ASIC refers to what 'adequate arrangements' would comprise, ASIC is presumably referring to what a licensee must do to comply with the law.

13. In that context, we suggest that draft RG 181.56 and the last bullet point in RG 181.57 Table 2, about regularly reviewing arrangements, may go beyond the law and give what we submit is an incorrect impression that the legal obligation to '*have in place adequate arrangements'* includes also having in place arrangements to ensure that the licensee's conflicts managements arrangements, in the sense of the licensee's general conflicts management policies and framework, remains adequate. Whilst of course it would be good practice to have review arrangements in place (and perhaps this is required by the 'efficiently, honestly and fairly' requirement in Corporations Act paragraph 912A(1)(a)), this is not actually required by Corporations Act paragraph 912A(1)(aa) itself. That is, not checking from time to time whether your general arrangements are still adequate does not mean that they are not adequate. In *Avestra*[7] (cited in draft RG 181 in relation to this point), Beach J at [194] says that a 'response' to a particular identified conflict must be 'regularly monitored' to ensure

[7] *ASIC v Avestra Asset Management Limited (in Liquidation*) [2017] FCA 497

that 'its implementation is effective' and thereby 'controlled' but that statement is about 'controlling' a particular conflict and is not saying that, as a matter of law, paragraph 912A(1)(aa) requires a licensee to regularly review its general conflicts management framework.

14. Our view is that the importance of review mechanisms is a matter of guidance and appropriate ASIC expectation rather than a statement of what 912A(1)(aa) actually requires as a matter of law. Accordingly, we suggest the following revisions:

> RG 181.56 You should also *implement*, *monitor*, *maintain* and *review* your arrangements. ~~for them to be adequate~~.
>
> …
>
> **Table 2: Adequate arrangements to manage conflicts**
>
> 4. Implement
>
> You should implement, monitor, maintain and review your arrangements to ensure they remain robust and effective. This includes ensuring:
>
> - your arrangements are approved and endorsed by your senior management and, if appropriate, your board;
> - staff and relevant parties are appropriately trained to thoroughly understand the arrangements and can apply them to a range of conflicts;
> - you have systems in place and people with the authority to follow and apply the arrangements to a conflict of interest (i.e. compliance monitoring) and take appropriate action when required;
> - you have a person or persons accountable for complying with your arrangements;
> - arrangements include disciplinary measures for non-compliance, if appropriate;
> - your arrangements are appropriately documented and stored; and
> - your arrangements are regularly reviewed (e.g. internally or by a third party, such as an auditor) and updated as necessary.
>
> ~~Merely having or possessing conflicts management arrangements is insufficient.~~

15. Given that ASIC has acknowledged that what is 'adequate' will depend upon the nature, scale and complexity of the licensee's business (for example, in paragraph RG 181.48), it is important that ASIC is not inappropriately prescriptive in its guidance, and recognises that there isn't a 'one size fits all' way to meet this obligation. We note that the term '*should*' is used in a number of places, which suggests that there is only one way for a licensee to 'adequately' manage a conflict of interest, and encourage ASIC to revisit this.

16. It would also be helpful for ASIC to add some colour to how the 'nature, scale and complexity' of a financial services business will impact what arrangements might be considered adequate. For example:

    (a) licensees with larger scale businesses that provide a number of different kinds of financial services to different types of clients may have a conflicts management framework consisting of a number of different policy documents which require different approaches to be taken in different business lines;

    (b) licensees that are part of a multi-national group may also need to consider obligations under foreign laws in developing their conflicts management arrangements; and

    (c) the size and level of sophistication of clients and counterparties the licensee deals with will likely also have a bearing on what is 'adequate'—as retail clients with limited financial resources may need to be more carefully protected than wholesale institutional investors who are better placed to protect their own interests.

Disclosing conflicts of interest

17. We do not agree with ASIC's statement to the effect that '*mere disclosure is unlikely to be sufficient to effectively manage conflicts*' in paragraph RG 181.71. To the extent that there is a legislative obligation for a licensee to disclose a particular conflict to the client (for example, a commission they may receive), and the obligation has been met, arguably this may be regarded as 'adequate'. Whether or not disclosure is an effective method to manage conflicts will depend on the facts of a situation, including the level of materiality of the conflict. We recommend that ASIC reconsider this statement in light of our comments.

Examples in Table 1

18. As noted in our covering letter, we consider that it is helpful for ASIC to provide examples of conflicts of interest that can occur in different kinds of financial services businesses. However, we believe that ASIC could improve upon the clarity and quality of the illustrative examples set out in Table 1 in a number of respects.

19. Some examples are confusing in their current form:

    (a) In the example '*A director's affiliations with an outside organisation influencing decisions that the director makes about the financial services business, to the detriment of members*', the reference to 'members' appears to refer to shareholders of the corporate financial services licensee. Does ASIC mean clients of the licensee? If so, we suggest this word be amended; and

    (b) In the example, '*An adviser recommending a client invest in a company the adviser holds significant shares in*', it is not clear what 'significant shares' means. In our view, the example would be easier to understand if the value or percentage of the adviser's shares in that company were stated.

20. It is important to distinguish situations that give rise to a conflict of interest as a result of the licensee carrying on its financial services business—which is what RG 181 should be concerned with—from misconduct which is a breach of obligations (for example, insider trading and other forms of market misconduct and failing to maintain

confidentiality of information). In a number of examples, these matters appear to have become conflated. Some examples use industry jargon which may be familiar to licensees in the particular sub-sector but may not be readily understood by the broader licensee population, making it difficult for them to apply the example. An example of this is the reference to a 'take-private'. We recommend that ASIC explain the meaning of technical terms which may not be well understood by licensees outside of the relevant industry sub-sector. Care should also be taken with the use of terms that may have a different meaning depending on the context or industry sub-sector.

21. It would also be helpful to insert a third column in Table 1 which identifies the potential detriment to clients or investors that the relevant conflict might cause: for example, a licensee's remuneration or incentive arrangements may tempt the licensee to make investment recommendations to their client, and this could result in the licensee generating more revenue, which could conflict with their duty to act in the client's best interests if those investments are unsuitable for the client.

22. If the purpose of Table 1 is only to provide examples of conflicts that can arise, then we submit that it should not also make reference to conflict management arrangements or methods. For example '*not disclosing to a client*' the licensee's economic relationships with other investors is not the basis on which the conflict of interest arises—rather the conflict may arise from the licensee having relationships of a different nature with some of the investors. Whether or not the conflict is disclosed is a separate matter which goes to the question of whether the arrangements to manage the conflict are adequate (rather than the question of whether there is a conflict in the first place).

Minor clarifications

23. The term 'advisory' is generally understood to be an adjective. However, it is used as though it is a noun in a number of places in draft RG 181. We suggest using 'advisory firm'.

24. Table 1 makes a number of references to actions being taken by a 'fund'. The fund is the investment vehicle and it may not be a separate legal entity (for example, a registered managed investment scheme). It is the operator of the fund, rather than the fund, for whom such conflicts of interest could arise.

25. Draft RG 181 does not address the fundamental general law position that there may be no conflict between a fiduciary and client/beneficiary if what would otherwise be a conflict is authorised by the terms governing the relationship between the fiduciary and the client/beneficiary: for example, where a trust deed authorises the charging of fees or authorises a trustee to act in its own interests. We suggest that this could be referenced as follows:

> RG 181.21 A fiduciary duty can arise under common law in certain recognised relationships of trust and confidence. If a fiduciary duty exists, you may be required to act in the other party's best interests, prioritise their interests, not profit without consent, ~~or address any conflicts~~ or avoid or appropriately manage conflicts (subject to the terms governing the relationship between the fiduciary and the client/beneficiary, such as a trust deed).

26. In Table 2 on page 16, ASIC states: '*Merely having or possessing conflicts management arrangements is insufficient'.* We submit that this might be more clearly expressed in the following way:

> *Documenting policies and procedures that refer to conflicts management arrangements is insufficient. You need to be able to demonstrate that you have integrated these policies and procedures into your business activities*.

27. In Table 3 on page 20, an example of a compliance monitoring mechanism is 'control rooms'. We suggest that some explanation be included of what is meant by control rooms so that this reference is understood by the average reader.

28. In RG 181.73, there are the following statements: '*You should only disclose material conflicts*. *You should not use excessive or unnecessary disclosure that could obscure or distract from an issue*.' We suggest that the second sentence is the key point, and the first sentence may suggest that certain conflicts that may be relevant to a client do not need to be disclosed if they are not 'material'. We suggest this alternative drafting for this paragraph: '*You should not use excessive or unnecessary disclosure that could obscure or distract from an issue. You should disclose conflicts in a way that clearly highlights material conflicts that are expected to be relevant to clients.'* It may also be useful for the guidance to include some examples of conflicts that ASIC would not consider to be material.

29. In Table 10 in the 'Source' column, we suggest that the text be amended as follows:

> ***Superannuation Industry (Supervision) Act 1993***
>
> - ~~Section 52(2)(a) (duty of trustees of registrable superannuation entities (RSEs) to act honestly)~~
> - Section 52(2)(c) (duty of trustees of RSEs to act in members' best financial interests)
> - Section 52A(2)(c) (duty of corporate trustee directors to perform their duties and exercise their powers in members' best financial interests)
> - Section 52(2)(d)(i)–(iv) (e.g. duties of trustees of RSEs to prioritise the members' interests)
> - Section 52A(2)(d)(i)–(iv) (e.g. duties of corporate trustee directors to prioritise the members' interests)
>
> ***Other instruments***
>
> APRA Prudential Standard SPS 521

30. In Table 11, the reference to section 601E should be to section 601FE.

31. The definition of 'financial product' at the back of the document is the general definition of the Corporations Act. We submit that the use of the term 'financial product' should also capture everything that is specifically included as a financial product under section 764A of the Corporations Act. We therefore recommend that ASIC revisit the draft RG 181 definition of 'financial product'.