Australian Government
The Treasury

TSY/AU

Quality of Advice Review

Template for response

August 2022

Consultation process

Request for feedback and comments

Interested parties are invited to provide feedback on the proposals for reform listed in the Quality of Advice Review Proposals Paper using the template in Appendix 1. Consultation will close on Friday 23 September 2022.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses in a Word or RTF format via email. An additional PDF version may also be submitted.

Publication of submissions and confidentiality

All of the information (including the author's name and address) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

View our submission guidelines for further information.

Closing date for submissions: 23 September 2022

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Appendix 1: Consultation template

Name/Organisation: Strata Community Insurance Agencies Pty Ltd

Questions
Intended outcomes
1. Do you agree that advisers and product issuers should be able to provide to personal advice to their customers without having to comply with all of the obligations that currently apply to the provision of personal advice?

Strata Community Insurance Agencies Pty Ltd (**SCIA**) supports – in general terms – the commentary, findings, proposals and outcomes outlined in the Consultation Paper.

The point we wish to emphasise, however, is that the policy imperative ostensibly underpinning the proposals and outcomes discussed in the Consultation Paper (namely, to improve the accessibility and affordability of financial advice by removing or reimagining existing regulatory impediments) risks being undermined unless the particular issue of 'cross-authorisation', or 'cross-endorsement', under section 916C of the *Corporations Act 2001* (Cth) (the **Act**) is specifically addressed.

This issue, and the opportunity for reform, is detailed further below.

Summary of the issue

Many advisers in financial services, in our sector – general insurance specifically, choose to operate under the licence and supervision of one or more Australian Financial Services (**AFS**) licensees, rather than apply for and support a licence on their own.

As section 916C currently operates, one adviser can be the authorised representative of 2 or more AFS licensees, but only if each of the licensees consents to the adviser being the authorised representative of the other licensees (or each of the licensees is a related body corporate of the other licensees).

This requirement for cross-authorisation, or cross-endorsement, has the effect that AFS licensees that have already appointed advisers as authorised representatives have an *unqualified discretion* to prevent those same advisers from also providing financial services on behalf of other AFS licensees, for any reason – including, for example, where the motive to withhold consent is driven purely by a desire to secure a commercial or competitive advantage for the incumbent AFS licensee.

In other words, this provision permits (and in practice historically *has* resulted in) individual AFS Licensees restricting the supply of financial services, including the provision of financial product advice, by appointing advisers as authorised representatives and then refusing (including arbitrarily and for purely commercial reasons) to permit those same authorised representatives to provide financial services on behalf of other AFS licensees.

In short, individual AFS licensees may utilise cross-endorsement practices to effectively monopolise the services of particular advisers, simply by appointing them as authorised representatives on a 'first-in, first-served' basis and thereafter refusing to provide cross-endorsement consent in respect of other AFS licensees. The resulting inability for other AFS licensees to access and authorise such providers can lead to perverse, and clearly unintended, consumer outcomes – including a *reduction* in the availability of financial advice and an impaired ability for financial services to be provided efficiently, honestly, and fairly.

The policy imperative of improving the accessibility and affordability of financial advice clearly risks being frustrated by this practice, currently facilitated by existing provisions in the Act, and any suite of reform initiatives must necessarily include a review of the current operation of the cross-endorsement provisions.

What is section 916C?

Section 916C of the Act provides:

> *(1) One person can be the authorised representative of 2 or more financial services licensees, but only if:*
>
> *(a) each of those licensees has consented to the person also being the authorised representative of each of the other licensees; or*
>
> *(b) each of those licensees is a related body corporate of each of the other licensees; or*
>
> *(c) the only financial services provided by the person as authorised representative of any financial services licensee are claims handling and settling services.****

The Explanatory Memorandum to the *Financial Services Reform Bill 2001* provided, in relation to [the then proposed] section 916C:

> *11.25 Proposed section 916C permits an authorised representative to act for more than one licensee but only where each person has consented to the person also being the representative of each of the other licensees, or each of those licensees is a related body corporate of each of the other licensees.*

The process whereby a licensee consents to one of their authorised representatives acting for one or more other licensees is referred to as 'cross-authorisation', or 'cross-endorsement'.

There are no further legislative provisions dealing with cross-endorsement beyond section 916C cited above, and there is no substantive regulatory guidance dealing with the subject.

> ***It should be emphasised that subsection 916C(1)(c) has only relatively recently been enacted, as part of the suite of reforms associated with introducing 'claims handling and settling services' as a class of financial service. This inclusion – of what is essentially a carve-out from the requirement for cross-

endorsement consent from incumbent AFS licensees where the financial services being provided by the authorised representative in question amount only to claims handling and settling services – was a response to concerns articulated by industry stakeholders relating to the potentially negative and unforeseen consequences of permitting the historical cross-endorsement provisions to operate in the context of insurance claims handling.

Specifically, in that context – without introduction of the new subsection 916C(1)(c) – individual AFS licensees may have been able to utilise the existing cross-endorsement provisions to, for example, prevent other AFS licensees from accessing the services of loss assessors, loss adjusters, and insurance fulfilment providers.

As articulated by SCIA in its submission in response to Exposure Drafts of the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: claims handling* and *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Claims Handling and Settling Services) Regulations 2020: claims handling*:

> "The purpose of introducing 'claims handling and settlement' as a new category of 'financial service' is largely to ensure that persons providing these services will now be required to comply with the general conduct obligations under section 912A of the Act, including obligations to do all things necessary to ensure they act efficiently, honestly and fairly. The Government has indicated that, at a minimum, this will require that licence holders handle and settle an insurance claim [refer Exposure Draft Explanatory Materials, at 1.18]:
>
> > *• in a timely way, without undue delay, balancing the negative effects of delay on insureds with the insurer's reasonable requirements for handling and settling an insurance claim;*
> >
> > *• in the least onerous and intrusive way possible, including requesting information, medical examinations, surveillance and undertaking other assessment methods if it is strictly relevant to the claim;*
> >
> > *• fairly and transparently, with information about the handling and settling process, the reason for information requests, and reasons for decisions provided to insureds; and*
> >
> > *• in a manner that ensures adequate support is provided for insureds, in particular for vulnerable consumers.*
>
> It is self-evident that engaging the services of loss assessors, loss adjusters, and insurance fulfilment providers is fundamentally essential for licence holders to be able to comply with the general conduct obligations under section 912A of the Act, including obligations to do all things necessary to ensure they act efficiently, honestly and fairly, in the context of the new financial service of 'claims handling and settlement'.
>
> With limited resources and without access to the services of these providers, licence holders will be restricted in the extent to which they can ensure claims are handled and settled in a timely way without undue delay, in the least onerous and intrusive way possible, fairly and transparently, and in a manner that ensures adequate support is provided for insureds.
>
> Moreover, in the event licence holders cannot access an adequate range of loss assessors, loss adjusters, and insurance fulfilment providers, they may be required to compensate by bringing such services 'in-house'. Consumers will inevitably lose out in such a scenario, as the expertise these

> service providers bring to the claims adjustment and fulfilment process will necessarily be eroded. This would represent a major backwards step in terms of improving consumer outcomes.
>
> However, consistent with the preceding discussion, tactical utilisation of the cross-endorsement provisions by one or more licensees for commercial and competitive purposes in the context of claims handling and settlement has the potential to result in some licence holders being denied access to the services of loss assessors, loss adjusters, and insurance fulfilment providers. Incumbent licensees may essentially restrict such access entirely arbitrarily, and even in order to secure self-interested commercial or competitive advantage. This is simply an unacceptable consumer outcome.
>
> … the simplest solution would be to exempt the financial service of claims handling and settlement from the operation of section 916C."

In a similar vein, the same risk already exists – given the operation of subsections 916C(1)(a) and (b) – in the context of other financial services including the provision of financial advice. Similarly to the manner in which the Government responded to concerns around cross-endorsement in the context of claims handling and settling services, the opportunity now exists for implementation of targeted and measured reforms to ensure that individual AFS licensees cannot unreasonably or arbitrarily restrict the provision of financial advice.

Recent industry practice

Importantly, there is no statutory requirement for a licensee, on receipt of a request for cross-endorsement consent, to actually provide consent or even to consider or respond to the request (within a specified time period, or at all). Further, where a licensee *does* consider a request, it has an *unrestricted subjective discretion* to withhold consent for *any reason*.

Unfortunately, a corollary of this discretion has been, in our experience, that some licensees in the general insurance industry have demonstrated a willingness to tactically utilise the cross-endorsement provisions in the Act by withholding consent for commercial and competitive purposes.

Particularly, some licensees have been seen to indefinitely refuse outright to consider cross-endorsement requests; refuse cross-endorsement requests on arbitrary grounds (or without offering *any* justification); or refuse cross-endorsement requests ostensibly as part of a deliberate commercial strategy to create barriers to entry, limit competition in the market, and reduce consumer choice by effectively denying access to products and services. In SCIA's particular experience – it currently has a total of 349 outstanding cross-endorsement requests that have been submitted to a small number of licensees operating in the strata and community title insurance industry. These requests date as far back as 2014. In respect of these 349 requests, some incumbent licensees have communicated an open-ended wholesale refusal to consider any requests – without providing any (or in some case wholly arbitrary) reasons – while other requests have simply been ignored. This represents 349 individual cases where advisers seeking to be authorised under SCIA's AFS licence have been restricted from doing so because of the failure of other licensees to provide, or even consider providing, cross-endorsement consent. The outcome is ultimately a net reduction in advice and advocacy for consumers.

Since the authorised representative regime was created for consumer protection, such negative unintended consequences for consumers would ordinarily be seen as unacceptable atypical and unforeseen circumstances. We consider it unlikely that the regulator or legislature would deem the emergence of such practices by licensees as those described above as a natural, or intended, consequence arising from legitimate operation of the cross-endorsement provisions.

However, such practices have effectively been endorsed as valid. The Administrative Appeals Tribunal (AAT) in NSW, for example, has previously opined:

> *…ASIC says that the consent requirement in CorpAct s 916C was plainly intended to operate for the benefit of an "incumbent" licensee (ie. one who had first granted "authorised representative" status)…*
>
> *ASIC emphasised that… the question whether that risk was acceptable to an existing licensee asked to provide "cross endorsement" was one that the Corporations Act permitted the licensee to answer in a subjective and self-interested fashion…*
>
> *It is, to my mind, fundamentally wrong to contend that a consent refusal must be characterised as unreasonable merely because either (i) consent could not occasion a relevant or material liability detriment, or (ii) the refusal is primarily (perhaps even exclusively) motivated by a desire to maintain a perceived commercial advantage.*
>
> [Strata Community Insurance Agencies Pty Ltd and Australian Securities & Investments Commission [2016] AATA 768 (30 September 2016) at paragraphs 56, 60, 65.]

That is: it has been confirmed that the cross-endorsement provisions are intended to arbitrarily benefit whichever licensee 'provides authorisation first'. Also, such a licensee will not necessarily be acting unreasonably where it considers subsequent requests for cross-endorsement consent from other licensees in an entirely subjective and self-interested manner – even where *providing* consent would result in no detriment to them, or where in *withholding* consent they are motivated purely to obtain a commercial or competitive advantage.

The opportunity

The policy imperative of improving the accessibility and affordability of financial advice, by removing or reimagining existing regulatory impediments, is commendable and is supported by SCIA. Currently, section 916C of the Act may be tactically utilised by individual AFS licensees to *restrict* the accessibility of financial advice, and limit the provision of this vital financial service to one provider, or a small number of providers. As such, it stands out as an obvious existing impediment to achieving improved accessibility. Similarly to the manner in which Government amended the cross-endorsement provisions to carve-out claims handling and settling services upon their introduction as a separate class of financial service, any regulatory or legislative reform initiative relating to the provision of financial advice should similarly consider appropriate amendments to section 916C necessary to support the policy objective of improving accessibility.

What should be regulated?

2. In your view, are the proposed changes to the definition of 'personal advice' likely to:

a) reduce regulatory uncertainty?

b) facilitate the provision of more personal advice to consumers?

c) improve the ability of financial institutions to help their clients?

Without addressing issues associated with cross-endorsement as outlined in our response to question 1, uncertainty will remain, the goal of facilitating provision of more personal advice to consumers may be ultimately frustrated, and the ability of financial institutions to help their clients may also be undermined and not realised.

3. In relation to the proposed de-regulation of 'general advice' - are the general consumer protections (such as the prohibition against engaging in misleading or deceptive conduct) a sufficient safeguard for consumers?

a) If not, what additional safeguards do you think would be required?

No comment, other than to say that SCIA supports – in general terms – the commentary, findings, proposals and outcomes outlined in the Consultation Paper.

How should personal advice be regulated?

4. In your view, what impact does the replacement of the best interest obligations with the obligation to provide 'good advice' have on:

a) the quality of financial advice provided to consumers?

b) the time and cost required to produce advice?

No comment, other than to say that SCIA supports – in general terms – the commentary, findings, proposals and outcomes outlined in the Consultation Paper.

5. Does the replacement of the best interest obligations with the obligation to provide 'good advice' make it easier for advisers and institutions to:

a) provide limited advice to consumers?

b) provide advice to consumers using technological solutions (e.g. digital advice)?

No comment, other than to say that SCIA supports – in general terms – the commentary, findings, proposals and outcomes outlined in the Consultation Paper, and to note that – consistent with our response to question 1 – no legislative or regulatory reform initiatives will be assured of being effective in making it "easier" for providers of financial services to effectively service consumers unless the issue of cross-endorsement is addressed.

6. What else (if anything) is required to better facilitate the provision of:

a) limited advice?

b) digital advice?

No comment, other than to say that SCIA supports – in general terms – the commentary, findings, proposals and outcomes outlined in the Consultation Paper, and to note that – consistent with our response to question 1 – no legislative or regulatory reform initiatives will be assured of being effective in making it "easier" for providers of financial services to effectively service consumers unless the issue of cross-endorsement is addressed.

7. In your view, what impact will the proposed changes to the application of the professional standards (the requirement to be a relevant provider) have on:

a) the quality of financial advice?

b) the affordability and accessibility of financial advice?

No comment, other than to say that SCIA supports – in general terms – the commentary, findings, proposals and outcomes outlined in the Consultation Paper.

8. In the absence of the professional standards, are the licensing obligations which require licensees to ensure that their representatives are adequately trained and competent to provide financial services sufficient to ensure the quality of advice provided to consumers?

a) If not, what additional requirements should apply to providers of personal advice who are not required to be relevant providers?

No comment, other than to say that SCIA supports – in general terms – the commentary, findings, proposals and outcomes outlined in the Consultation Paper.

Superannuation funds and intra-fund advice

9. Will the proposed changes to superannuation trustee obligations (including the removal of the restriction on collective charging):

a) make it easier for superannuation trustees to provide personal advice to their members?

b) make it easier for members to access the advice they need at the time they need it?

No comment.

Disclosure documents

10. Do the streamlined disclosure requirements for ongoing fee arrangements:

a) reduce regulatory burden and the cost of providing advice, and if so, to what extent?

b) negatively impact consumers, and if so, how and to what extent?

No comment.

11. Will removing the requirement to give clients a statement of advice:

a) reduce the cost of providing advice, and if so, to what extent?

b) negatively impact consumers, and if so, to what extent?

No comment.

12. In your view, will the proposed change for giving a financial services guide:

a) reduce regulatory burden for advisers and licensees, and if so, to what extent?

b) negatively impact consumers, and if so, to what extent?

SCIA supports – in general terms – the commentary, findings, proposals and outcomes outlined in the Consultation Paper.

However, it is imperative to note that any reform premised upon allowing advice providers more flexibility in the way they provide information to their clients must be balanced by consideration of consumer interest in receiving transparent and meaningful disclosure in a timely manner.

The proposed changes, which will essentially allow advice providers to elect whether to give their clients a copy of the financial services guide (**FSG**) *or* make information available to their clients on their website, will self-evidently reduce regulatory burden – but unless implemented in a manner supporting transparent, meaningful and timely disclosure, the proposed changes risk negatively impacting consumers.

Specifically, the information ordinarily contained within FSGs is essential for consumers to make an informed, educated decision on whether to engage a financial services provider. If consumers are not made explicitly aware of this information, or are made aware at an inappropriate time, consumers will necessarily be making decisions based on incomplete and imperfect information.

Reform proposals must also consider whether proposed changes will be sufficient for financial services providers to fulfil their fiduciary obligations to the consumers they service. SCIA considers that satisfaction of such obligations necessitates disclosure that is comprehensive, transparent, and timely. Detailed information relating to, *inter alia*: the relevant financial service provider's corporate relationships and arrangements; respective parties and beneficiaries to transactions; all monetary and non-monetary benefits (including distribution thereof); and any actual or potential conflicts of interest – should be explicitly brought to the attention of the consumer prior to the provision of any financial services, such that those financial services are provided with fully informed consent.

Design and distribution obligations

13. What impact are the proposed amendments to the reporting requirements under the design and distribution obligations likely to have on:

a) the design and development of financial products?

b) target market determinations?

No comment, other than to say that SCIA supports – in general terms – the commentary, findings, proposals and outcomes outlined in the Consultation Paper.

Transition and enforcement

14. What transitional arrangements are necessary to implement these reforms?

No comment, other than to say that SCIA supports – in general terms – the commentary, findings, proposals and outcomes outlined in the Consultation Paper.

General

15. Do you have any other comments or feedback?

None – other than to reinforce the sentiment that:

- the proposals and outcomes discussed in the Consultation Paper are ostensibly underpinned by the general policy imperative to improve the accessibility and affordability of financial advice by removing or reimagining existing regulatory impediments; and
- this commendable undertaking risks being wholly undermined unless existing provisions in the *Corporations Act 2001* (Cth), permitting individual Australian Financial Services Licensees to arbitrarily restrict or prohibit the provision of such services, are appropriately amended.