**MEMORANDUM OF ADVICE IN RELATION TO THE ROLE OF THE COLLABORATIVE FINANCIAL PROFESSIONAL**

**12 April 2024**

In 2023, the Board of CP (NSW) received advice from Holley Nethercote Lawyers (“**HNL**”) as to the scope of the advice which financial planners/advisers can provide in the collaborative law process, and the circumstances in which they can provide it.

The Board were particularly concerned about:

(a)        Standard 3 of the Financial Planners and Advisers Code of Ethics, relating to conflicts of interest; and

(b)        the distinction between ‘general advice’ and ‘personal advice’.

The key question put to HNL was *Can financial planners advise in the collaborative law process?* The response from HNL is:

*2.3       Insofar as retail clients are concerned, it is not possible for financial planners to advise in the collaborative law process except where they:*

*(a)        act for one party only; or*

1. *provide financial education in circumstances where it is clear that they have not taken into consideration anything about the person to whom the education is provided.*

*2.4       This is because:*

*(a)        to the extent that a financial planner provides personal advice to two parties in the collaborative law process, the financial planner cannot meet the best interests obligations under the Corporations Act 2001 (‘the Act’);*

*(b)        to the extent that the financial planner provides any services (beyond financial education of the type listed in paragraph 2.3(b)) to two parties in the collaborative law process, the financial planner cannot meet the requirement to comply with the values of competence and fairness in the Financial Planners and Advisers Code of Ethics (‘the Code’) or Standards 2, 3 and 5 of the Code; and*

1. *to the extent that the financial planner provides financial services to two parties in the collaborative law process, there is a risk that they will cause their authorising licensee to breach section 912A of the Act, containing the ‘efficiently, honestly and fairly’ obligation.*

*2.5       This is because, while the reach of the Code is unclear, in our view, it applies to all services provided by the financial planner as part of the collaborative law process, not just personal advice and not just financial services.*

The position as regards wholesale clients is not entirely clear but, as HNL say, most clients in the collaborative process are retail clients:

*2.6       It is difficult to form a view on the applicability of the Code to the financial planner’s activities relating to wholesale clients. However, we expect that most clients in the collaborative law process would be retail clients, based on the assumption that superannuation would normally be a consideration in the process. For financial services relating to superannuation, a client is nearly always retail.*

*2.7       Nevertheless, there may still be issues with providing services to two parties who are wholesale clients because to do so may be regarded as a breach of a licensee’s ‘efficiently, honestly and fairly’ obligation under section 912A of the Act.*

The Board is highly conscious of the important role which a financial planner/adviser can play in the collaborative process and wishes to ensure that such professionals continue to be involved to assist parties to achieve their goals.

Based on the HNL advice it appears that the most efficacious way of achieving that outcome is that the financial planner/adviser act for only one party.   In some circumstances, only one financial planner/adviser will be needed for a collaboration, in other instances the parties can each engage their own collaboratively trained financial planner/adviser.  As we see it financial professional(s) are not precluded from attending group meetings so long as it is made clear that any advice is offered by each financial professional to one party only.   Please note that this advice relates only to financial planners/advisers, not accountants.

To that end there has been drafted an Addendum to the form of the Participation Agreement providing that the financial professional will attend in the capacity of adviser to only one or other of the parties to assist that person to identify objectives, gather relevant information, create options and reach agreement.   A copy of the proposed Addendum is available on the CP(NSW) website.

HNL have advised that the role of a financial planner in advising one party only may involve the provision of personal advice. A financial adviser or relevant provider engaged to provide assistance for one party only will need to make their own determination with consultation from their Australian Financial Services Licensee as to compliance with the relevant legislation.

It remains a requirement that the financial advisor/planner should be collaboratively trained.