HOLLEY NETHERCOTE
LAWYERS

10 June 2022

Email: AdviceReview@treasury.gov.au

Quality of Advice Review Secretariat
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Ms Levy,

RE: Quality of advice review – issues paper

Thank you for the opportunity to provide feedback on Treasury's issues paper *Quality of Advice Review* (**the Issues Paper**).

ABOUT US

We are making this submission because of our deep involvement in the advice sector. We are one of Australia's leading law firms in the financial advisory space, acting for many hundreds of advice licensees, ranging from institutional groups through to small one-person practitioners.

Holley Nethercote Lawyers are experts in financial services law and regulation. We are also experts in credit, crypto, financial crime and commercial law. Employing 33 staff across Melbourne, Sydney and Port Macquarie, our firm has a preventative-law focus and deep regulatory expertise. A third of our fee-earners previously worked at ASIC, and we regularly advise the regulated sector and engage with the relevant professional bodies. We also run the Compliance Manager's Forum twice yearly, which includes representatives from most of Australia's top 50 dealer groups.

We also provide non-legal services through our related business Holley Nethercote Compliance, including Australian Financial Services Licence (**AFSL**), Australian Credit Licence (**ACL**) and Australian Deposit-taking Institution (**ADI**) application support; training; template compliance documents and regulatory updates. Templates and online training are provided through the HN Hub: https://www.hnlaw.com.au/hn-hub-home/.

We also provide tailored face-to-face training, and have trained regulators and *thousands* of financial planners, accountants, stockbrokers, fund managers, life insurers, general insurers,

CFDs providers, retail and industry superannuation funds – and more – on the distinction between no advice, general advice and personal advice.

SUMMARY OF OUR VIEW

The goal of protecting consumers, and having quality and affordable advice, is challenging. Lawyers are known for saying "Do you want quality, affordability or speed? Pick two." Whilst it's an exaggeration and a light poke at the legal profession, it highlights the inherent difficulty in legislating to meet all of these conflicting needs. This is a difficult problem to solve.

Also, governments have been quick to add obligations but slow to simplify them. The result is a regime that is too complex. As Hans Küng said: "The more finely woven the fabric, the greater the number of holes."

The financial advice industry has evolved to become more professional. It follows that the regulatory framework needs to become less prescriptive.

RESPONSE TO CONSULTATION QUESTIONS

Our feedback only addresses certain points in the Issues Paper. We adopt the same glossary of terms.

3.1 Quality Financial Advice:

- What are the characteristics of quality advice for providers of advice?
- What are the characteristics of quality advice for consumers?
- Have previous regulatory changes improved the quality of advice (for example the best interests duty and the safe harbour (see section 4.2))?
- What are the factors the Review should consider in deciding whether a measure has increased the quality of advice?

Previous regulatory changes have improved the quality of personal advice. Particularly, effective changes have been the prohibition on conflicted remuneration and the professional standards reforms. The latter reforms are outside the scope of the Terms of Reference for this Review, but provide important context for the Review.

Some previous regulatory changes have inhibited improvements in the quality of personal advice. In particular, we have observed (through reviewing thousands of client files) a tendency for the safe harbour steps to drive a "tick a box" approach. This approach leads personal advice firms to produce generic objectives and recommendations across multiple clients. In some cases, this amounts to poor quality advice. High quality personal advice, by contrast, is characterised by quite different objectives and recommendations from client to client.

There is significant complexity in the current regulatory framework (see below, under 3.2), and both this complexity and a "tick a box" approach causes advisers to lose sight of what is really important in providing quality personal advice to clients – the basic concept of acting in the best interests of the client and providing the client with advice which is appropriate to them.

We have seen instances of ongoing fee arrangements or fixed-term agreements[1] being used to accommodate rising compliance costs linked to legislative complexity. This tends to drive advice which is less affordable than may otherwise be the case.

3.2 Affordable Financial Advice

- What is the average cost of providing comprehensive advice to a new client?
- What are the cost drivers of providing financial advice?
- How are these costs apportioned across meeting regulatory requirements, time spent with clients, staffing costs (including training), fixed costs (e.g. rent), professional indemnity insurance, software/technology?
- How much is the cost of meeting the regulatory requirements a result of what the law requires and how much is a result of the processes and requirements of an AFS licensee, superannuation trustee, platform operator or ASIC?
- Which elements of meeting the regulatory requirements contribute most to costs?
- Have previous reforms by Government been implemented in a cost-effective way?
- Could financial technology (fintech) reduce the cost of providing advice?
- Are there regulatory impediments to adopting technological solutions to assist in providing advice?

Compliance costs are impacting the cost of personal advice. There is significant complexity in the current regulatory framework applicable to personal advice licensees. This complexity stems from:

- obligations specifically applicable to the provision of personal advice;
- obligations in the Financial Planners and Advisers Code of Ethics;
- overlap between the two above areas; and
- other Australian financial services licensing obligations, such as reportable situation obligations and product design and distribution obligations.

While professional standards are excluded from the scope of this Review, the overlap between legislative obligations and the obligations in the Financial Planners and Advisers Code of Ethics causes added complexity which should not be ignored.

The Royal Commission led to an increase in regulatory complexity and an increase in enforcement activity, driving up compliance costs. Since the Royal Commission, we have observed some firms moving more fervently to the use of ongoing fee arrangements as a way of guaranteeing an income stream to defray these costs and to replace the old income streams stemming from conflicted remuneration. Pay-as-you-go or one-off advice is difficult to find. This leads to two problems. First, personal advice under an ongoing fee arrangement is likely to cost the client more money, without it necessarily being the case that the additional servicing provided under such arrangements is really justified. Second, while the removal of conflicted remuneration from the industry has been positive, a new

[1] We believe fixed-term agreements to be problematic if not used properly. If they are simply being "rolled over" each year, we believe they are likely to meet the definition of an ongoing fee arrangement. Our references to ongoing fee arrangements includes a reference to fixed-term agreements that are rolled over each year on, essentially, the same terms as the previous year.

potential conflict of interest has appeared in the propensity with which advisers recommend that clients enter into ongoing fee arrangements. This raises questions about the quality of advice provided when an adviser recommends that a client enter into an ongoing fee arrangement. (See our discussion of this below.) We understand that ongoing quality advice is at the heart of the value proposition for financial advisers. Many of them will see the provision of ongoing service to their clients as consistent with a long-term value-adding role. This is certainly the case for many advisers. However, in our experience, once-off advice is increasingly uncommon in the personal financial advice sector.

Another significant cost affecting personal advice licensees which is passed on, in some measure, to clients, is the cost of professional indemnity insurance. The requirement for this insurance (when it comes to licensees with retail clients) stems from section 912B of the *Corporations Act 2001*. Some personal advice licensees are reporting significant increases in premiums – for example, $50,000 to $170,000 in a single year, with no change in business activities.

3.3 Accessible Financial Advice

- How should we measure demand for financial advice?
- In what circumstances do people need financial advice but might not be seeking it?
- What are the barriers to people who need or want financial advice accessing it?
- How could advice be more accessible?
- Are there circumstances in which advice or certain types of advice could be provided other than by a financial adviser and, if so, what?
- Could financial advisers and consumers benefit from advisers using fintech solutions to assist with compliance and the preparation of advice?
- What is preventing new entrants into the industry with innovative, digital-first business models?

Cost is a huge barrier to people accessing financial advice. Advice costs more and clients are often paying for it on an ongoing basis, via ongoing fee arrangements for reasons previously discussed.

The high cost of compliance is driven by the complexity and overlap between aspects of the regulatory framework. This means it takes licensees significant time and resources to understand and comply with the measures. Personal advice licensees sometimes over-engineer aspects of the personal advice process to ensure compliance in a way that is driven by fear. Factors that may be driving this fear are:

- ASIC's current enforcement approach
- the complexity of the regime requiring the involvement of lawyers for assistance with meeting compliance obligations – for example, by having them draft Statement of Advice templates, which can lead to such documents being used as legal risk management tools, making them longer and more complex than the legislation intended.

The right regulatory approach could allow accountants to provide certain, specific types of advice outside the licensing regime.

There are increasing opportunities for the Consumer Data Right to make it easier for financial advisers to collect data about a client's financial situation, thus expediting the fact-

finding part of the personal advice process. Fintech will also be a key part of obtaining this data and feeding it directly into the personal advice process.

4.1 Types of Advice

- Is there a practical difference between financial advice and financial product advice and should they be treated in the same way by the regulatory framework?
- Are there any impediments to a financial adviser providing financial advice more broadly, e.g. about budgeting, home ownership or Centrelink pensions? If so, what?
- What types of financial advice should be regulated and to what extent?
- Should there be different categories of financial advice and financial product advice and if so for what purpose?
- How should the different categories of advice be labelled?
- Should advice provided to groups of consumers who share some common circumstances or characteristics of the cohort (such as targeted advertising) be regulated differently from advice provided only to an individual?
- How should alternative advice providers, such as financial coaches or influencers, be regulated, if at all?
- How does applying and considering the distinction between general and personal advice add to the cost of providing advice?
- Should the scope of intra-fund advice be expanded? If so, in what way?
- Should superannuation trustees be encouraged or required to provide intra-fund advice to members?
- Are any other changes to the regulatory framework necessary to assist superannuation trustees to provide intra-fund advice or to more actively engage with their members particularly in relation to retirement issues?
- To what extent does the provision of intra-fund advice affect competition in the financial advice market?
- Do you think that limited scope advice can be valuable for consumers?
- What legislative changes are necessary to facilitate the delivery of limited scope advice?
- Other than uncertainty about legal obligations, are there other factors that might encourage financial advisers to provide comprehensive advice rather than limited scope advice?
- Do you agree that digital advice can make financial advice more accessible and affordable?
- Are there any types of advice that might be better suited to digital advice than other types of advice, for example limited scope advice about specific topics?
- Are the risks for consumers different when they receive digital advice and when they receive it from a financial adviser?
- Should different forms of advice be regulated differently, e.g. advice provided by a digital advice tool from advice provided by a financial adviser?
- Are you concerned that the quality of advice might be compromised by digital advice?
- Are any changes to the regulatory framework necessary to facilitate digital advice?
- If technology is part of the solution to making advice more accessible, who should be responsible for the advice provided (for example, an AFS licensee)?

- In what ways can digital advice complement human-provided advice and when should it be a substitute?

The distinction between financial product advice and financial advice relating to other areas obviously has certain regulatory underpinnings. The Commonwealth (thanks, in part to referred powers) legislates in relation to financial products whereas property falls into the domain of the States. Crypto assets have so far been largely unregulated as they frequently fail to meet the definition of "financial product" under the *Corporations Act 2001*.

Many personal advice licensees are quite siloed in their approach, restricting their activities to activities relating to financial products. For example, we have observed that large licensees are reluctant to allow advisers to advise in relation to direct property investment. Personal advice licensees are reluctant to enter the landscape of advising in relation to crypto assets. This is driven by regulatory frameworks (or the absence thereof), professional indemnity insurance considerations and other risk considerations. However, it is in some ways artificial, at a practical level, for financial advisers (particularly those purporting to provide "holistic" advice) to provide advice in relation to financial products but no other investments beyond these.

There would be benefits in having a regulatory framework which promotes the consideration of most "run of the mill" investments by a single financial adviser. One step towards this would be to bring crypto assets under the current Australian financial services licensing regime. We have already provided support for this proposal in our response to the *Crypto asset secondary service providers: Licensing and custody requirements* Consultation paper dated 21 March 2022.

Applying and considering the distinction between general and personal advice adds indirectly to the cost of providing advice. The biggest impact is on businesses providing general advice. The lack of certainty around where the boundary lies between general and personal advice creates difficulties in setting up processes, training staff and using innovative business models. General advice offers a less labour-intensive, lower cost means of providing financial product advice to clients. However, the lack of clear delineation between what is personal advice and what is general advice acts as a disincentive to parties wishing to commence business in this space.

Despite attempts by ASIC to confirm that it is acceptable for personal advice to be limited in scope, there is some nervousness around this in the industry. The reality is that most personal advice is limited in scope to some degree. The safe harbour steps seem to create the impression that it is necessary to conduct the same level of fact finding for limited scope advice that you would conduct if providing holistic advice. Other professionals do not grapple with this issue in the same way. For example, a doctor providing advice to a patient about a problem with their eye would not necessarily seek information about the patient's ankle. Lawyers, accountants and doctors are comfortable with adapting their version of the advice process to the task at hand, which is almost always limited in scope in some way.

If the professional standards reforms have done what was intended and the current cohort of financial advisers really now constitutes a profession (rather than a population of sales people), then one would expect that they have the skills and capability to provide their services, in the best interests of the client, in the way that other professionals do. This

means that highly prescriptive provisions like the safe harbour steps are redundant and possibly distract an adviser from simply applying their professional skills to the task at hand. Highly prescriptive provisions also send a message from the Parliament (which, of course, represents the people) that society does not believe that financial advisers are professionals or can be treated as such. Removing highly prescriptive provisions would underscore the idea that financial advisers are professionals and should act as such.

If it is not accepted that professional standards have lifted the calibre and morality of the financial advice industry, then consideration must be given to changing those standards (although we note that this area is explicitly excluded from the scope of this Review).

When considering the application of the best interests duty to the provision of personal advice via digital means, it is worth considering that the best interests duty is a legislative incarnation of a duty arising in fiduciary relationships. These relationships were historically human to human, not robot to human. This raises the question whether it is really appropriate to apply this concept to a digital advice scenario or whether it would be preferable to develop requirements tailored to that scenario. The downside of preparing a new set of requirements for the digital advice scenario is that it may lead to further regulatory complexity.

4.2 Best Interests and Related Obligations

- Do you consider that the statutory safe harbour for the best interests duty provides any benefit to consumers or advisers and would there be any prejudice to either of them if it was removed?
- If at all, how does complying with the safe harbour add to the cost of advice and to what extent?
- If the safe harbour was removed, what would change about how you would provide personal advice or how you would require your representatives to provide personal advice?
- To what extent can the best interests obligations (including the best interests duty, appropriate advice obligation and the conflicts priority rule) be streamlined to remove duplication?
- Do you consider that financial advisers should be required to consider the target market determination for a financial product before providing personal advice about the product?

In our view, the safe harbour steps should be removed. This is because:

- they lead to a "tick a box" approach which, in turn, drives licensees to promote the use of generic objectives and recommendations for clients and distracts advisers from simply exercising their professional capability in providing advice
- they add to an already complex regulatory environment which, in turn, leads to greater operating costs for personal advice licensees which are then passed onto clients
- they particularly cause confusion in that there is a perception that they are the only way the best interests duty can be met, this perception possibly being fed by ASIC focusing heavily on safe harbour steps.

The problem identified above in relation to generic objectives and recommendations is easily identifiable by looking at multiple client files for a single personal advice licensee. Common sense dictates that where the same objectives and recommendations appear file after file, it is likely that the best interests obligations are not being met on at least some of those files. However, it is difficult for a regulator focusing on a single client file with such generic objective and recommendations to prove, on the face of the file, that the best interests duty

has not been met. In other words, the use of generic objectives and recommendations by personal advice licensees is not an issue that can be easily addressed by enforcement. Other ways of discouraging this conduct must be found. One way is to discourage a "tick a box" approach by removing the safe harbour steps.

When it comes to target market determinations, we would expect that a financial adviser would already consider the target market determination when considering the possibility of recommending a product to the client, as part of the personal advice process, in order to meet the best interests obligations. Thus, it seems unnecessary to introduce a provision specifically requiring an adviser to consider the target market determination.

4.3 Conflicted Remuneration

- To what extent has the ban on conflicted remuneration assisted in aligning adviser and consumer interests?
- Has the ban contributed towards improving the quality of advice?
- Has the ban affected other outcomes in the financial advice industry, such as the profitability of advice firms, the structure of advice firms and the cost of providing advice?
- What would be the implications for consumers if the exemptions from the ban on conflicted remuneration were removed, including on the quality of financial advice and the affordability and accessibility of advice? Please indicate which exemption you are referring to in providing your feedback.
- Are there alternatives to removing the exemptions to adjust adviser incentives, reduce conflicts of interest and promote better consumer outcomes?
- Has the capping of life insurance commissions led to a reduction in the level of insurance coverage or contributed to underinsurance? If so, please provide data to support this claim.
- Is under insurance a present or emerging issue for any retail general insurance products? If so, please provide data to support this claim.
- What other countervailing factors should the Review have regard to when deciding whether a particular exemption from the ban on conflicted remuneration should be retained?

The ban on conflicted remuneration and introduction of the best interests obligations has improved the quality of advice. However, in the personal advice context, a new conflict of interest has arisen. This is the widespread use of ongoing fee arrangements by personal advice licensees. These arrangements, whilst helping an adviser provide ongoing value-adding services to clients, also provide a steady source of income in an environment where regulatory complexity leads to increased compliance costs, which need to be met, and where conflicted remuneration previously provided a steady income stream but, for obvious regulatory reasons, no longer does.

When we conduct file reviews, we particularly observe repeated use of generic objectives and recommendations when providing personal advice to clients to enter into ongoing fee arrangements.

4.4 Charging Arrangements

- Are consent requirements for charging non-ongoing fees to superannuation accounts working effectively? How could these requirements be streamlined or improved?

- To what extent can the requirements around the ongoing fee arrangements be streamlined, simplified or made more principles-based to reduce compliance costs?
- How could these documents be improved for consumers?
- Are there other ways that could more effectively provide accountability and transparency around ongoing fee arrangements and protect consumers from being charged a fee for no service?
- How much does meeting the ongoing fee arrangements, including the consent arrangements and FDS contribute to the cost of providing advice?
- To what extent, if at all, do superannuation trustees (and other product issuers) impose obligations on advisers which are in addition to those imposed by the OFA and FDS requirements in the Corporations Act 2001?
- How do the superannuation trustee covenants, particularly the obligation to act in the best financial interests of members, affect a trustee's decision to deduct ongoing advice fees from a member's account?

Our understanding from personal advice licensees is that the requirements applicable to ongoing fee arrangements take a significant amount of time to administer, disproportionate to the value the requirements deliver to clients.

There is certainly scope to reduce compliance red tape here. In particular, recent reforms regarding ongoing fee arrangements and consents, while increasing client engagement with the requirement for annual renewals of ongoing fee arrangements and consents for the deduction of adviser fees, have unnecessarily increased cost and complexity by removing the ability for advice providers to streamline the timing of giving FDSs. Many advice providers previously issued FDSs to clients in bulk during the year. Streamlining was previously permissible under the Corporations Act (see withdrawn RG 245), however, since the introduction of *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021*, there is no longer a mechanism to streamline the giving of FDSs. There does not appear to be any policy rationale that we are aware of for the removal of streamlining FDSs. To the extent that this was an unintended consequence of the recent reforms, we recommend that this be addressed by appropriate legislative amendments.

The ability to streamline the giving of FDSs would provide efficiency for personal advice licensees, reducing the compliance burden and costs and, hopefully, thereby reducing the cost of advice for clients.

Also, there is no materiality thresholds for pricing errors. So, an FDS that is incorrect by $0.07, and then sent out to 100 clients, causes complex reportable-situation assessments that may even involve briefing external lawyers!

4.5 Disclosure Documents

- How successful have SOAs been in addressing information asymmetry?
- How much does the requirement to prepare a SOA contribute to the cost of advice?
- To what extent can the content requirements for SOAs and ROAs be streamlined, simplified or made more principles-based to reduce compliance costs while still ensuring that consumers have the information they need to make an informed decision?
- To what extent is the length of the disclosure documents driven by regulatory requirements or existing practices and attitudes towards risk and compliance adopted within industry?

- How could the regulatory regime be amended to facilitate the delivery of disclosure documents that are more engaging for consumers?
- Are there particular types of advice that are better suited to reduced disclosure documents? If so, why?
- Has recent guidance assisted advisers in understanding where they are able to use ROAs rather than SOAs, and has this led to a greater provision of this simpler form of disclosure?
- Are there elements of the COVID-19 advice-related relief for disclosure obligations which should be permanently retained? If so, why?

Preparing an SOA contributes to the cost of advice in two ways. First, the preparation of the SOA for the individual client takes some time and, given the nervousness around meeting the requirements, probably takes longer than is really required from a compliance perspective. Second, there are compliance costs associated with developing SOA templates and having SOAs audited as part of auditing the advice process. The more complex SOA requirements are, the more these functions will cost. And those costs will be passed onto clients.

Giving advisers greater freedom to prepare an advice document of their own form and choosing would bring them closer to other professionals who do not have to follow a mandated format for delivering their professional expertise. For example, a lawyer prepares an email or a letter of advice. The particular law firm may dictate the structure of letters of advice and/or provide a template for use by its lawyers, but the creation of those is not constrained by prescriptive regulatory provisions. Likewise, doctors and accountants aren't typically constrained in the way they provide their advice.

See above under "Types of advice" for more of our comments on the need for the regulatory framework to respond to the evolution of the personal advice industry and for the regulatory framework, in turn, to send the message that the industry is now a profession to the extent that it requires less instruction.

The length of disclosure documents is partly driven by regulatory requirements and partly driven by attitudes towards risk – and partly by an interplay between the two. Advice licensees often consult lawyers, who are naturally risk averse and who often see opportunities to manage risk in the drafting of disclosure documents and templates for disclosure documents. This sometimes leads to documents being longer and more complex than they need to be.

Clear consideration needs to be given to the extent to which disclosure protects consumers and promotes quality in the advice context. Much intelligence on the effectiveness of disclosure has come, in recent times, from the field of behavioural economics. This information has fed into useful commentary such as Pamela Hanrahan's Background Paper 7 for the Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry, and Background Paper FSL 5 for the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation.

Problems with disclosure as a method of protecting consumers, as described in these Papers, are:

- clients often do not read or understand the written disclosures given to them;
- disclosure can have the unintended effect of making a client more trusting and less discerning about the advice given; and

- people do not always make rational decisions and yet the concept of disclosure as a regulatory tool presupposes that they do.

Background Paper FSL 5 for the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation notes that increasingly interventionist measures have come to be used as a method of protecting clients in financial services, raising the question whether disclosure (and particularly lengthy disclosure) remains necessary.

On this basis, we advocate reducing the number of content requirements for SOAs and giving advisers greater discretion as to how they exercise their professional skills.

Having different disclosure requirements for different situations is a good idea in theory but will lead to increased complexity in the legislative framework. It would be better to pare back some of the more prescriptive measures to more principles-based provisions with broad applicability.

We note that, in our experience, advisers did not make use of the COVID-19 advice-related relief.

4.6 Accountants Providing Financial Advice

- Should accountants be able to provide financial advice on superannuation products outside of the existing AFSL regime and without needing to meet the education requirements imposed on other professionals wanting to provide financial advice? If so, why?
- If an exemption was granted, what range of topics should accountants be able to provide advice on? How can consumers be protected?
- What effect would allowing accountants to provide this advice have on the number of advisers in the market and the number of consumers receiving financial advice?
- Is the limited AFS licence working as intended? What changes to the limited licence could be made to make it more accessible to accountants wanting to provide financial advice?
- Are there other barriers to accountants providing financial advice about SMSFs, apart from the limited AFSL regime?

We have a number of accounting firms as clients of our legal practice or of our associated compliance business, many with limited AFSLs. The costs associated with having a limited AFSL are significant and dissuade many accountants from having one. This means they are unable to give basic financial product advice to clients who could benefit from it and will not receive it via other methods.

The accounting firm clients typically affected fall into two categories – those who only have a small amount to invest and would otherwise not obtain advice, and those that are small business owners. In both instances, these clients often do not have a financial planner, because they can't afford one, or a planner cannot offer the services they need. For example, accountants advise their small business owner clients to help them run and grow their businesses, which are often their greatest retirement asset (which is not a financial product). These clients need basic advice in relation to superannuation (particularly SMSFs), both in relation to contributions and pensions. Accountants who have additional training in superannuation and SMSFs are well-suited to advise on this, but are currently unable to without a full AFSL.

Allowing all accountants to provide this kind of advice, which fits naturally with their accounting activities and removing the need for a limited AFSL, would make advice far more accessible for clients, particularly small business owners.

This could be managed by imposing appropriate education requirements through a regime administered by a professional body.

4.7 Consent Arrangements for Wholesale Client and Sophisticated Investor Classification

- Should there be a requirement for a client to agree with the adviser in writing to being classified as a wholesale client?
- Are any changes necessary to the regulatory framework to ensure consumers understand the consequences of being a sophisticated investor or wholesale client?
- Should there be a requirement for a client to be informed by the adviser if they are being classified as a wholesale client and be given an explanation that this means the protections for retail clients will not apply?

Having a requirement that a client agree with the adviser in writing to being classified as a wholesale client would add further paperwork and complexity to the advice process. If a client wishes not to be treated as wholesale and the adviser refuses to accommodate this, the client may "vote with their feet" and go to another adviser. Requiring such agreement would not of itself educate the client as to what it means to be wholesale. Also, this requirement would not necessarily address situations where the client is being treated as wholesale in circumstances where this is not appropriate. This is because an adviser wishing to treat their client as wholesale might well encourage their client to provide this written agreement, without the client particularly understanding the ramifications of this.

The ideas of better educating clients about what it means to be a sophisticated investor or wholesale client are good, but introducing more requirements to the regime risks creating greater confusion. Regulatory complexity sits behind a number of issues, including compliance costs, which feed into the cost of personal advice and accessibility issues.

5. Other measures to improve the quality, affordability and accessibility of advice

- What steps have licensees taken to improve the quality, accessibility and affordability of advice? How have these steps affected the quality, accessibility and affordability of advice?
- What steps have professional associations taken to improve the quality, accessibility and affordability of advice? How have these steps affected the quality, accessibility and affordability of advice?
- Have ASIC's recent actions in response to consultation (CP 332), including the new financial advice hub webpage and example SOAs and ROAs, assisted licensees and advisers to provide good quality and affordable advice?
- Has licensee supervision and monitoring of advisers improved since the Financial Services Royal Commission?
- What further actions could ASIC, licensees or professional associations take to improve the quality, accessibility or affordability of financial advice?

Ironically, while the Royal Commission was scathing of many ongoing fee arrangements, one industry response to the Royal Commission has been an embracing of ongoing fee

arrangements with a corollary abandonment of one-off or pay-as-you-go advice models. As noted above, whilst this goes to the heart of many advisers' value proposition, there is a conflict of interest in building a steady income stream in the face of rising compliance costs post Royal Commission.

As noted above, an ongoing fee arrangement is, in some ways, the new conflicted remuneration of the 2020s. There is an inherent conflict in an adviser or licensee advising a client to enter into an ongoing fee arrangement with that same adviser or licensee. Yet this occurs regularly and is often, in our experience, associated with heavy use of clearly templated client objectives and recommendations, suggesting that the best interests obligations are not necessarily being met when the recommendation to enter into an ongoing fee arrangement is made.

Other professions tend not to rely as heavily on this kind of fee model. For example, most of our clients pay for legal services as they use them and only a small proportion are on retainer arrangements. It would be surprising to see a doctor charge an ongoing fee. By contrast, businesses which rely heavily on ongoing fees (like gyms, for example) tend not to be professional firms.

Consideration should be given to ways in which the industry could be persuaded to reduce their reliance on ongoing fee arrangements. One possible approach is to reduce compliance costs by addressing things like regulatory complexity, and also the commercial realities linked to the regulatory requirements, such as the rising cost of professional indemnity insurance. But perhaps there are other methods to convince firms to move back to models of charging more closely aligned with those of other professions. Some lateral thinking might be required on this front.

Please contact pauld@hnlaw.com.au if you have any questions or wish to discuss our submission.

Yours sincerely,

Holley Nethercote Lawyers