AFA Opening Statement to the PJC

The PJC - TASA

12 June 2013

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Introduction

- Good afternoon and thank you for the opportunity to appear at this hearing. My name is Phil Anderson and I am the Chief Operating Officer of the AFA:
    - I have been working in the Financial Services industry for nearly 20 years. I have been working in financial advice for much of the last 10 years.
    - At the AFA I am responsible for Policy and Regulatory Change.

- I am here with Deborah Kent who is the NSW state director of the AFA and a financial adviser. Deborah has been a practising Financial Planner for the past 25 years, operating a boutique fee for service financial planning practice for 17 years, located in Parramatta in Western Sydney. In her business, there are three practising Advisers and three support staff.

A Brief Introduction to the AFA

- The AFA is Australia's oldest professional financial adviser association.
- Founded in 1946, we have a 67 year track record.
- It is an association of, by and for advisers
- We have a membership of over 2000 individual members and through our Licensee partners represent around 7500 advisers, spread throughout the country.

To the AFA's view…

At the outset I would like to express our position on the intent of this Bill - we do not oppose the introduction of the Tax Agent Services Act for financial advisers. We have, however, actively opposed the current version of the legislation as we believe that it:

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

Definition

The definition of Tax Advice (Financial Product) Services, as included in the draft legislation, released in February, 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 was unworkable.

More recently we, 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. The definition was based upon "advice in respect to a client's financial affairs specifically related to wealth management, retirement planning, estate planning, risk management and related advice" and used Corporations Act definitions that relate to the activities of a financial advice licensee.

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…

A financial services licensee is a very broad category and what does "of a kind usually given by a financial services licensee" actually mean?

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.

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.

Consultation Process

I would now like to talk about the consultation process and the timeframe for this legislation. The AFA got involved with the TASA regime 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. We didn't hear anything further until the draft legislation was released in February of this year. There was a seven month gap in activity.

The legislative process on TASA has been sporadic with large gaps. We have responded actively at each point that we have been engaged. We do not understand why this has taken so long.

More recently there has been some engagement with the industry, however it has been quite limited with little details provided.

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.

This review process has been underway for three years. We are quite 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. You only need to have a look at FoFA, which is due to start on 1 July 2013, to understand why this timeframe is critical. We are still waiting for key regulations on grandfathering and Corporate Super advisers still have no practical means to provide services to new clients.

With FoFA due to start on 1 July 2013, it is not practical to add another regulatory regime on top of this 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.

Implications of the 1 July 2013 Start Date

We acknowledge that the full TASA obligations don't start from day one, but some do. It is important to have a look at one of the obligations that 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.

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. 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.

Other Issues in the Legislation

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.

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 on the meaning of this in the financial advice space for some time. 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? We don't know! 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.

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 remains much uncertainty with this legislation where we seek further consultation.

Lack of Detail:

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

- 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.

Loss of Consumer Protection

I would also like to address the comments that have been made in the last week about the loss of consumer protection that will flow from a delay in the commencement of the 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 also 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 IDR and 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.

I 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.

Conclusion

In conclusion, we believe that this legislation should be modified to correct the definition of tax (financial) advice services.

Importantly we also believe that the commencement date should be put back to 1 July 2014. In that timeframe it will be possible to conduct adequate consultation, and develop all the necessary regulations and guidelines and provide the training.

It is also critically important to appreciate that in the absence of legislation and without a further extension to the existing carve-out, the provision of financial advice would largely need to cease from 1 July 2013. In the context of legislative uncertainty, there needs to be a sensible solution found for the current predicament via a regulation that extends the carve out until 30 June 2014.

We do not oppose TASA, but we want to see it implemented in an effective manner, which addresses the concerns raised today.

We thank you for the opportunity to provide feedback on the TASA Amendments and welcome your questions.

Thank you