



21 December 2012

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Dear Ms Sim,

FSC SUBMISSION – Exposure Draft - Legislative amendments relating to the use of the expressions 'financial planner' and 'financial adviser'

Thank you for the opportunity to provide a submission to the Treasury regarding the recently issued Exposure Draft - Legislative amendments relating to the use of the expressions 'financial planner' and 'financial adviser'.

The Financial Services Council (FSC) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers and financial advisory networks. The FSC has over 130 members who are responsible for investing \$1.9 trillion on behalf of more than 11 million Australians.

The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Stock Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

The FSC supports the intention of the draft legislative amendments to introduce a distinction to clarify when a person can use certain prescribed terms, specifically "financial planner" and "financial adviser". However, we are of the view that further amendments and clarity of the Legislation is warranted.

In particular, the Bill creates significant ambiguity around the use of the two terms in question, as well as the use of terms of like import (especially where one of the three words - financial, adviser or planner - is used in conjunction with another descriptor). In the FSC's view it is very important that the Bill creates certainty around the use of these terms, both where a person uses the term to describe their personal professional capacity, as well as those who operate within a financial services business and use such terms in the course of their daily activities, including in engaging with clients. We make recommendations on the use of these terms in these capacities in our submission below.

Our submission discusses these concerns in more detail. We look forward to discussing the contents with you. If you have any questions regarding the FSC's submission, please do not hesitate to contact me on (02) 9299 3022.

Yours sincerely



CECILIA STORNILO
SENIOR POLICY MANAGER



FSC SUBMISSION

Exposure Draft

**Legislative amendments relating to the
use of the expressions 'financial planner'
and 'financial adviser'**

DECEMBER 2012

1. KEY ISSUES

Consultation with members has highlighted the following key issues:

- 1.1 DRAFTING ISSUES
- 1.2 DEFINITION
- 1.3 TRANSITION
- 1.4 GENERAL COMMENTS

1.1 DRAFTING ISSUES

a) *s923C Title*

We note that the section title for s923C reads

“Restriction on use of the expressions *financial planner* and *financial adviser* etc.”

It would be helpful if the drafting was far more specific or exact so that industry participants clearly understand their obligations. What is intended by the use of this term “etc.” in the heading? Is it common for legislation to use such a term?

Recommendation

The FSC recommends the term “etc.” be deleted from the section 923C heading.

b) *Intent*

understood that the intent of the drafting structure of section 923C (1) and (2) is essentially to prohibit any persons in s923C (1) using the term “financial planner” or “financial adviser” and any other prescribed terms (**Restricted Terms**) and then permit exempted persons section 923C (2) to use the Restricted Terms.

We note that there are current restrictions on use of certain words or expressions set out under s923A (including but not limited to “independent”, “impartial”).

In relation to the drafting at section 923C(b) as to when a person “assumes or uses” a restricted word or expression:

- **‘assumes’** - In our view you cannot “assume” a word or expression in the same way that you can “assume” a position or title.
- **‘like import’** – We assume the intention is ‘of similar meaning’ rather than ‘similar level of importance’.

Given the above, we submit that the current drafting creates the following issues:

- a) Section 923C(2) sets out that it is not a contravention if a person that holds an Australian Financial Services Licence (AFSL) can under the AFSL provide personal advice to retail clients in relation to Designated Financial Products. Current drafting prohibits financial advice service providers limited to a wholesale and/or sophisticated client Licence from being able to use the Restricted Terms;
- b) Section 923(c)(4)(a)(iii) sets out that a restricted word includes any other word or expression that is of *like import* of a Restricted Term. Even though it is understood that the intention is to avoid new terms being created by those that make inappropriate representations to a consumer that they are a financial adviser/planner when they are not, the current drafting is too ambiguous potentially capturing words of like meaning to “financial”, “adviser” and “planner”. For example, “banking”, “monetary”, “economic” and “consultant” could be prohibited;
- c) Section 923C(4)(b) sets out that a person assumes or uses a word or expression even if the word or expression is being used as part of another word or expression or in combination with other words, letters or symbols. The issues that arise from this include:
- When a word or expression is used in advertising material or in communication with consumers. For example, a product issuer with a limited AFSL will be restricted from using the term in their disclosure materials and communications to investors (e.g. “Please see your financial adviser for more information”) (see Product Issuer and Use of Restricted Terms below);
 - When a word is used as part of another word to describe something, e.g. a financial institution;
 - Restrictions on those that use certain terms in their title that do not provide any form of personal financial advice. For example, chief financial officer (Refer to Definition below).
- d) It is not clear whether an adviser who gives advice mainly to retail clients can use the Restricted Terms when giving advice to a non-retail client? and
- e) Does not prohibit non-advice providers from using the Restricted Terms – eg a real estate agent.

Recommendation

The FSC recommends that section 923C be re-drafted to:

- Prohibit use of the Restricted Terms “financial planner or financial adviser” by anyone unless they are authorised to provide personal advice in relation to Designated Financial Products (see pg 8 for our comments on “Designated Financial Products);
- Delete s923C(1) and replace with a general prohibition, regardless of the nature or type of business (except where the term is used solely to refer to a person who is not prohibited from using the restricted terms); and
- Include “wholesales clients/sophisticated investors” at each reference to retail clients in section923C(2).

With regards to section 923C use of the following terms:

- 'The first person'; 'another person'
- 'On behalf of'

Is this construction designed to refer to authorised representatives providing advice on behalf of a Licencee?

A person (the **first person**) contravenes this subsection if:

- (a) either:
 - (i) the first person carries on a financial services business or provides a financial service (whether or not on behalf of another person); or
 - (ii) **another person** provides a financial service on **behalf of** the first person; and
- (b) the first person **assumes** or uses, in this jurisdiction, a restricted word or expression in relation to that business or service

We note that an individual is an authorised representative of an AFSL. Individuals do not generally hold licences, financial services businesses do. An AFSL also does not give individuals the right to provide personal advice, rather it gives the financial service business the ability to provide advice through representatives.

Recommendation

The FSC recommends the drafting be amended to reference Licencees, their representatives and authorised representatives consistent with the Corporations Act.

c) *Personal Advice vs General Advice / Financial Planner Training Requirements*

The Bill seems to imply that a person authorised only to provide general advice could not use the Restricted Terms. 1.14 of the Explanatory Memorandum states 'it is enough that, under the terms of the Licence, the Licencee would be able to provide advice on one or more of these types of products'.

This is unclear and potentially problematic as:

- 1) The word "advice" is used (as opposed to "personal" advice)
- 2) An individual with two Diploma of Financial Planning subjects could call themselves a financial planner. This latter situation would appear to be in conflict with intentions communicated by ASIC in CP153 (regarding financial planner training) and with those of the Government in relation to tax advice by financial planners and associated education requirements under the Tax Agent Services Act. To legislate the use of the term of financial planner/adviser before ASIC has finalised its competency requirements for financial planners/advisers appears to be problematic.

Recommendation

The FSC recommends that the draft Bill and Explanatory Memorandum be amended to clearly state the Governments' intention regarding:

1. Whether an individual must be authorised to give personal financial product advice (and not merely general advice); and
2. An individual must have obtained the minimum training and competency levels required by law to be a financial planner.

1.2 DEFINITION

Noting the concerns expressed in paragraph 1.10 and 1.11 of the Draft Explanatory Memorandum, we note that the industry has a significant array of job titles that could inadvertently fall foul of the Restricted Term definition because of the breadth of the definition.

The definition creates a contravention if any other word or expression or of like import (section 923C(4)(a)(iii)) is used by any persons (with or working under an AFSL) not providing personal advice to a retail client. As such job titles such as the following would inadvertently contravene whilst being legitimate job descriptions for consumers:

- Any title with the word “financial”, (eg “financial consultant”, “analyst”, “financial councilor”, “financial advice representative” etc)
- Any title with the word “adviser” (as a stand alone title, “private wealth adviser”, “tax adviser”, “advisory services” etc); and
- It is also not clear whether the word “wealth” can be used (eg “wealth adviser” or “wealth consultant”).

Of significant concern is whether the draft Legislation prevents the use of the word “advice” within a job title. There are a multitude of job titles containing “advice” within the corporate financial services sector i.e. Advice Dispute Resolution Manager, Advice Compliance Manager, Head of Advice and General Manager Advice Services etc. These job titles often have their profiles promoted and deal directly with retail clients (in some cases employed by an AFSL) even though not in a capacity of providing personal advice. We would have significant reservations if these job titles would be impacted under section 923C(4)(a)(iii).

Recommendation

The FSC recommends two categories of restricted terms; exact terms and like terms with corresponding stringency in approach to the restrictions. Put plainly:

- Use of exact expressions of financial planner / financial advisers to be reserved to those Licenced to give personal advice etc.; and
- Use of ‘any other word or expression that is of like import....’ to be reserved for anyone who operates under an AFSL within a financial services business.

Product issuer and use of the restricted terms

Product Issuers currently use a number of terms in disclosure and other means that could be captured by the current drafting of the legislation (where they do not meet the AFSL conditions in the drafting). As the intention of the legislation is aimed at a person that call themselves a “financial adviser/planner” when they are not in order to protect consumers, this is very different to a product provider using the term to inform a retail client to, for example, “Speak to a financial planner for further information”. Product issuers should be outright prohibited and should be able to refer to financial planning and/or financial advisers in their material. It is our view that this benefits a consumer to give them adequate information in order for them to seek appropriate advice.

1.3 TRANSITION

We note that the legislation comes into effect the day it received Royal Assent without provision of transition for the industry.

As highlighted above, a significant portion of the industry will be in contravention of the new legislation, committing an offence the day after the Act(s) are enacted and is no longer be able to use the terms:

- “Financial planner”;
- “Financial adviser”;
- “adviser” (used as a stand-alone term)
- “advice” (used within corporate job titles)
- “wealth” (adviser, consultant); and
- “financial consultant”

As such the industry requires time to amend all disclosure documentation (eg FSGs), marketing material, websites, amend job titles, published job descriptions, business cards etc in order to comply with the legislation.

We question whether the Government has considered flow on cost impacts to legitimate financial planner/adviser businesses (a cost impost not considered by the Government Regulatory Impact Statement) and why the implementation date is not aligned at least to co-incide with the FOFA hard compliance date of 1 July 2013.

Recommendation

The FSC recommends that the financial services industry requires twelve months from Royal Assent to transition all written material, job structures, titles and all business collateral material to comply.

1.4 GENERAL COMMENTS

Designated financial products

The list of products in section 923C(5) is a list of **exclusions** from the meaning of Designated Financial Products. We note that a Financial Product is defined in the Corporations Act as meaning all financial product and query the new term created by this draft legislation. Further, In the Explanatory Memorandum, the same products are described as **the** Designated Financial Products, inconsistent with the legislation.

Recommendation

The FSC recommends that the wording at the beginning of paragraph 1.13 of the Explanatory Memorandum be amended to read: “A ‘Designated Financial Product’ is a financial product other than a general insurance product ...”.

The Explanatory Memorandum (at 1.14) states that the intention of the term “designated financial products” is to capture financial products which are less well understood and may be associated with greater risks.

Recommendation

The FSC requests clarity as to whether a person restricted from using the term “financial planner” and “financial adviser” can use the term and provide advice on the following: unlisted ‘mortgage debentures’, ‘debentures’, ‘secured notes’, ‘unsecured notes’ and ‘unsecured deposit notes’.