14 June 2013

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
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Parliament House
CANBERRA, ACT, 2600

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Dear Dr Grant,

AFA Submission on the Inquiry into the Creation of a Regulatory Framework for Tax (Financial) Advice Services

Thank you for the opportunity to make a submission with respect to the proposed legislative amendments relating to the Tax Agent Services Act. We also thank you for the opportunity to present our views on 12 June at the hearing in Sydney.

The Association Of Financial Advisers Limited ("AFA") has served the financial advising industry for over 65 years. Its aim is to provide members with a robust united voice, continually improve practices and focus firmly on the exciting, dynamic future of the financial advising industry. The AFA also holds the client to be at the centre of the advice relationship and thus supports policies that are good for consumers and their wealth outcomes. Driving professionalism and striving for quality in advice are core objectives of the AFA.

With over six and a half decades of success behind it, the AFA's ongoing relevance is due to its philosophy of being an association of advisers run by advisers. This means advisers set the agenda, decide which issues to tackle and shape the organisation's strategic plan.

The AFA does not oppose the introduction of the Tax Agent Services Act for financial advisers. We have accepted that this legislation will be extended to cover Financial Advisers. We do, however, oppose the current version of the legislation for the following reasons:

- It does not adequately define tax (financial) advice services,
- There are other legislative deficiencies and issues,
- It is being introduced without adequate detail or explanation and
- It is being introduced in a seriously deficient timeframe

We also seek to make particular reference to the obligation to disclose to clients when unregistered. This obligation was not in the February 2013 draft legislation, and in fact paragraph 1.90 of the February 2013 draft Explanatory Memorandum specifically stated "that during the notification phase, unregistered entities that provide, or advertise that they will provide a tax advice (financial product) service will not be liable for any civil penalty under the TASA 2009." A breach of this obligation now represents a civil penalties offence. The industry has had a mere 4 weeks to consider this and all

within the context of complete uncertainty. This obligation involves a substantial amount of effort to prepare for across the entire financial services industry and therefore will leave the entire industry exposed.

We recommend that the consideration of the legislation be deferred until all the issues can be addressed and appropriate consultation can be undertaken. The legislation should then be brought back to the parliament for consideration. In the event that this is the path that the Government selects to take, then we request that the existing carve-out for financial advisers be extended through until 30 June 2014. The AFA is committed to actively engage in this consultation process to ensure that this is the final extension of the carve-out.

In this submission we will address the following issues:

- Legislative issues and lack of clarity,
- Timeframe issues,
- Concerns with respect to the consultation process, and
- Consideration of the implications of a delay in commencement

Legislative Issues and Lack of Clarity

Our primary concern with this legislation is the definition of tax (financial) advice services.

The definition is particularly important as it defines what and who will be included under the TASA legislation. Critically, the definition is also the mechanism through which clarity can be provided as to what is fully exempt from the legislation and what is not considered a tax (financial) advice service, but will be is treated as a full tax agent service. We do not believe that the legislation and the Explanatory Memorandum provide the necessary level of clarity as to what is covered. In fact we would suggest that at present it is quite uncertain.

We have been concerned about the definition from the point when the public consultation commenced. The draft legislation, which was released in February 2013, defined Tax Advice (Financial Product) Services. This definition did not work, as it was too specific to products and excluded advice provided by financial advisers that was of a strategic nature. That is, advice related to strategy that does not include the recommendation of a specific product. This represented a significant problem as advisers providing this type of strategy advice would not sit under the definition and would therefore have been classified as a full tax agent under the legislation. This would have been unworkable as financial advisers are not in a position to comply with the full TASA obligations. In our submission to Treasury, in March 2013, we expressed our objections to the proposed definition.

More recently the AFA, along with a large number of other associations, have worked with Treasury to find a definition that would work. In fact the industry as a whole did come up with a definition that we felt worked, in that it specifically referred to financial advisers and what they do. This proposed definition continues to have the support of many in the industry.

We recommend the meaning of a tax (financial) advice service at section 90-15 be amended to the following:

> "A tax (financial) advice service is a tax agent service (other than within the meaning of subparagraph (1)(a)(iii) of the definition of that expression) provided in the course of providing **financial advice services as defined below** that relates to ascertaining an entity's tax liabilities, obligations or entitlements or advising an entity about tax liabilities, obligations or entitlements.

For the purpose of this definition, tax (financial) advice services would mean advice in respect of a client's financial affairs specifically related to wealth management, retirement planning, estate planning, risk management and related advice, including:

a) advice on financial products as defined in s764A carried out pursuant to an Australian Financial Services License;
b) advice and dealing in financial products as defined in section 766B and 766C of the Corporations Act;
c) non-financial product advice including financial strategies or structures; and
d) taxation advice which is related to advice provided under (a) or (b) or (c).

For the avoidance of doubt, a tax (financial) advice service does not include preparing, or lodging, a return or a statement in the nature of a return."

Unfortunately, this definition was rejected and we have ended up with the one in the legislation which is far too broad. This definition includes the following:

A tax (financial) advice service is a tax agent service provided by a financial services licensee or a representative of a financial services licensee in the course of giving advice of a kind usually given by a financial services licensee or a representative of a financial services licensee…

It is our understanding that this TASA amendment is targeted at financial advisers, however financial services licensees include a wide range of different types of entities and is much broader than just financial advisers. An AFSL holder also includes product providers, managed investment schemes, superannuation funds, life insurers, general insurers, custodians, stockbrokers, research businesses, investment reports etc.

This opens up the question as to whether the TASA legislation is expected to apply to stock brokers, general insurance brokers, research companies, fund managers, platform operators and others who might be caught under this definition. The Explanatory Memorandum does not provide an adequate explanation of the intended scope of this legislation.

We believe that this is an important point and would like to see Treasury reconsider the use of the definition that the industry collectively recommended.

In the 7 April 2011 announcement of the Future Regulation of Financial Planners Providing Tax Advice, the Assistant Treasurer stated that the provision of general factual tax information was not tax advice. We are not comfortable that this has been reflected in the legislation or adequately addressed in the Explanatory Memorandum. We would also propose that general advice be explicitly excluded from coverage under the TASA regime. We further seek clarity in the following circumstances:

- Scenarios where advice might be given to a group.
- Situations where there is no direct fee for the advice, but fees are paid for other services.
- Implications for on-line calculators and computer programs.

In the 7 April 2011 announcement of the Future Regulation of Financial Planners Providing Tax Advice, the Assistant Treasurer also committed to the development of guidance material to clearly explain to financial advisers the types of tax advice that can be provided under each level of registration. This guidance has not been provided, despite the proposal to have the legislation commence on 1 July 2013. This 7 April 2011 release also referred to the Tax Practitioners Board (TPB) and ASIC working together to develop competencies and qualifications for financial advisers. It is not apparent to us that this has happened. We believe that it is important that there is a unified view of competencies and qualifications across the two regimes.

As previously stated, 1 July 2013 also represents the commencement of the FoFA legislation. One of the critical components of FoFA is the Best Interest Duty. The financial advice industry has been concerned about the interplay between TASA and the Best Interest Duty. Section 961B(2)(d) of the Corporations Act requires the adviser to assess whether they have the expertise to provide the

advice. The TASA legislation will lead to the establishment of a standard for taxation qualifications that is likely to be above the current level for a significant proportion of advisers. We believe that there is a risk that financial advisers, who provide advice without this qualification, will be in breach of the Best Interest Duty.

This matter was discussed with ASIC on Monday 3 June, and they have responded by suggesting that it will be possible for an adviser to satisfy both these obligations. They do not propose to provide guidance until further down the track. We are cautious that there may subsequently be conditions related to the manner of supervision, which may present issues in terms of how the financial advice industry is structured. We have illustrated this point to highlight the potential for conflict between TASA and the Best Interests Duty. FoFA is a very complex piece of legislation, and therefore it would be necessary to give the issue of inconsistency between the legislation much greater thought. No one has had the opportunity to do this.

The TASA regime has a mechanism where there is a requirement that only a "sufficient number" of tax agents need to be registered with the TPB. We have been asking for clarity for some time on how this will be applied in the financial advice space. This is an important issue for the industry in preparing for this legislation. Might this mean that only one person in a financial advice practice needs to be registered? How does it apply for salaried adviser businesses? Understanding this is important in considering the registration process and in considering the education requirements. It is also important when considering the Best Interest Duty interplay.

Now in the long term, tax (financial) advisers will need to pass an experience requirement of at least 12 months, before being able to apply for registration with the TPB. As there is no experience requirement in the AFSL regime, this will potentially significantly change the way that new advisers join the industry. If advisers need to meet these experience requirements before providing advice, this will fundamentally change the recruitment of new advisers into the financial advice industry. This is another area where there is potential inconsistency between the AFSL regime and the TASA regime. It is difficult to understand the full implications of this without being able to understand who will need to be registered under the "sufficient numbers" requirement.

The legislation only allows for AFSLs and Authorised Representatives to register during the notification period (1 July 2013 to 31 December 2014). Why are representatives who are not authorised representatives (ie salaried advisers), unable to register during the notification period? What are the implications for salaried channels and the supervision of advisers during this period? How do new advisers gain qualifying experience during this period if they do not have registered tax (financial) advisers to work with? There are definite implications that flow from this difference. Registration is easier during the notification period. Thus it will be more difficult for representatives to register during the Transition period. We also understand that registration fees will apply during the transition period, so this is another point of disadvantage for representatives. We recognise that representatives are not registered with ASIC, however we seek guidance on why they have been excluded from TASA during the notification period. We further recommend that they should have been allowed to register during the notification period.

In addition to the points previously raised we have other concerns with respect to a lack of detail on the TASA regime:

- Implications for Professional Indemnity Insurance. AFSLs are already required to hold PI, but this is at the entity level. How will PI work where registration with the TPB is at the individual level, but the existing PI is at a different level?
- What will the education requirement be?
- When do existing advisers need to achieve the education standard?
- What are the requirements for registration as a recognised tax (financial) advice association?

There is much that we do not yet understand. This is concerning when it is proposed to commence in three weeks time. We believe that there should have been further consultation on the issues raised above.

We note that the Tax Practitioners Board are holding a consultation session on Tuesday 18 June, and we may gain a better understanding of some of the key elements at that event.

Timeframe Issues

There have been many comments that financial advisers don't need to do anything in the first 18 months. There are three key areas where this is incorrect:

- Updating the disclosures where an adviser is unregistered,
- Adopting the TPB Code of Professional Conduct, and
- Ensuring that the adviser has compliant PI Insurance.

We acknowledge that the full TASA obligations don't start from day one, but there are important obligations for both those who register and those who do not. The disclosure obligation will commence from 1 July 2013, for anyone who is not registered. Every piece of advice will need to include a disclosure that states that the adviser is not a registered tax (financial) adviser and if the client intends to rely on the advice they should request advice from either a registered tax agent or a registered tax (financial) adviser. Advisers do have an existing disclosure, however this will need to be changed, in order to be compliant. Whilst we are talking about changing a relatively small disclosure, this is still a significant task, considering the scale and complexity of the industry.

This would require the entire industry to change their disclosures on all advice documents and other key disclosure documents. This includes system changes, process changes and training, all at a time when key resources are focussed on FoFA. Without a knowledge of the industry it is difficult for outside observers to appreciate the scope of such an obligation. There are many hundreds of licensees and there are thousands of advice practices. With financial advice software, it is often necessary to get system providers to make these changes. This is not as simple as changing some words in a word processing template. There are other documents such as Financial Services Guides that need to be changed. In some cases Licensees run this centrally, so this represents a logistics exercise of significant proportion. On the product side, we are also talking about changing Product Disclosure Statements, right across the industry. This is an absolutely enormous task. Given the scale of the task, the industry would need to have at least 6 months to make this change. This is a strong reason for why a 1 July 2013 commencement is simply not practical or possible.

In terms of adopting the TPB Code of Professional Conduct, this is not an obligation that should be taken lightly. All advisers should be subject to training on these obligations. It would be a mistake to take on these obligations without providing appropriate guidance and training to support advisers in understanding their obligations. We believe that those who are suggesting that there are no obligations on advisers for the first 18 months are not paying sufficient attention to the importance of the Code of Professional Conduct.

With PI insurance there are a number of issues, including working with insurers to confirm that the existing insurance cover can be extended to incorporate the requirements under TASA. Also there are some practical issues about how the PI requirements under the AFSL regime will align with what is required under the TASA regime. Where changes to PI policies are required, this will take a considerable period of time.

For all these reasons, we believe that it is essential for more time to be made available to understand the obligations and to prepare for implementation. Thus to ensure that the industry is in a position to take on TASA, we recommend a deferral in the start date until 1 July 2014.

Concerns with Respect to the Consultation Process

The legislative process on TASA has been sporadic with large gaps. The AFA have sought to be involved along the way and have responded actively at each point where we have been engaged. We appreciate the frustration from some parties on the timeframe for this legislation to come to fruition, however this has been entirely out of the control of the financial advice industry. We do not understand why this whole process has taken so long. We reject, however, the suggestions that due to the delays, this legislation needs to be passed as it is, and not subject to a more sensible and practical consultation and implementation schedule.

We do note that the Assistant Treasury issued a media release on 7 April 2011, in which he announced the proposed regulation of financial advisers providing tax advice and stated a planned commencement date of 1 July 2012. He also stated that "Treasury, in consultation with the Board and ASIC, will now progress the details of the model to be determined by the Government with a view to consultation on exposure draft legislation later in the year". This timeframe was clearly not met and a further extension of the carve-out to 30 June 2013 was provided.

The AFA next got involved with the TASA legislation consultation process in February 2012, where we attended a meeting and had the opportunity to comment on a restricted consultation paper. There was further consultation in June of 2012. It should be noted that the consultation in 2012 was entirely confidential, and limited to professional associations, so there was nothing made available for public viewing on the direction of the TASA regime. From June 2012, we didn't hear anything further until the draft legislation was publically released in February of this year. There was a seven month gap in activity.

More recently there has been some further engagement with the industry, including the options with respect to the definition of Tax (financial) advice, however it has been quite limited with little details provided. Also this consultation has once again been confidential.

The final version of the legislation was only made available on 29 May 2013. Some parties have suggested that we had visibility of the legislation in February, so we had a long time to prepare. In reality, there were significant changes between the draft legislation in February and the final legislation on 29 May, including the following:

- A change to the definition of tax (financial) advice,
- Change to eligibility for registration during the notification period
- The addition of the disclosure requirement for unregistered entities, and
- Changes to the deemed timing of registration and the timeframe for re-registration.

These changes include some very significant factors. Some comments made about the ease of modifying the disclosure obligations, demonstrate a complete lack of appreciation of the complexity of this matter or the industry. Put simply, the modified disclosure obligation was new and unexpected, and requires a significant workload across the industry to prepare for. This is a critical point and needs to be taken into account in considering an appropriate commencement date. It is poor practice to announce an obligation of this scale so close to a commencement date, when there has been no consultation on it and no effort to understand the implications and consequences.

From the broader financial advice community perspective, they have seen the 7 April 2011 media release by the Assistant Treasurer, then the February 2013 release of draft legislation for consultation, followed by the 29 May 2013 introduction of the legislation into parliament. This demonstrates a long delay followed by what appears to be an excessive rush.

We have believed for some time that it was not practical to implement this legislation, with effect from 1 July 2013. In fact, in our March 2013 submission, we recommended a 6 – 12 month deferral could be provided without the need to change the full implementation date of 1 July 2016. The Notification and Transition periods could both be reduced to 12 months.

We have heard a number of comments that regulatory change in a tax context happens in a short timeframe. There is a reason for this, which is typically anti-avoidance. We do not accept that this is comparable to the case of the introduction of a new regulatory regime. We are very concerned about having legislation released just one month before it is due to start. That is not best practice. The AFA has previously, with respect to FoFA, recommended that legislation should be finalised at least 12 months before it is due to commence. FoFA illustrates the importance of an adequate lead-time. Although the FoFA legislation was passed in June 2012, we are still waiting for key regulations on grandfathering and Corporate Super advisers still have no practical means to provide services to new clients.

Also we would like to make the point that with FoFA due to start on 1 July 2013, it is not practical to add another regulatory regime on top of this, particularly with less than one month to prepare. FoFA is an incredibly broad and complex package, that has involved significant expense and resources across the industry. The industry does not have the spare capacity to focus on TASA at this point.

The Implications of a Delay in Commencement and Consumer Protection

We would also like to address the comments that have been made in the last couple of weeks about the loss of consumer protection that will flow from a delay in the commencement of the TASA legislation. We believe that this is a mis-representation of both the facts and the consequences.

Firstly, in terms of education and qualifications, taxation is taught as part of the Diploma of Financial Planning and also there is a taxation subject in the Advanced Diploma of Financial Planning. Advisers definitely have education on taxation. We acknowledge that under TASA, that standard is likely to be increased, however they do already have a decent level of knowledge.

Secondly, in terms of complaints and dispute resolution, there will simply be no detriment. Clients who get inappropriate advice due to a financial adviser's failure to correctly consider a taxation issue, have been able to seek compensation through the AFSL's Internal Dispute Resolution (IDR) and External Dispute Resolution (EDR) processes under FSRA for a long time. This has included issues like recommending superannuation contributions that exceed the relevant contribution caps, and failing to consider Capital Gains Tax when recommending the sale of investment assets. Financial advice complaints based upon taxation errors are not common, but they are certainly covered and included under the EDR regime. Statistics on this should be available from the EDR schemes. From a consumer perspective, we would also suggest that the increased complexity as to who the appropriate regulator is in the context of a taxation related matter, might actually become a negative in a consumer protection context.

We would like to further, make reference to paragraphs 3.96 and 3.97 of the Explanatory Memorandum. Complaints will continue to be addressed under the AFSL regime and in fact paragraph 3.97 specifically states that there are no dispute resolution-related obligations under TASA. Financial Advice clients are already very well protected in the AFSL regime.

We do not believe that there is going to be any notable reduction in consumer protection that will flow from a delay in the commencement of this legislation. On the other hand, we believe that it is much more important to ensure that it is implemented correctly rather than in haste.

Conclusion

Whilst we do not oppose the amendment of TASA to incorporate financial advisers, we do not believe that the current version of the legislation is appropriate or the process satisfactory and therefore recommend that consideration of this legislation be deferred to enable further consultation and the opportunity to address the deficiencies identified by the financial services industry. Importantly we request that a recommendation is made to extend the regulation carve-out for financial advisers until 30 June 2014.

We thank you for the opportunity to make this submission.

Should you have any questions, please do not hesitate to contact me on .

Yours sincerely,

Phil Anderson

Chief Operating Officer