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Submission to the Treasury on the Quality of Advice Review

June 2022

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Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: AdviceReview@treasury.gov.au

Dear Michelle

Quality of Advice Review

The Institute of Public Accountants (IPA) welcomes the opportunity to provide comments on the much-anticipated Quality of Advice Review (the Review). We appreciate that it will not be a panacea to overcome all of the existing issues in the financial advice sector. However, we are hopeful of meaningful and significant progress toward a consumer-centric model defined by proportionate regulation to enable the provision of competent and affordable financial advice by appropriately qualified professionals in a revived (and eventually) thriving sector. At a time when the demand from Australian consumers for affordable financial advice is increasing, it is imperative that all stakeholders work together to achieve genuine reform.

The IPA is one of the three professional accounting bodies in Australia, representing over 47,000 members and students in Australia and in over 80 countries. Our comments are from the perspective of small business and SMEs given that three-quarters of our members work in or are advisers to these sectors. We note that the majority of both IPA members in practice and financial advice practices are also small businesses.

We are grateful to IPA members who have taken the time to contribute to surveys and consultation, and their views and feedback are reflected in this submission. We are especially grateful for the invaluable contribution by Lionel Rodrigues, an IPA member who has held an AFSL for many decades and whose Master of Financial Planning thesis has been a major source of insight, information, and inspiration.

In addition to the submission made on the Terms of Reference for the Review, the IPA will be part of or making three submissions to the Review:

- Part of the Associations Working Group, which includes 11 organisations (IPA, CA ANZ, CPA Australia, SMSF Association, FPA and others).
- A joint submission with CA ANZ and SMSF Association on the role of accountants in financial advice, being section 4.6 of the Issues Paper.

- This individual submission which focuses on areas of particular concern to IPA members.

Our comments in response to the Issues Paper are discussed below.

Please don't hesitate to contact Vicki Stylianou (vicki.stylianou@publicaccountants.org.au or mob. 0419 942 733) if you require further information or have queries.

Yours sincerely

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IPA comments on the Issues Paper

We have made general groupings of the questions in the Issues Paper under sections 3, 4 and 5.

Section 3: Framework for Review

Questions 6, 15, 16 – relate to cost drivers, ways to reduce cost (including technology/ fintech), barriers for consumers to accessing financial advice, how could advice be more accessible.

Questions 81 and 83 – relate to ASIC CP 332 *Promoting access to affordable advice for consumers.*

Sections 3.2 and 3.3 Affordable and accessible financial advice

As part of responding to ASIC CP 332, the IPA undertook an extensive survey and consultation of our members. Below are excerpts from our submission relating to the cost and other impediments to providing financial advice.

The survey results (which are statistically valid) indicate that the overwhelming response to the question of access to affordable advice for consumers is that compliance is the main driver of cost in providing advice. And that meeting these compliance costs is making it unprofitable to provide advice to a cohort of consumers who will not pay. We note that CP 332 acknowledges the cost gap between what it costs to provide the advice versus what consumers are prepared to pay. A significant rebalance is needed if the unmet advice needs of consumers are to be satisfied.

However, this is a challenge which needs a holistic solution, and which cannot be solved by ASIC alone. In this regard we acknowledge that CP 332 states that ASIC will pass on feedback and comments on suggestions for law reform to Government, and we assume this has been done as part of the Review.

The IPA believes that to seriously tackle the affordability issue that compliance requirements will need to be changed in terms of legislation, regulation, interpretation, and implementation. We appreciate that ASIC's role is in interpreting, implementing, and enforcing the legislation and regulation, which are developed and decided by Treasury and Government. However, fees such as those imposed by the ASIC industry funding model, are within the control of ASIC and are part of the increasing cost of doing business suffered by many IPA members and other advisers.

Costs of financial advice

<u>Too expensive:</u>

- The survey asked whether the cost of advice made it too expensive for (some) clients. Almost 100 per cent of respondents replied 'yes'. Some members expressed surprise that we would even have to ask the question. There were many comments stating that compliance and documentation made the cost prohibitive; the fact find being a waste of time; most clients don't read the documents and question why they

are being provided with them. In response to the high cost of advice, about a third of respondents changed their target market, mostly to high net wealth individuals or business/ professional type clients and some were focusing only on SMSF clients. Others stated that they intended to exit the financial advice space as they were no longer able to provide advice profitably; others provided financial advice as an add-on service to tax and accounting services and did not expect to do so profitably.

Costs include:

- ASIC levies
- Licensee fees
- AFCA fees
- Registration at the Tax Practitioners Board (TPB)
- Regulatory fact finds
- Product comparison and research
- Record keeping requirements
- Professional indemnity insurance
- Professional association fees
- Software subscription fees (X Plan etc)
- Ongoing mandatory CPD and training costs

Future regulatory costs include:

- Compensation Scheme of Last Resort fees
- Financial Accountability Regime
- Fees to Financial Services Credit Panel
- Industry Funding Model for Financial Counsellors
- Incoming Reference Checking Protocols
- Design and Distribution Obligations

<u>Regulatory framework:</u>

- The most overwhelming response was to the question on whether the current regulatory framework and compliance should be simplified, and if so, how. Almost 100 per cent of respondents answered 'yes'. Some of the comments were 'obviously', 'definitely', 'it's a disgrace', 'really???', 'absolutely', 'standard 6 FASEA is a problem', 'it's insane', 'totally over the top madness', 'we've built a $3 trillion super pool but you can't get advice on it', 'cost structures advantage the large players', 'complete review is needed' (this was a common theme), 'dramatically shorten SOAs', 'ASIC needs to get out of the way' and other similar remarks.

- Since our CP 332 survey, members have also commented on the overly-excessive requirements relating to obtaining client consents, of which there are numerous; and the client complaints having to provide so many consents.
- The conclusion which was noted by many members (including in consultation with members) was that the high cost of advice meant that many consumers were not getting advice. As noted in the consultation paper, clients refuse to pay enough to cover costs. As one member put it, 'the simple question of 'should I start a pension' becomes a war and peace document costing $2,000'.

Technology and costs:

- With respect to the use of technology, many respondents stated that they used software and were aware of and used various digital solutions, however, these did not alleviate the cost of providing advice due to the fact that many of the increasing costs were not reliant on technology or could not be addressed by technology.

Licensees and dealer groups:

- Another theme was that members who are authorized representatives were often subject to the requirements of their licensees and dealer groups, who were usually risk-averse, with very little opportunity to make changes.

Industry funds:

- Some members mentioned the role played by industry funds, which they believed should facilitate and support the advice community, but instead were taking advantage of the situation and were able to offer more affordable or free advice to consumers. Members stated they were unable to compete given the vastly different cost structures under which they respectively operate.

Solutions to cost and impediments

Documentation:

- One of the main themes was that compliance requirements around documentation need to be simpler. Many members made comments to the effect that SOAs and other documents are really for compliance purposes and to protect licensees and are not for the clients. Some have to pay fees to their dealer groups to have their SOAs vetted and approved before being able to present them to clients. This added to the time and cost of the process; with many of these members saying that the cost was to vet for compliance rather than for the quality of the advice. Duplication in the documentation was another frequent comment, such as 'ongoing duplicated disclosures adds to the cost and adds no value'.

ASIC guidance:

- Members were divided as to the usefulness of ASIC guidance, including RG 244 and RG 90, and whether more guidance was needed, though most agreed that more examples would be useful. Whilst some believed that more guidance was definitely needed as to what constituted acceptable advice, others were just as vehement that the existing guidance only served to confuse matters or make the provision of advice more complicated and detailed than was necessary. The majority of authorized representatives agreed that it would help if their licensees and dealer groups

accepted or applied the ASIC guidance. Many suggested that ASIC could issue standard documents for everyone to use.

Individual licensing:

- A number of members suggested that having an individual license structure, like tax agents, lawyers, doctors, SMSF auditors, registered company auditors, would reduce costs. This would reduce the licensee/ dealer group costs and reduce complexity and the compliance burden. Some suggested that dealer groups could still provide services like APLs, research, and products. Building competence in a specific area and then advising solely in that area was also suggested by some members. This also goes to the issue discussed below of whether scoped advice should be encouraged.

Matching complexity:

- An overall and common theme was that regulation should match the complexity of the advice being given and the risk involved. Smaller licensees were considered to be of lower risk due to having generally less complex work, but they were still constrained by the same legislation as larger licensees.

AFCA:

- In terms of reducing risk-aversion, one member commented that access to AFCA should be made more difficult for consumers, as some made baseless complaints which then had to be paid for by the licensee and this just kept adding to the cost-base, while the consumer bore no cost. [We believe that AFCA has introduced a more rigorous pre-vetting process and other improvements.] We have received comments from members and other advisers about licensees basing their compliance programs on the outcomes of AFCA investigations.

Role of consumers:

- Another common theme was around consumers taking more responsibility, and greater encouragement of consumer participation. This included, consumers having more awareness of the role of financial advisers and of the legal and regulatory requirements placed on them. Many commented that even though they describe and explain this to clients, that it simply does not make much difference in terms of how they view the relationship and how much they are prepared to pay for the services.

Scoped advice:

- Members were asked whether being able to offer 'scoped' or 'single issue' advice would make it more profitable for them and less expensive for consumers. Whilst many commented that scoped advice was already possible and they already offered scoped advice, approximately half answered that 'yes' being able to offer 'scoped' or 'single issue' advice would make it easier and less expensive for consumers.

Lessons from COVID-19 relief:

- Members were divided in their responses to the question of whether they found the COVID-19 relief helpful and whether relief should be provided to make ROAs more readily available for financial advisers to use as an alternative to an SOA. Whilst approximately a third found it useful, the others did not take up the relief offered on

the basis that they did not think it was commercially viable or considered that it would be 'too risky'.

Strategic advice

- The majority of IPA respondents do not offer product recommendations and believe that most consumers would benefit from strategic advice only. There was a mix of responses from members who provide strategic advice, with and without product recommendations (if licensed to do so) while others refer clients to financial planners or other specialized providers who can assist with product recommendations. There was a general consensus among those who do not provide product recommendations that they do not wish to do so on the basis of the compliance burden.

- The majority of respondents stated that 'all clients' would benefit from receiving strategic advice and similarly the majority of respondents stated that 'all consumers' would benefit from receiving financial advice. In addition, there was a variety of responses, including 'young clients', 'salary and wage earners', business clients' and 'professional clients' as to those who would benefit from strategic advice only.

- We also asked whether it would be helpful to have more guidance and examples from ASIC on compliant strategic advice. There was a mix of responses as to ASIC guidance generally. While some found it useful, others did not, based on its focus on compliance rather than on what might constitute acceptable advice and that it did not appear to be client focused.

In summary, by allowing appropriately qualified people to register to provide advice on specific topics without the need for a suite of long, legalistic documentation, would make a good start to 'promoting access to affordable advice to consumers'.

Seaview Consulting which advises financial services licensees and has extensive experience in the sector, has provided feedback that almost every AFSL holder has materially increased the fees charged to Advice businesses for the provision of services they require to operate their business. In many instances this increase has been in excess of 50 per cent per annum. Seaview Consulting has advised that they are seeing a significant increase in the number of smaller businesses who are becoming "non-viable" at the scale they are at. This is leading to "forced merger discussions" or exit forced sales. It is Seaview's opinion that the increase in compliance costs is the major contributor to this consequence.

Both Seaview and IPA members have commented that it would be useful if ASIC was available to the sector to provide interpretation on some matters which are confusing rather than to direct each participant to seek their own advice. The ATO and its rulings system and more 'user friendly' approach is often recommended as an alternative approach. An example is where there is a sale or transfer of a business and the need to understand what documentation is required when:

1. An adviser changes
2. A Corporate Authorised Representative (CAR) changes

3. A Licensee changes

Each Licensee has differing interpretations and it should be clarified.

Another example is whether a CAR or an Authorised Representative can be a representative of more than one Licensee? Locum operators are eternally confused.

Technology and data management

It is not only incumbent upon advisers and licensees to use technology such as fintech, AI etc to reduce the cost of advice, it is also incumbent upon the regulator, ASIC, to use technology to drive efficiencies and reduce its own costs. This should have a direct impact on the Cost Recovery Implementation Statement and the amount levied on advisers. We acknowledge the two year freeze on levies and the review.

We have commented in previous submissions that ASIC states on its website:

'As technology rapidly reshapes global financial markets, services and their regulation, ASIC's strategic priority is promoting regulatory technology (regtech) adoption'.

Given this approach, we would expect to see ASIC leading the way in the use of regtech in its own regulatory activities, with a resulting decrease in costs for regulated entities and an increase in effectiveness. We note that ASIC also mentions 'suptech' (supervisory technology); and is involved with the Innovation Hub and the regulatory sandbox. There is no transparency as to whether the use of regtech and suptech are driving efficiencies, innovation, cost reduction and effectiveness at ASIC. We appreciate that progress is being made, however, we would like to see more emphasis placed on an 'open data' policy (across government as a whole). The IPA Deakin University SME Research Centre is frequently impeded in its research efforts by the lack of accessibility to data for the purposes of academic research which is in the public interest. Open data at the government level seems to be mythical.

The idea of 'Open Data' is not new. We refer to the 2015 Report — *Fit for the Future: A Capability Review of ASIC.* The Government stated at the time that 'The Report presents findings and practical, forward-looking recommendations framed to ensure ASIC has the right governance and leadership, strategy and delivery capabilities to meet its objectives and regulatory challenges today and in the future'.

Specifically,

Recommendation 33: ASIC to invest in the development and application of big data 'reg-tech' analytics, through identifying specific applications for regulatory data analytics and building required staff skills/capabilities.

Recommendation 34: ASIC, in conjunction with the Council of Financial Regulators (CFR), to develop a forward work program to design and implement open data policies and data analytic collaboration.

Section 4: Regulatory Framework

Question 32 – relates to limited scope advice and how it could be changed to make it more accessible [attractive] for accountants wanting to give advice, and whether it's working.

Section 4.1 Types of advice

The limited AFSL was badly designed from the outset as it required accountants (and others who accessed it – it was not limited to accountants but was primarily introduced to 'appease' accountants for losing the 'accountants' exemption' as part of the FoFA reforms). This is because those accessing it had to comply with most of the AFSL requirements but did not receive much in return, there was a huge imbalance between what they were required to do and what advice they could give. Nevertheless, it was taken up by approximately 1,600 IPA members (including the limited AFSL and being authorized representatives under an AFSL) as financial advice was viewed as a growth area with considerable consumer demand plus many accountants wanted to continue to advise on SMSFs as they had specialized in this area prior to the FoFA reforms.

Put another way, the policy rationale of the limited AFSL regime was to provide accessible AFSL licensing to ameliorate the negative effect of bringing SMSF advice within the scope of AFS licensing regardless of the identity of the advice giver. Where this policy has failed is in making the limited AFSL accessible and failing to acknowledge the extent to which other professional obligations (eg the Code of Ethics for Qualified Accountants) create duplicate regulation at the cost of the consumer. To that extent, the policy goal of making financial advice accessible to the public is at odds with the policy of bringing SMSF advice within the scope of the AFS licensing regime, and the former should be prioritised.

In terms of changes to limited licensing, the IPA points to its joint proposal with CA ANZ and the SMSF Association which separates the role of accountants in certain limited circumstances whilst preserving the limited AFSL regime. We do not think there are any changes that would be entertained to the limited AFSL regime that would make it more accessible to IPA members, as the regulation of the AFSLs is deliberately onerous following numerous reviews and the Hayne Royal Commission. There is a distinction to be made between financial advice and traditional tax and accounting services, the latter being already professionalized.

In respect of professionalising the financial advice sector, we consider the medium to long term move to implementing individual registration for financial services providers and the creation of a centralised regulatory body (which was recommendation 4.2.2 of the Hayne Royal Commission) would bring the industry into a position analogous to lawyers, who are regulated by state-level legal commissions (in Victoria the Victorian Legal Services Board and Commissioner), uniform state legislation (the Legal Profession Uniform Law), and a set of subordinate legislation (The Australian Solicitor's Conduct Rules and the Legal Profession Uniform General Rules). The IPA has been a long time supporter of individual registration or licensing.

With respect to professionalizing, it may be useful to revert to Commissioner Hayne's six key principles:

• obey the law;
• do not mislead or deceive;
• act fairly;
• provide services that are fit for purpose;
• deliver services with reasonable care and skill; and
• when acting for another, act in the best interests of that other.

As Commissioner Hayne said,

"These norms of conduct are fundamental precepts. Each is well-established, widely accepted, and easily understood."

The general obligations on licensees in section 912A of the *Corporations Act 2001* (Corporations Act) take that approach but are then followed by voluminous specific laws and regulations which cause complexity and cost.

The matter of professionalizing is discussed in more detail in the Associations Working Group submission.

Section 4.2 Best interests and related obligations

Questions 43 to 46 inclusive – relate to, inter alia, the statutory safe harbour provisions for the best interests duty and whether this provides any benefit for consumers or advisers, and would there be any prejudice to either if it were removed.

Fiduciary obligation

The discussion below is extracted from the Master of Financial Planning thesis of Lionel Rodrigues (with permission). The full thesis provides a considered examination of the questions being posed in the Issues Paper.

In considering repealing section 961(B)21(1), we believe that history has shown that legislators have resisted replicating a fiduciary obligation when framing the best interests duty of financial advisers. The argument that both can co-exist is arguably supported by recent case law, as well as the common law presumption of being a fiduciary.

The central question is to what extent the changes have benefitted consumers and, in the presence of increasing costs, has the quality of advice improved.

The 2019 ASIC Report 614 *Financial advice: Mind the gap*, highlighted deficiencies in familiarity and understanding by the retail consumer of the differing 'types' of advice being offered. This prompted the regulator to commission further research to better understand the nature and demand for advice (ASIC Report 627, '*Financial Advice: What Consumers Really Think'* 2019). The research focuses on; 'Overall demand for advice', 'Why Australians get advice', 'How advisers are chosen' and 'Why Australians do not get advice'. Three specific areas of the report stand out as significant for legislators and regulators. Of the participants, 53 per cent were open to receiving advice via digital platforms only (robo advice). This was not addressed by Commissioner Hayne and the regulator will be required to review how the 'quality' of advice is to be assessed via this medium. A further 68 per cent

[1] s 961 B *Corporations Act* 2001 (Cth).

of respondents wanted advice on retirement income planning and growing their superannuation. Importantly, 89 per cent of those respondents who had sought advice from a financial adviser would do so again.

One of the criticisms of the Corporations Act is the lack of definition of 'best interests'. A financial adviser is required to 'act in the best interest of the client in relation to advice' under section 961B(1). In the absence of a definition, section 961(B)(2) proceeds to inform how advice providers may satisfy such an undefined duty if certain safe harbour provisions are met. Here, the obligations of the adviser can be met if certain provisions are complied with. Section 961B of the Corporations Act is effectively a series of compliance obligations that focuses more on the conduct of advisers as opposed to their motivations. For advisers, the lack of statutory clarity surrounding best interests makes specific compliance difficult to achieve.

In abolishing the safe harbour clause, an alternative may be found in section 961J of the Corporations Act which requires an adviser to place the interests of the client ahead of their own. This section together with the ethical standards, may give rise to an interpretation similar to the general law, 'fiduciary duty'. However, the previous 'suitability rule' under FoFA and the current best interest duty obligations do not appear to be designed to impose a fiduciary duty on financial advisers. Commissioner Hayne though, noted that, 'depending on the nature of the client's interaction with a financial adviser, a general law duty of care may also arise, as may a fiduciary duty'.

The Parliamentary Joint Committee (PJC) on Corporations and Financial Services, also known as the Ripoll Report, recommended the creation of a statutory fiduciary for financial advisers (Recommendation 1). However, industry groups such as the Australian Financial Markets Association (AFMA) raised concerns about the additional legal and administrative burdens on advisers (AFMA, Submission to ASIC on Consultation Paper 182: Future of Financial Advice-Best Interest Duty and Related Obligations, 5 October 2012).

The then Coalition Opposition suggested there needs to be a 'balance between the appropriate levels of consumer protection and ensuring the accessibility and affordability of high-quality financial advice'[2]. With the advent of the Banking Royal Commission Final Report, the focus was not on affordable and accessible financial advice for consumers.

An analysis of the Hayne Royal Commission shows the complexity of the current best interests duty. This complexity may hinder an improvement in behaviours that are expected of financial advisers in dealing with their clients. Commissioner Hayne actually proposed less law rather than more law. The Hayne Royal Commission felt that both ASIC and APRA did not effectively use existing laws. In the Final Report, Commissioner Hayne stated, 'the law has not been obeyed, and has not been enforced effectively'. The Royal Commission report also goes on to suggest that a 'robust approach to enforcement' is central to an effective disciplinary system.

Commissioner Hayne stated, "[p]assing some new law to say again, 'do not do that', would add an extra layer of legal complexity to an already complex regulatory regime. What would that gain?". (Banking Royal Commission, Interim Report, (Executive Summary), vol 1, 20-21).

Following are excerpts from the conclusion from Mr Rodrigues' Masters thesis.

[2] Mathias Cormann, 'The Way Forward on Financial Advice Laws'. (Media Release, Treasury (Cth), 20 June 2014).

The introduction of FASEA was a bold step in the right direction. [This paper] argues that financial advisers need appropriate training and competent regulation. Likewise, consumers need to be better informed. For the financial planner, the benefit now is that there is little doubt as to what is required, how to get there and to whom all these changes are intended to benefit. With the growing need for financial advice, it is essential that prescribed minimum standards be promulgated for an emerging profession.

The formal introduction of [the best interest duty] and related obligations was to ensure retail clients enjoyed a high standard of financial advice and that advisers were provided with standards that assist with compliance (section 961B). The introduction of this legislation, evolved from the 'suitability' doctrine of the Wallis Inquiry (1997) and moved from 'suitability' and 'appropriateness' (FoFA) to the present duties.

An analysis of the Hayne Royal Commission shows the complexity of the current best interests duty. This complexity may hinder an improvement in behaviours that are expected of financial advisers in dealing with their clients.

It is significant for advisers and consumers that the Final Report recommended a review and potential abolition of the safe harbour clause. Whilst there may be a modification of this clause, the abolition of the safe harbour provisions may create uncertainties in legal interpretation. There is much merit in the suggestion of the Royal Commission to simplify the law. Similar to FASEA, the US and the UK/EU experience, [this paper] suggests that the best interest duty should be principles-based. Whilst this has merit it is apparent that legislators in Australia have already taken a different path. The scope of the *Ethics Code* is broader than the section 961B provisions and despite backing by section 921E, requiring advisers to comply with the *Ethics Code*, such interactions are yet to be tested. Clearly Australia has many 'law in books' mechanisms, such as best interests duty, banning conflicted remuneration, use of restricted terms, etc. but as Commissioner Hayne has highlighted, the problems lie in implementing and enforcing the existing laws. Perversely though, [more laws were enacted by the previous Government].

The most recent initiatives of the [previous] Coalition Government are to introduce measures to hold financial advisers accountable. Financial advisers are already subject to increasingly extensive regulation. Australian regulatory scrutiny is designed to increase trust in the industry[3] and provide access to high quality advice. However, the conundrum for legislators is how to legislate to protect consumers from the consequences of their own greed. Recent investor losses in the form of Melissa Caddick[4], Castle Rock Funds Management[5] and Mayfair 101[6] demonstrate that many investors are driven by the attraction of above market returns. These investments were not offered through the independent financial adviser channels. Regulation of advisers to offer quality advice only goes part of the way in protecting consumers.

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[3] Michelle Cull and Terry Sloan, 'Characteristics of Trust in Personal Financial Planning' (2016) *Financial Planning Research Journal*, 2, 12-35.

[4] Kate McClymont, Laura Chung, and Sarah McPhee, 'Melissa Caddick's missing $25m: Report reveals scale of lost funds' *The Sydney Morning Herald*, <http://smh.com.au/national/nsw/Melissa-caddick-s-missing-25m-report-reveals-scale-of-lost-funds-20210303-p557jhtml>.

[5] Pamela Williams, 'Sue or settle: skint Castle Rock investors to decide' *Australian Financial Review*, (online 6 April 2021) <http://afr.com/companies/financial -services/sue-or-settle-skint-castle-rock-investors-to-decide-20210331-p57fnj>

[6] Liam Walsh and Jonathan Shapiro, 'Mawhinney had to be stopped 'to protect public,' judge says' *Australian Financial Review* (online 19 April 2021) <http://afr.com/companies/financial-services/mayfair-101-s-james-mawhinney-cops-20-year-ban-20210419-p57kdh>.

[This paper] asserts that whilst the reforms to professionalize the financial advisory industry are steps in the right direction, such benefits to the retail consumer of financial services have largely been eroded by the …[former] Coalition Government and an oppressive regulatory environment[7].

[Some footnotes have been left in to aid referencing.]

Section 4.6 Accountants providing financial advice

Questions 71 to 75 inclusive – relate to the role of accountants in providing financial advice.

Refer to the joint submission made by IPA with CA ANZ and SMSF Association.

Section 4.7 Consent arrangements for wholesale client and sophisticated investor classification

Questions 76 to 78 inclusive – relate to the operation of the above provisions.

The IPA believes that the distinction made between ordinary consumers and so-called wholesale, or sophisticated consumers should be removed. All consumers should be able to access the same level of legislative and regulatory protections. Disclosure of what the classification means, even if well understood, should not remove the protections afforded to consumers within a genuinely consumer-centric model. It also simplifies the system and would be a good example of deregulation for the benefit of consumers.

From the perspective of advisers, our members who advise sophisticated investors also generally advise ordinary consumers and have the requisite processes in place. We have heard many anecdotes from IPA members who say that some clients may qualify under what is an arbitrary definition, however, this may be due to an inheritance, business sale, good fortune, divorce, or other such situation, which does not necessarily mean they are 'sophisticated' in terms of financial literacy and genuinely understanding what it means to be classified as 'sophisticated'. Some members report that even though clients might qualify as 'sophisticated' they treat them as if they were not.

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

Sections 5.1 ASIC and 5.3 Professional associations

Questions 80 and 83 – relate to other measures and actions taken by professional associations to improve the quality, affordability, and accessibility of advice and how they have affected the advice.

[7] *Multi-Level regulatory Capacity in Australia (The OECD Review of Regulatory Reform in Australia)* 2010.

Measures taken by professional associations (IPA)

Speaking for the IPA, we have worked with our members who operate within the AFSL regime to ensure they are adequately trained and educated to ensure they provide high quality advice to their clients. Ongoing education and training are essential to improving the quality of financial advice; and this is a mandatory requirement enforced by the IPA through annual CPD audits. Even though we assist members, if they remain non-compliant with the mandatory requirements then membership will be suspended or forfeited.

In addition, IPA has a rigorous complaints and disciplinary regime to enforce the requirements and we also impose our own investigation and penalties (where applicable) following any enforcement action taken by ASIC. Our members are also subject to a quality assurance process which examines their application of relevant AFSL related requirements and APES 230 *Financial Planning Services* which is promulgated by the Accounting Professional and Ethical Standards Board (APESB) and enforced by the professional accounting bodies.

However, whilst the quality of advice may be more within the control of the adviser, licensee and to some extent the professional association, the accessibility and affordability are largely reliant on the legislative and regulatory regime.

The role of professional associations

We refer to the following statement on pages 33-34 of the Issues Paper:

However, in a submission to the Financial Services Royal Commission, ASIC noted that the multiplicity of professional associations has 'mitigated against any of them taking a strong leadership role in setting or enforcing strong ethical standards (lest they risk losing members to those bodies with less rigorous standards)'.93

Under the current regulatory regime there is limited scope for professional industry associations to play a significant regulatory role, although some play a role in the disciplining of members.

We are bewildered and disappointed that Treasury has chosen to repeat this statement in the Issues Paper, and at a loss to understand the reason for its inclusion. It is our strong view that it indicates a lack of understanding and appreciation of the role and value contributed by (some) professional associations. Also, we are not clear which 'professional industry associations' are being referred to.

Firstly, the existence and indeed growth of professional associations (such as the IPA) must surely reflect the fact that there are numerous voices and views which desire representation, which is to be expected in a vibrant environment. Further, membership is voluntary, not mandatory, which presumes members see value in their membership. Further, a distinction should be made between professional associations such as the IPA which must act in the public interest and industry or trade bodies which operate quite differently.

A recent 2022 IPA member survey indicated that members 'greatly value' the education, training, advocacy, and technical support provided by the IPA. This is in addition to our compliance and disciplinary functions.

The statement also ignores the fact that many associations seek common ground and often present a collective voice. For instance, the three professional accounting bodies – IPA, CA ANZ, and CPA Australia – collectively represent their members on numerous matters across many different topics and issues.

The statement is not only bewildering, but also offensive, in its unfounded inference that professional associations would compromise their standing and legislative recognition as professional associations on the basis of 'losing members' to bodies with less rigorous standards.

Speaking for IPA, we take a 'strong leadership role in setting and enforcing strong ethical standards'. For instance,

The IPA (along with CA ANZ and CPA Australia) is a member of the APESB which promulgates mandatory professional and ethical standards enforced by the professional accounting bodies. There is an active consultation process for all standard setting.

The APESB's mission and vision are noted below,

Mission & Vision

What we are striving to achieve

Exemplary levels of professionalism and ethical behaviour in the accounting profession.

We will promote professionalism and ethical behaviour and maximise the integrity of the accounting profession by:

- *Issuing professional and ethical standards that are relevant to members of the Professional Accounting Bodies* while serving the public interest.*
- *Effectively engaging our key stakeholders, including professional accountants, the public, government bodies, regulators, and the Professional Accounting Bodies.*
- *Influencing and responding to the national and international agenda in relation to professional and ethical standards.*
- *Promoting that professionalism and ethical conduct drive the behaviour of accountants and conducting outreach activities in collaboration with key stakeholders.*

Further information on APESB can be found at, Home – APESB

In addition to the APESB, the accounting bodies are also members of the International Federation of Accountants (IFAC), which is the global governing body for accountants and has specific reporting requirements as part of membership of IFAC.

Besides APESB and IFAC, the IPA also has extensive reporting requirements to the Financial Reporting Council (FRC), TPB, and the Professional Standards Councils (PSC) under Professional Standards Legislation. Our members are also subject to the mandatory requirements of the government standard setters, AASB and AUASB.

Some IPA members are subject to three codes of ethics or professional conduct (Treasury/ASIC, TPB and APESB). The IPA separately enforces the APESB Code of Ethics, which means that members may be subject to multiple penalties for the same action. This is an additional layer of consumer protection which we believe is unusual among professional service providers.

To elaborate on the PSC – IPA has a Professional Standards Scheme, and it is mandatory for members in practice to be participants in the Scheme (no IPA members have applied for an exemption). We report annually to the PSC by way of a Professional Standards Improvement Program (PSIP) which includes data on every aspect of our organization, including member regulatory compliance risk management, training and education, financial management, professional indemnity insurance and actuarial reports, resources allocated to supervision and enforcement of the Scheme and so on. The last report lodged in March 2022 was over 230 pages and had 29 annexures. The cost to the IPA of applying for and operating a Scheme is incredibly significant.

Further information can be found at, Welcome to the Professional Standards Councils | Professional Standards Councils (psc.gov.au)

An excerpt from the PSC/ Professional Standards Authority website, which speaks for itself, follows:

We are the independent statutory bodies responsible for promoting professional standards and consumer protection. We do this through thought leadership and education, and the approval, monitoring and enforcing of Professional Standards Schemes.

We have been established by the Australian state and territory governments. Our approach is based on the three pillars of professional standards legislation:

Protect consumers.

We demand high levels of professional standards and practices from those that participate in Professional Standards Schemes. We expect associations within our regulated communities to make sure their members uphold these standards through education and guidance, monitoring and enforcement, and other measures. This plays an important role in protecting consumers.

Improve professional standards.

We work closely with associations to develop self-regulation initiatives. We support research, develop policies and guidelines, and promote debate and change to improve professional standards and conduct.

Help associations.

By approving and administering Professional Standards Schemes, we can work with associations to strengthen and improve professionalism within associations, and promote self-regulation while protecting consumers. In return, professionals that take part in an approved Professional Standards Scheme have their civil liability limited.

The statement also ignores the fact that there is no appreciation of the consultation and collaboration which exists in setting and enforcing strong ethical standards and the effort made by government agencies such as TPB, FRC, PSC, AASB, AUASB to include input from the professional associations. These government agencies undertake genuine consultation with the professional accounting bodies, as does the APESB and other standard setters. On the other hand, ASIC undertakes consultation and outreach on a regular basis but does not appear to understand or incorporate the input from the profession. The IPA has made numerous submissions supporting this position.

The simple fact that the Financial Regulator Assessment Authority had to be established to review ASIC and APRA speaks for itself. However, we have repeatedly urged government to ensure that our corporate regulator is adequately funded to fulfil its growing functions.

The IPA takes its 'co-regulatory' role in monitoring and enforcing professional and ethical standards extremely seriously and rejects any suggestion to the contrary. For this reason, we would welcome a retraction of this statement from the Issues Paper.

Observations from and on the ALRC Inquiry into the Legislative Framework for Corporations and Financial Services Regulation

The Australian Law Reform Commission is currently undertaking a review initiated by the Hayne Royal Commission into financial services legislation, with its first interim report released in November 2021. The IPA's believes this is a critical inquiry which must be used to inform the outcomes of the Quality of Advice Review.

On page 10 of the summary report, it states:

A particularly challenging feature of the Corporations Act is that the regulator, ASIC, is given the power to make notional amendments to the Act by legislative instrument in certain circumstances. ASIC has frequently exercised this power in approximately 100 legislative instruments. Notional amendments in legislative instruments make the law deeply inaccessible. A person reading the Corporations Act or Corporations Regulations cannot be confident that the provision they are examining has effect as it is written. The provision may have been notionally omitted or amended, or an additional provision may have been inserted. Such changes may apply only in certain circumstances or may apply universally.

The IPA contends that the fact that ASIC presides over 'impenetrable' legislation and regulation and given that it has the most extensive set of responsibilities of any corporate

regulator in the world, then its strategy, decision-making, day-to-day functions, and operations, are all under considerable constraint. Commensurate with this is ongoing inadequate funding. We note that these factors have led some highly regarded domestic and international commentators (ALRC/ Melbourne University Law School webinar on the twin peaks model) to refer to a blurring of the 'twin peaks' model of financial regulation.

The IPA believes that to simplify the impenetrable legislation and the ensuing complexity which in turn are drivers of compliance costs, it is necessary to reduce ASIC's ability to create notional amendments. Given that compliance costs are the main drivers impeding the provision of affordable advice for consumers, it would be a useful place to start. It is essential to treat not just the symptoms, but also the cause, that is, reducing the ability of ASIC to keep adding to complexity, confusion, and compliance costs.

Whilst the ongoing scrutiny of ASIC over a series of reviews, Royal Commission, inquiries and generally, is welcome, there is also a need to ensure that genuine progress is made in implementing recommendations and improvements. For instance, the 2015 Capability Review (mentioned above) offered 34 recommendations to improve the efficiency and effectiveness of ASIC, to a global best practice level. Even though ASIC rejected some of these recommendations, it would be a useful starting point to benchmark against these recommendations (and many others since). Whether these comments are relevant to the Quality of Advice Review, we believe that a well performing and well-funded corporate regulator is essential to the future success of the financial advice sector.

Conclusion

The IPA is hopeful of meaningful reform in terms of striking the right balance between consumer needs and demand and addressing the disproportionate regulatory burden on financial advisers, most of whom are small businesses. We believe that if the main cost driver, being regulatory compliance, can be sustainably reduced then this will flow through to more accessible and affordable financial advice for Australian consumers, without negatively impacting consumer protections.

However, compliance costs are only one driver, and the Review must be viewed against the backdrop of the ALRC review into the legislative framework for financial services and ASIC CP332 plus other past and present reviews and inquiries. These are all critical elements to a holistic, practical and long term solution which reduces complexity and serves the needs of consumers.

The IPA urges the Review to take a bold and ambitious approach if we are to achieve meaningful progress toward a sustainable, consumer-centric model which will also attract talented and ethical financial advisers in a thriving and appropriately regulated profession.

We reiterate that this submission must also be viewed in conjunction with the other two submissions of which the IPA is a part.