10 June 2020

Stamping Fee Team
The Treasury
Langton Place
PARKES ACT 2600

By email: StampingFeeTeam@treasury.gov.au

DRAFT STAMPING FEE EXEMPTION REGULATION
SUBMISSION BY STOCKBROKERS AND FINANCIAL ADVISERS ASSOCIATION

Stockbrokers and Financial Advisers Association (SAFAA) is the peak body representing stockbroking, investment advisory firms and their partners and associates in Australia's vitally important listed equity market participation. Our members are Market Participants and advisory firms which provide securities and investment advice, execution services and equity capital-raising for Australian investors, both retail and wholesale, and for businesses.

Preliminary Comments

First, we note that the consultation was announced on 4 June 2020, with submissions due by close of business on 10 June 2020, which six-day period included a long weekend.

A consultation period of four business days is patently inadequate. The ability to seek feedback from members in such a short time was close to impossible.

As Treasury would no doubt be aware, the extreme market volatility arising as a result of the COVID-19 pandemic has had an enormous impact on SAFAA members. Since March 2020, Market Participants have been under significant stress as they provide advice and guidance to their clients, who are themselves under considerable anxiety due to market conditions.

Trading volumes have been high. Intra-day volatility has been a feature of the last few months, with the markets on many occasions undergoing complete reversals in direction during the same trading day. The levels of trading, clearing and settlement have placed stress on IT and Operations staff within Market Participants.

Due to the business continuity arrangements put in place in order to address social distancing requirements, Market Participants are mostly employing split teams and working remotely where possible. IT and Operations staff are working extended hours to ensure business and client requirements are satisfied.

In this context, allowing four business days for members to provide comment on the stamping fee exemption regulation does not amount to consultation at all.

Second, we note that no rationale has been provided for the decision to partially remove the exemption in relation to LICs and LITs, but to allow the exemption to remain for REITS and infrastructure offerings. We note that the Treasury report into the matter has not been made public, and we therefore are not able to see whether Treasury has, in fact, recommended this removal, and if it did, what its rationale was.

We have also not been able to view any of the public submissions that were lodged with Treasury on this matter, which is contrary to normal process.

In short, the process around the government's decision and its implementation does not represent transparency in any shape or form.

Thirdly, we cannot proceed to comment on the consultation without recording SAFAA's strong submission that the decision is the wrong one. The decision confuses the service and remuneration model of stockbroking with the service and remuneration model of financial planners. It also fails to give regard to the matters set out in SAFAA's submission to Treasury on the subject, including:

- the importance of LICs and LITs to satisfy the demand from retail and high net worth clients for new and diversified classes of investments
- the potential that issuers will not develop and bring such issues to market in the Australian jurisdiction if there is no confidence that investors will have access to advice from their advisers on those products
- the absence of any difference between the size of stamping fees paid to advisers, and the size of brokerage commissions on market transactions, such that the suggestions of there being a conflict of interest are not borne out.

Rather, the Draft Regulations attempt to distinguish between real estate and infrastructure on the one hand, and other forms of investment on the other, on what we consider to be a spurious basis of "passive investments". It is hard to see the justification or rationale for such a distinction, and the concept of a “passive investment" on which the Regulation is based is, in our opinion, unsound. We comment on this more in the sections below.

By partially removing the stamping fee exemption, the government is effectively favouring one sector over others, without providing any rationale for doing so.

Subject to these overarching comments, below are SAFAA's comments on the Draft Regulations.

The Draft Regulations

Impact on advisory and capital raising fees

On our reading, the drafting of the Draft Regulations and the definition of "stamping fee" would appear to have the combined effect of prohibiting the payment of fees that are not stamping fees in the ordinarily understood meaning of that term. The drafting needs to be reconsidered so that this does not happen.

The definition of "stamping fee" in **Reg 7.7A.12B** in part says:

> ***stamping fee*** means a fee, or a part of a fee:
>
> (a) that a person, including an issuer of a financial product, or a person acting on behalf of the issuer, pays either directly or indirectly to a provider in connection with:
>
> (i) an offer by the issuer to issue the financial product; or
>
> (ii) an invitation by the issuer for an application to issue the financial product; or

This definition is broad enough to capture **any fees** paid to the licensee in connection with an issue, not just fees that are commonly understood to be stamping fees. In the case of a licensed entity that conducts corporate advisory and equity capital markets work within the same licensed entity as the provision of financial advice to retail clients, the effect of the Draft Regulation would be to prohibit the payment of ordinary corporate advice fees, underwriting fees and fees for managing and arranging the issue on behalf of the issuer, in connection with a LIC or LIT offering.

In cases where licensees form part of a corporate group, with the capital markets operations and financial advice operations sitting in separate licensed entities, then this may not be an issue, as the relevant fees may be paid to the entity which is not the provider of the advice.

However, we understand that even in such group cases, it is not uncommon for the financial advice provider entity to receive an arranger fee and/or a management fee for work done in connection with the issue. These fees are not within what is thought of as a "stamping fee".

In relation to licensees that incorporate their capital markets and financial advice operations within the same licensed entity, the Draft Regulation would have the effect of forcing those entities to establish a new licensed entity to separate the work. This would entail all of the costs involved in setting up the additional entity, applying for an additional AFS License, and the ongoing costs of running the corporate entity, reporting, audit and regulatory fees, and so on.

The effect of this would be felt most at the small to medium end of the market, where licensees attempt to streamline their operations as much as possible and reduce costs of business. If small to medium entities were required to duplicate their entities, this would have a flow-on effect on the cost of capital raising by small cap stocks and start-up ventures, which more commonly rely on licensees in the small to medium sector for their corporate and capital markets advice.

The drafting of the Regulation and in the Draft Regulations needs to be amended to make it clear that the prohibition on stamping fees applies only to those fees that can be regarded as a "stamping fee" in the commonly understood sense.

"Passive investments"

The framework of the Draft Regulations relies on the concept of a "passive investment", as defined, in order to justify the separate treatment of LICs and LITs compared to REITS and infrastructure investments.

This use of the concept of a "passive investment" is, in our view, somewhat novel, and quite bizarre.

The definition of "passive investment" refers back to "investments that are permitted by subsection 115-290(4) of the Income Tax Assessment Act 1997", although the latter Act does not refer to those classes of investment as passive investments.

In our submission, the concept of a "passive investment", as it is ordinarily understood, relates to the manner of the investment, not to the underlying investment. That is, where an investor buys and holds an asset, that is passive investing, whatever the asset. This is in contrast to buying and selling assets to generate a profit, or buying and actively improving an asset.

To say that shares, debentures, and so on, are "passive investments", is in our submission, nonsense. Similarly, to say that holding real estate in a real estate investment trust, in order to derive rents from the tenants of the buildings, is not passive investment, is in our view also contrary to accepted understanding of the term. There can be no more passive investment than holding real property in order to collect rent.

In our submission, the framework in the Draft Regulation for distinguishing between those LICs and LITs for which stamping fees will be prohibited, and those for which they will continue to be permitted, is flawed, and likely to generate legal uncertainty.

This call into question the whole basis of the differential treatment of the two classes of LICs and LITs, and the absence of any published reasoning to justify this separation, to which we refer in our preliminary comments above.

Conclusion

We would be happy to discuss any issues arising from these comments, or to provide any further material that may assist. Should you require any further information, please contact Peter Stepek at pstepek@stockbrokers.org.au or on (02) 8080 3200.

Yours sincerely

Judith Fox
Chief Executive Officer