21 April 2020

Andrew Choi
Policy Lawyer
Financial Advisers
Australian Securities and Investments Commission
Sydney NSW 2000

By email: feeconsentsandindependence@asic.gov.au

Dear Andrew,

**Re: Implementing Royal Commission Recommendations – Advice Fee Consents and Independence Disclosure – CP 329**

The Australian Financial Markets Association (AFMA) welcomes the opportunity to provide comment to ASIC on Implementing Royal Commission Recommendations related to *Advice Fee Consents and Independence Disclosure.*

At a high level, the legislative instrument proposed is well aligned with the policy intent of the Royal Commission's recommendations. Please find below our response to the questions raised in the consultation. We raise a number of matters in support of appropriate calibration of the proposals to promote efficiency and reduce duplication.

We note that CP329 is based upon the draft legislation as at 10 March 2020. Treasury consultation on the draft legislation has now concluded but, due to the impact of COVID-19, the draft legislation will now not come before parliament until later in 2020. We would appreciate the opportunity to further comment on the draft legislative instruments and ASIC's specific questions once the final form of that legislation and its start date are known.

We trust our comments are of assistance. If you would like further information, please do not hesitate to contact me via the Secretariat.

Yours sincerely

Damian Jeffree

**Senior Director of Policy**

## B1: Consent to the deduction of ongoing fees

**B1Q1**

*Do you agree with our proposal? If not, why not?*

AFMA's comments are focused on refinements to the proposals to reduce duplication and other inefficiencies.

**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?*

AFMA does not support this requirement as it creates unnecessary duplication which is inefficient.

These services to be received are included in a service agreement between the client and the adviser and are further set out in the annual Fee Disclosure Statement (FDS). Detailed information about the client, providing entity, benefits, remuneration and advice are also covered by application forms, Financial Services Guides (FSGs) and Statements of Advice (SOA). A legislative instrument that aims to be as inclusive as presented in Table 2 of CP329 could place inefficient and cumbersome requirements on advisers. There are additional concerns around commercial sensitivity, in that an advice firm must provide information about the nature and cost of services to product issuers who have vertically integrated business models with advisory arms.

AFMA would also like to better understand ASIC's expectations regarding the obligation of account operators who are not superannuation fund trustees, to ensure that the stated services have been provided before allowing the deduction. If ASIC does mandate that the consent set out the services, our preference would be to do this via a cross reference to the relevant client service agreement.

**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 do not believe more information should be required to be disclosed.

**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?*


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No, AFMA supports a principles-based approach to regulation. A prescriptive approach risks inflexibility.

**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.*

AFMA would support ASIC providing further clarification on how clients consenting across multiple product providers would have the privacy of their confidential product information maintained. For instance, if consent includes information, which pertains to multiple trustees, how might trustees seeing information that is not relevant to them, be avoided?

**B1Q6**

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

AFMA supports the use of worked examples for common business models.

**B1Q7**

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

In summary, a consent form including all the requirements of the legislative instrument as proposed by ASIC may create duplication and inefficiency by adding administrative constraints on advisers. A shortened and focused consent form that provides a general attestation to the services by cross-reference to the relevant client service agreement would more clearly serve the purpose of the instrument and would better recognise existing obligations in SOAs and other forms. ASIC guidance on the appropriate length of a brief consent form is welcome. AFMA supports a flexible approach for businesses to better discharge their regulatory obligations.

**Table 2 Item 7** requires the consent form to stipulate proportions of each of the possible multiple accounts that the client may choose to make fee payments from. However, this may rest on an oversimplification of the payments process as some clients may opt for moving percentage shares related to the Funds under Management (FUM) for each account. As such, we propose a broad instruction that offers the account details and an estimate of the split payments. The detailed payment break-up may be included in other mandatory disclosure documents specific to the client and their payment preferences.


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**Table 2 Item 8** requires that the consent must include a warning of the benefits to which the account holder is entitled that may cease or be reduced because of the deduction of ongoing fees.

AFMA suggests that warning of the benefits that the account holder may lose due to fees being deducted is better included in the SOA or the product disclosure document rather than the consent form as it describes a feature of a specific financial product. In the case of an Ongoing Fee Arrangement (OFA), as defined by s962A, the client will have already received the SOA and other related mandatory disclosure documents relevant to the financial product.

With regards to ASIC's requirement of obtaining a written and signed consent form, AFMA would request confirmation from ASIC regarding the validity of online consent forms for the purposes of providing written consent. Such consent can be can be recorded by clicking the consent provision button on online consent forms. We also seek confirmation from ASIC of any specific requirements for such arrangements where consent is provided by clicking an online form, or otherwise provided 'electronically'.

**Meaning of account:** We would request confirmation that a bank account is not an account for the purposes of these requirements. That is, a payment by direct debit from a bank account should not involve the same requirements as for a payment from an investment or Superannuation/Pension account.

**B2: Consent to the deduction of non-ongoing fees from Superannuation**

**B2Q1**

*Do you agree with our proposal? If not, why not?*

AFMA supports similar suggestions as made in relation to proposal B1 regarding the inclusion of the services and benefits warnings and the need to recognise the existing obligations to provide this information. Many of the requirements, for example 2, 3, 4, 6 and 7 and potentially others may already be covered by application forms and Statements of Advice (SOAs).

We also note our preference that in the event there is a requirement to provide information about the advice that this is limited to a high-level statement only where specific services are not listed.

The Exposure Draft Explanatory Memorandum on Recommendation 3.3 raises concerns around 'invisible fees' related to non-ongoing fees deducted from a Super product. However, where the customer has received advice and signed an application form stating the advice fees will be deducted from the Super product, it is unlikely these fees are 'invisible'. Thus, a consent form explaining the purpose(s) for which the cost of financial product advice is passed on to the member's super account, which includes information about the arrangement entered into, should enable Trustees' oversight on responsibly discharging their obligations.


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**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?*

AFMA supports guidance on what ASIC would consider a typical length for a consent form but would not support a prescribed maximum length. A principles-based approach in this regard would allow for necessary legal matters to be covered without compromise.

**B2Q4**

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

AFMA would support ASIC presenting worked examples of the written consent requirements under different scenarios. This is advisable for guidance instead of standardisation. For example, in case only a portion of an advice fee is attributed to a Super product, or where costs are passed on other than through a deduction to the customer's interest (Table 3 Item 8). This would help the industry to have greater certainty when discharging their obligations under the instrument's requirements.

In relation to **Table 3 Item 7,** the information to be provided in the consent as to how the cost will be passed on would likely need to be agreed between the adviser and the superannuation trustee. The adviser would be unlikely to have this information. We also seek clarification from ASIC regarding the reference to deducting fees from a particular "investment option" in this Item, in particular, an explanation of how "investment option" differs from "account".

**B3: Lack of independence disclosure**

**B3Q1**

*Do you agree with our proposal? If not, why not?*

AFMA is focusing our comments on refinements to the proposals.

**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?*

**Proposal B3** proposes to disclose any lack of independence 'in a box' on the first page of the FSG.

AFMA proposes that firms should have the discretion to choose how to undertake discharging their lack of independence obligations in the FSG. For instance, such


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disclosure may be made prominent by making the text bold and with a separate sub-heading in the FSG to address the disclosure.

**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 see issues with prominence where the FSG is issued in electronic form and is an exact copy of the printed FSG, as is practiced by some firms. If ASIC proceeds with this proposal without amendments, further clarity and consultation on the definition of the first substantive page may be helpful.

**B3Q4**

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

AFMA does not believe the legislative instrument should take a more prescriptive approach to specifying the information required to explain the lack of independence.

The current approach suggested by ASIC is preferred, as it allows financial institutions to explain the nature of the lack of independence to clients in their own words.

**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?*

We would consider that the current remedies under the Corporations Act and ASIC Act would be available for use in this eventuality (for example the prohibition on misleading and deceptive conduct).

**B3Q6**

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

AFMA would support the provision of worked examples of independence disclosure statements. These could cover disclosure statements for common business models such as vertically integrated businesses or businesses that accept insurance commissions or those from wholesale clients as permitted under the Corporations Act.

ASIC may also provide guidance on the firm's ability to place another statement alongside the disclosure statement, mentioning that notwithstanding the conflict, the Adviser is obliged to act in the best interests of the client, must prioritise the interests of the client in case of conflict, etc. AFMA suggests that this placement of the statements provides comprehensive information to the clients.

Further guidance in relation to Approved Product Lists (APLs) would be useful, specifically in relation to the circumstances in which use of an APL would constitute a direct or indirect restriction per s 923A(2)(d). For example, an explanation of what


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constitutes an 'easy process' for recommending a non-APL approved product per RG 175.78, or what number or variety of products is required for there to be no direct or indirect restriction.

**C1: Proposed guidance on ongoing fee arrangements**

*C1Q1 Do you agree with our proposal? If not, why not?*
*C1Q2 Are there any additional areas relating to ongoing fee arrangements where we could provide guidance?*

We provide our responses to these questions below in relation to each of the proposed guidance topics:

**C1 (a) – Whether an FDS can be issued before the end of the 12-month period to which it relates**

S.962H requires that the FDS be for a period of 12 months and that it be received within 60 days of the end of the 12-month period. AFMA suggests it may be helpful if firms could provide an FDS and opt-in before the end of the 12-month period if that aligned with client's availability to meet for their review.

**C1 (b) – Whether an FDS must specify the 12- month period to which it relates**

AFMA supports ASIC's guidance on whether an FDS must specify the 12-month period to which it relates.

**C1 (c) – When a defect in an FDS or renewal notice will be such that the document is no longer an FDS or renewal notice**

AFMA suggests further guidance be provided particularly on the materiality threshold for errors in an FDS. We support the view that only 'materially adverse' errors or omissions should make an FDS 'defective' and suggest that this change will be unlikely to result in ASIC's regulatory objective not being met.

**C1 (d) – Information about the fees that should be included in an FDS**

We suggest that ASIC guidance is not required since firms agree in practice with their clients over which OFA fees are payable and should be included in the FDS. Changes in this position may create uncertainty where an agreed position with a client already exists.

**C1 (e) - The services that should be identified in an FDS as services the client is entitled to**

AFMA supports allowing firms to describe their services in a way that reflects our business model rather than using language prescribed by ASIC.


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**C1 (f)** - **The scope of the definition of an ongoing fee arrangement—for example, whether the scope covers:**

**(i) Agreements that have a period of longer than 12 months, but are cancelled before 12 months have elapsed**

AFMA has concerns that this guidance may not be consistent with the Corporations Act. While a good client experience (i.e. to receive an exit statement), it would create undue disadvantages to firms if premature cancellations were legally mandated.

**(ii) A series of substantially similar agreements that each has 12-month terms;**

AFMA supports ASIC guidance in this determination, including guidance regarding substantially similar agreements less than 12 months each, but greater than 12 months collectively.

**C1 (g)** - **Whether an ongoing fee arrangement must only be renewed through a renewal notice**

AFMA supports that notwithstanding that the client and the provider should be able to renew the contract in any manner that they both agree on (without limiting it to renewal notices only) we do not see the benefit of focusing on alternative ways to renew over other regulatory priorities.

**C1 (h)** - **When an ongoing fee arrangement commences**

AFMA proposes that ASIC's prescription for a consent form timeframe should be based on industry consultation and agreement (i.e. ASIC Guidance should be noted). The implementation of consent receipt can be a time-consuming process and a feasible timeframe for most or all industry participants should be agreed upon. An adequate window of execution would allow a more flexible approach for cases of advice, that need to be implemented in a sequential order.

**C1 (i) whether the FDS and renewal notice requirements apply to MDA operators.**

No specific comments.


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