Law Council
OF AUSTRALIA

Business Law Section

21 February 2020

David Baker
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By email: Dave.Baker@treasury.gov.au

Dear David

**Consultation on stamping fee exemption**

1. This submission concerning the merits of the current stamping fee exemption in relation to listed investment entities is made by the Corporations Committee of the Business Law Section of the Law Council of Australia (**the Committee**).

***Key Points***

2. The key matters the Committee wishes to raise are as follows:
    a. Current and existing proposed regulations strike the right balance in terms of investor protection and access to products that fulfil long term wealth creation needs of investors.
    b. The Financial Adviser Standards and Ethics Authority's (**FASEA**) new Code of Ethics should be allowed to operate as intended to drive decisions around whether to retain some or all these stamping fees or instead rebate them to clients.
    c. Any changes could have an adverse market impact.

***Submissions***

1. While the Committee accepts the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry identified the need for increased transparency in the financial services industry, including the disclosure and elimination of conflicted remuneration, the Committee queries whether the current debate with regard to stamping fees would address any of the issues raised.

2. The Committee is concerned that the debate has conflated two issues: the performance of LICs/LITs and the payment of transactional fees to stockbrokers for their role in the public security offering process. These fees are different in nature to a financial planner's commission or other asset backed fees.

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3. The Committee is not aware of evidence to support planners being improperly motivated by the fee and "over-allocating" to these asset classes, but assumes that this is something that could be tested to raise the level of debate on the issue beyond being merely anecdotal.

4. The Committee continues to support *Corporation Regulations 2001* regulation 7.7A.12B for the reasons that we supported it in 2014. It is appropriate for a benefit to be given by or on behalf of a capital raising entity to a broker or similar in relation to them dealing, on behalf of a retail client, in an approved financial product issued by the issuer.

5. Again the Committee continues to support the "undifferentiated" exemption that facilitates the raising of funds for the benefit of the issuer or seller. This provision avoids any distortion in the capital market that might arise between listed vehicles that are otherwise permitted to raise capital from retail investors. The Committee continues to support the changes to an undifferentiated model introduced in 2014 in limiting the exemption in the case of an "investment entity".

6. The alternative in differentiating, say, investment products, means further differentiating those products to, say, exclude infrastructure products and real property products (at a minimum).

7. Current and new regulations strike the right balance in terms of investor protection and access to products that fulfil long term wealth creation needs of investors. LIC/LIT structures bring retail investors access to illiquid assets (e.g. fixed income and other alternative asset classes) which may not otherwise be available to retail investors.

8. The current laws require adequate disclosure of these fees. A typical disclosure might be:

   *In respect of this Offer, the Issuer will charge a Handling Fee of 1.5% (inclusive of the net effect of GST) of the gross proceeds of the Offer.*

   ***Stamping fees***
   *The Issuer will pay the whole of the Handling Fee as a stamping fee to Licensees who procure subscriptions for Securities in the initial capital raising.*

9. The manufacturing and distribution sectors of the market are subject to robust measures such as ASIC's recently expanded 'product intervention' powers, the (FASEA) Code of Ethics Guidance (**Code**) and new 'design and distribution obligations' (that will commence operation from April 2021).

10. The Code allows financial advisers to receive "Income derived from ancillary products and services". In particular it provides:

    *You will not breach Standard 3 if you share in profits generated by the provision of ancillary products and services to clients providing that:*
    *• the ancillary products and services are merely incidental to the adviser's dominant purpose in providing advice, and*
    *• the ancillary products and services recommended are in the best interests of your client – conferring on the client value that is equal to or greater than that offered by any other option.*

    *You will breach standard 3 where the dominant purpose of providing advice to clients is to derive profits from selling those clients ancillary products or services from which you* *personally benefit.*

11. That said, the Code also says in Example 9: Selling IPOs:

    *Keeping the stamping fee rather than applying his usual practice of rebating it was unfair to Scott's clients. The option to keep the stamping fee creates a conflict between Scott's interest in receiving the fee and his client's interests. Standard 3 requires Scott to avoid the conflict of interest. It is not sufficient for him to decline the benefit as it may be retained by his principal. Either the firm must decline the stamping fee altogether, or Scott must rebate it in full to his clients.*

12. However, in that example Scott's motivation in keeping the fees is to pay school fees and so Scott "…fails to act with integrity and in the best interests of his client."

13. Under the Code brokers and advisers are bound to apply the client best interests duty and their commitment to ethical behaviour to drive decisions around whether to retain some or all these stamping fees, or instead rebate them to clients: for example, if an investor was paying an annual advice fee and they recommended a LIC/LIT IPO, then client best interest might suggest that any stamping fee should be fully or largely rebated to the client.

14. The Committee considers that the existing regime imposes a flexible ethical standard on the adviser/broker that requires them to assess the client's best interest, which is preferable than having government impose arbitrary rules.

**Conclusion and further contact**

15. The Committee would be pleased to discuss any aspect of this submission.

16. Please contact the chair of the Committee Shannon Finch on [shannonfinch@jonesday.com](mailto:shannonfinch@jonesday.com) or 0428 894 002, if you would like to do so.

Yours sincerely

**Greg Rodgers**
**Chair, Business Law Section**