



FINANCIAL  
SERVICES  
COUNCIL

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*ASIC Consultation Paper 329: Implementing the  
Royal Commission recommendations: Advice fee  
consents and independence disclosure*

FSC Submission

April 2020



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## **1. About the Financial Services Council**

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing \$3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world.

## 2. Executive Summary

The FSC welcomes the opportunity to submit to the consultation on *ASIC Consultation Paper 329: Implementing the Royal Commission Advice Fee Consents and Independence Disclosure (CP)*.

The CP outlines several proposals for the legislative instruments (**LI**) which we address in this submission. While the FSC recommends further consultation, we submit initial feedback on the CP in the latter parts of this submission and can readily work with ASIC on clarifying any of the points raised.

The FSC's recommendations can be summarised as follows:

- Consultation on the development of the LI should be extended and its commencement delayed until the COVID-19 pandemic ceases
- ASIC should take a facilitative approach to immaterial defects in fee disclosure statements (**FDSs**) and the Annual Renewal Notice requirements
- Obligations for product providers, trustees and advisers with regard to obtaining written consent need to be clarified and harmonised to minimise costs and adverse impacts to clients, superannuation funds, advice licensees and advisers
- ASIC should explore options for harmonising the fee disclosure statement (**FDS**) and annual opt-in requirements where possible, and that this form the basis of extended consultation on the LI
- The requirements for the use of 'independent' and 'not independent' should be set out in the LI

### 3. FSC Recommendations

1. The commencement date of the Legislative Instrument (LI) be deferred until the impact of the COVID-19 pandemic passes.
2. Consultation on the LI re-open before the commencement of the legislated requirement.
3. The LI should incorporate and where possible rationalise existing regulatory tools to encourage a seamless application to compliance systems.
4. ASIC should take a commercially facilitative approach to immaterial defects or clarify this issue through further Guidance.
5. ASIC should clarify the annual renewal period to ensure consistency and procedural regulatory fairness.
6. ASIC also should clarify instructions relating to written consent to ensure clear expectations for product providers and trustees in terms of their obligations relating to advisers, and allow for constructive streamlining of client communication and renewal requirements.
7. Provide a solution which protects Clients information if consent is being shared with multiple product providers (E.g. specify and refine select information the provider needs to receive and what they need to capture).
8. ASIC, in developing the LI explore ways to harmonise the FDS and annual opt-in requirements where possible and that this form the basis of extended consultation on the LI.
9. The specified requirements for the use of 'independent' and 'not independent' be set out in the LI.

## 4. Implementation

### 4.1 Consultation and commencement

The impact of the COVID-19 pandemic since the release of the CP will require ASIC to defer finalising the LI, and ideally allow a second round of consultation on a final draft LI. The FSC would welcome the opportunity to work with ASIC to address issues identified in this submission, and ensure that the final LI will not increase cost of advice for clients.

The original consultation period for the LI limits the opportunity to address such impacts. Added to that, a widely dispersed advice workforce across providers and super funds, limits the adequacy of feedback that can be provided to ASIC in the current consultation period. Many staff are working from home and in the process of implementing business continuity planning at this time.

Given the unprecedented economic uncertainty faced by many Australians, the primary focus of advice businesses and trustees is and must be on customers and members. In the current environment advisers are experiencing unprecedented numbers of clients seeking advice about new pension minimums, early access to superannuation, redundancy, changes to life insurance premiums and the impact of possible recession on retirement plans and savings.

The delay to the passage and therefore commencement of Royal Commission legislation until at least August will delay the commencement of the LI currently proposed for 1 July 2020.

### 4.2 Inadvertent lapses during transition period

With the transition of all existing clients to annual opt in, care must be taken that agreements with clients who value ongoing advice do not inadvertently lapse, severing the advice relationship. There is a concern that if clients cannot meet with advisers in the short time frame proposed at an out of cycle review, ongoing fee arrangements will lapse, and the advice relationship then also ceases. If this occurs, product providers will cease adviser access to client information, investment details and accounts. Clients may not be aware they are no longer being serviced, and may expect that advisers can assist them as they have always done. The administration work by the product provider and the adviser will increase the cost to provide advice.

A longer timeframe for implementation of the new annual renewal obligations would allow advisers to contact all existing clients and update agreements for ongoing advice within the normal review cycle.

#### **FSC Recommendation**

1. The commencement date of the legislative instrument be deferred to align with commencement of the relevant legislation.

#### **FSC Recommendation**

2. Consultation on the Legislative Instrument re-open before the commencement of the legislated requirement.

### **4.3 Compliance costs**

The added compliance cost impact of the LI could be considerable. One member (product provider and super fund trustee) currently estimates implementation costs arising from this change to be \$5 million. This would fund the implementation of an automated solution to receive and accept client consents. An automated solution is preferable to cater for the high volume of expected consents required to be processed.

In addition to implementation costs, there will be ongoing costs associated with complying with the obligations in the LI, primarily due to the requirement to collect consents which must be in a specified format and contain specified information. These are expected to involve exception cases only where automated processes discover some form of validation error. This would include scenarios where manual intervention is required to be included a consent has been provided. Costs for this have not been able to be estimated as yet due to the increasing workload on administrative teams at this time however and a short implementation timeline would exacerbate these costs.

## 5 General comments

### 5.1 Simplicity and clarity

The framework for OFAs and independence disclosure should be clear and straightforward. This should encourage consistent practice across industry that is easily adapted into already complex compliance systems. In general, such a regime should:

- **Be worded in a manner relevant to both funds and advice providers**
- **Support the key focus of funds and advice businesses on members and clients.** For example, ASIC should consider whether consent and disclosure could be provided for in one document to provide a seamless and straightforward experience for consumers. It should also consider whether implementing the transition to annual opt in can be incorporated into the usual cycle of annual reviews.
- **Be defined in terms that are express and robust.** An preliminary review of the proposals show they are prescriptive as to format however lack specificity as to how this format should be met or the specifics of detail that should be provided

Previous regulatory guidance and material from ASIC could be looked at for incorporation into the LI, regulatory guidance or other tools over time. ASIC Report 636 exemplifies ready-made guidance that can be adapted and applied to compliance systems.<sup>1</sup>

**FSC Recommendation:**

3. The Legislative Instrument should incorporate existing regulatory tools to encourage a seamless application to compliance systems.

The LI should seek to minimise the duplication for clients where information is already covered in other documents they are likely to receive at the same point in time. Excessive requirements for the different presentation of similar fees and consent information across multiple documents risks confusion for members and clients and risks of error by advisers.

### 5.2 Materiality and immaterial defects in Fee Disclosure Statements (FDSs) and Annual Renewal

At present under the FDS/annual renewal regime, there is no concept of the materiality of a defect; and 'immaterial' defects cannot be ignored. ASIC lists a range of defects, many of which would have no adverse impact on the client. The presence of a defect, no matter how

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<sup>1</sup> ASIC Report 636 Compliance with the fee disclosure statement and renewal notice obligations (SOURCE: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-636-compliance-with-the-fee-disclosure-statement-and-renewal-notice-obligations/>)

minor, means the provider has not provided an FDS, and incurs statutory penalties under the Corporations Act, and (for post-2013 OFAs) results in the termination of the OFA.<sup>2</sup>

Having no express materiality threshold for an FDS or Opt In has been unworkable in practice and has led to a large number of technical breaches where the error in the FDS was so minor it would not have any impact on a client.<sup>3</sup>

The proposals in the CP do not address this issue.

#### **FSC Recommendation**

4. ASIC should take a commercially facilitative approach to immaterial defects or clarify this issue through further guidance

### **5.3 Parameters of disclosure regime and annual renewal**

The consultation process and release of EDs, in addition to the release of the CP have highlighted stakeholder confusion as to annual renewal and effective annual renewal with regard to the fee disclosure regime.

The CP establishes the models for the guidance it will issue in relation to FDSs and annual renewal. While many agreements terminate after 12 months, there is confusion around annual renewal and where this ceases and starts and accordingly where and when the consequent obligations on product provider, trustee, or adviser arise.

For example, both types of consent (OFA and non-OFA) require reference to when the consent expires. This may not be able to be determined until the client signs the consent. In addition, a product provider may have their own rules regarding the charging of advice fees under these circumstances.

It is not clear how a trustee is to know when the adviser initiates the renewal period and therefore how would they know when to cease the fee. If an adviser fails to notify the provider the fees could continue for up to 15 months without the change that if the adviser had initiated the renewal period in the first 30 days would see the member over paying. This would require additional work of the trustee to claw back fees and just the account for the lost earning of overpaid fees.

Clarity is needed around how contracts are handled in this scenario.

Further guidance, including in the form of examples, would help advisers and product providers understand how the consent form can be completed to cater for these scenarios.

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<sup>2</sup> Herbert Smith Freehills. ASIC proposes new guidance on ongoing fee arrangements. (SOURCE: <https://www.herbertsmithfreehills.com/latest-thinking/asic-proposes-new-guidance-on-ongoing-fee-arrangements>)

<sup>3</sup> Ibid.

**FSC Recommendation**

5. Clarify the annual renewal period to ensure consistency and procedural regulatory fairness.

### 5.4 Consent requirements

ASIC proposals indicate that obtaining the consent of a client can be separate or combined potentially diluting the instruction to providers and trustees in Clause 63 of the CP<sup>4</sup>:

*Fee recipients may seek a client's consent for deducting ongoing fees in the **same** document as the renewal notice, assuming that the requirements in the draft instrument are met. Alternatively, a fee recipient may seek a client's written consent in a **separate** consent form—for example, when an ongoing fee arrangement is set up for the first time or when a client decides to pay ongoing fees from a new account.*

Trustees are currently seeking their own consent forms in a different format to the adviser OFA. This leads to confusion for clients who may provide a consent to the trustee and neglect to opt in, thinking that they have already done so. A common method of consent should be adopted to prevent confusion, double handling and additional cost to super funds, clients and advisers.

As a consumer protection measure, the form adopted should make it clear that the client understands that should they not respond or should they withhold consent, they will no longer receive advice services.

This could take the form of an industry standard for consent to providers and trustees. This would need to clarify what trustees and advisers are expected to capture. Capturing of services should remain the domain of the client-adviser relationship. It would be advisable for advisers to notify trustees once they have initiated the renewal period to ensure trustees know to stop paying the fee after a period best set at 35 days. This accounts for thirty days for the renewal period and five days for the adviser to provide the termination.

**FSC Recommendation:**

6. Clarify instructions relating to written consent to ensure clear expectations for product providers and trustees in terms of their obligations relating to advisers.

**FSC Recommendation:**

7. Provide a solution which protects Clients information if consent is being shared with multiple product providers (E.g. specify and refine select information the provider needs to receive and what they need to capture).

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<sup>4</sup> ASIC Consultation Paper 329, (SOURCE: <https://download.asic.gov.au/media/5492158/cp329-published-10-march-2020.pdf>)

### 5.5 Additional consent

While some advice businesses have shifted to annual renewal and some trustees already seek written consent, there needs to be clarity on the 'additional consent' practically expected by ASIC through the proposals in the LI. For example, where services provided is to be specified, it is not clear how the fund or advice provider should set these out or what is to be specified and what needs to be done when this information is received.

In general, providing information on the services in both the agreement and the consent creates duplication and could cause confusion for clients and is practically cumbersome for the adviser. Providing this level of detail to product issuers is unnecessary. The disclosure requirements on fees and warnings should be more specific. Warning requirements should not extend further than what is disclosed in the productive disclosure statement (**PDS**).

### 5.6 Interaction with the Sole Purpose Test

Expectations as to how a trustee differentiates between what services are provided in relation to the super, where there is one agreement, that has overall services provided should be clarified. Providing a streamlined template will ensure trustees have the ability to determine what services are relevant to the super and therefore if the deduction is consistent with sole purpose. Guidance to advisers about appropriate services for fees being deducted from super would support compliance with sole purpose test.

The cost to the provider in making an assessment of the many permutations of services will add to the cost to service members accounts. Some super funds already monitor fees to ensure they are reasonable, and receives a declaration from both the member and the adviser that the deductions are consistent with the sole purpose test.

Clear expectations are needed for situations where a trustee receives information relating to estimates and whether it is incumbent on the trustee to make a value assessment. This should extend to how services be treated once received by trustees. There should be clarity as to whether the trustee would need to identify and manage where the reasonable estimate provided and the actual amount differ materially and if so what expectation there is on providers.

### 5.7 Practicality of the Fee Disclosure Statement (FDS)

A longer consultation period should provide the opportunity for simplifying where possible the FDS requirements insofar as is possible within ASIC's powers. These could be harmonised to reduce unnecessary administration, cost and inconvenience to clients.

The Financial Services Royal Commission (**FSRC**) intended that fees, and the services to be provided, be visible to clients. We must ensure that clients wanting and paying for advice receive it, and that those who do not wish to renew can easily cease the arrangement. While a great deal is achieved by moving to annual opt in for all ongoing fee clients, the LI does not

remove the duplication of information that creates confusion and makes it more difficult for clients to understand whether they are receiving the services they are entitled to.

The LI should remove as much duplication as possible to make it simpler for clients and reduce the administrative burden.

An LI that ensures consistent practice across advice businesses and funds whose compliance systems are different is needed. For example, it is not clear from the CP whether one process for deducting fees from a client's account is required. Issues of this nature can be addressed through further consultation.

### 5.8 Improved disclosure process

A simpler, more consumer-friendly disclosure process could be achieved by:

- removing the specific requirement to provide a separate FDS; and
- information into the annual renewal that is clear and straightforward for the consumer

Prospective services must be outlined in the OFA and must be delivered. If they are not delivered (or the adviser cannot prove that they were delivered), then the client should be entitled to a refund of fees for that period.

The initial OFA and consent form would be adequate to disclose the prospective services and fees for *new* clients, and the Annual Renewal Notice would be used to include the details regarding fees and relevant services to be provided for the upcoming period. This makes the fees and service expectations very clear to the client without the need for an additional FDS document.

Harmonisation reduces the chance of inadvertent FDS breaches and addresses many of the issues raised in ASIC Report 636 regarding the widespread inconsistency in FDS management by licensees. While advice businesses have invested in external technology for many years to manage the FDS obligation, continuing to impose this obligation in an era of annual opt-in could continue to add to the cost of advice over time.

However, harmonisation should not have the unintended consequence of creating privacy issues. For example, confidential information such as the account details of a client and product they hold being held with one provider but visible and potentially stored by another provider.

Other practical considerations as to 'apportioning fees' and how a Trustee would be expected to possibly capture and treat this information should be clarified in the course of consultation. For example, whether this process require visibility of all other accounts and charges breakdown to validate an apportioned percentage or not.

#### **FSC Recommendation**

8. That ASIC explore ways to harmonise the FDS and annual opt-in requirements where possible and that this form the basis of extended consultation on the Legislative instrument.

## 5.9 Independence

The LI should be clear and specific as to how 'independent' labelling is and should be used.

One of the CP's proposals stipulates that whether a service is independent or 'not independent' be included.

ASIC should also provide clarity on how the disclosure of non-independence is to be worded either by definition or through an example. It is possible this might over time prove more effective in the Consent apparatus than in the Financial Services Guide (**FSG**).

### **FSC Recommendation**

9. That the specified requirements for the use of 'independent' and 'not independent' be set out in the Legislative Instrument

## 6 Additional comments

The FSC submits additional comments for consideration as part of an extended consultation process emanating from the ED. The FSC recognises it is not within the remit of ASIC's powers to ameliorate these but does however urge these be considered as the LI is developed.

### 6.1 Avoiding adverse impact of annual renewal dates on clients

At present, there are two different dates for moving existing clients to annual opt in. This will result in added costs to licensees for monitoring each separate deadline and to advisers who will need to conduct out of cycle reviews in order to meet a specific deadline for obtaining a new agreement. Out of cycle reviews inconvenience clients and add to adviser costs which will also drive up the cost of financial advice.

While OFAs generally outline an annual service package, in reality clients may wish to meet for a review earlier or later than the anniversary date. Bringing a review forward should not reset the anniversary date. Where a client is unable to meet during the 12 month period, some leniency to hold (or complete) a review should be available. We would still expect evidence that the adviser tried to schedule the review, and that it would need to occur within 60 days after the anniversary date. Allowing this flexibility would reduce the number of situations where arrangements inadvertently lapse as the client was unable to come in for a review, and save unnecessary administration costs which otherwise will drive up the cost of advice.

### 6.2 Information provided in the Fee Disclosure Statement

Where OFAs are renewed annually, there is little additional information or value in the content of the FDS. The FDS is a legislative requirement under the Corporations Act, however it is the domain of ASIC, through which the LI is being developed, to look at how its requirements could be harmonised with incoming the forthcoming annual opt-in requirements.