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LAWYERS

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STAMPING FEES

Submissions

The submissions below are provided in response to the invitation to comment on stamping fees made by Australian Treasury.

About Mont Lawyers

Mont Lawyers is a boutique legal corporate advisory firm. Our directors have extensive experience in advising entities on listed capital markets (both for listed investment entities and operational entities) initial public offers (**IPOs**).

We regularly act for the issuer and the lead manager syndicates in relation to listed investment entities and also provide legal advice on secondary raises by listed investment entities.

Introduction

Access to Listed Investment Companies (**LIC**) and Listed Investment Trusts (**LIT**) has allowed retail financial advisers to consider a broader product suite with which to meet their best interest duty to their retail clients.

LICs and LITs are considered listed investment entities by ASX. These terms are used interchangeably in this submission.

What are stamping fees?

A financial adviser will receive a stamping fee of between 1.0% -1.5% on the capital raised by an LIC or LIT IPO with clients of that financial adviser.

We note that there have been a few investment entity IPOs where the stamping fee is higher than the range stated above but, in our view, those IPOs should be considered as exceptions to the rule.

Depending on the remuneration arrangements between financial adviser and retail client, the financial adviser may pass on this entitlement. For instance, some financial advisers will charge a 'fee for service' or based on "assets under management arrangement" and won't accept the stamping fee.

In addition, arranger and corporate advisory fees are also paid to joint lead managers that assist in the IPO of an LIC or LIT.

Our Submissions

In our view, no change is required to the current arrangements which permit the payment of stamping fees to financial advisers with respect to an LIC or LIT IPO as:

A. Current laws provide sufficient protection to retail clients.
B. Stamping fees are appropriate for LIC and LIT IPOs.
C. Banning stamping fees would likely have adverse consequences.
D. Retail clients do not pay the stamping fee.
E. Retail clients know what fees are paid.

Full details are provided in the submissions below.

A. Current laws provide sufficient protection to retail clients

In providing advice to a retail client as to whether to participate in an IPO of an LIC or LIT, financial advisers need to ensure that participation matches the retail client's investment needs (growth, income, diversification etc.) and provide a record of advice or statement of advice, which is formally acknowledged by their client.

These obligations are enshrined in both the Corporations Act (as supported by ASIC Regulatory Guide 246) and the newly established FASEA code of conduct.

Despite recent media suggestions to the contrary, the FASEA code does not contain examples which prevent stamping fees being paid where an adviser acts in the best interests of its retail clients. ASIC and FASEA have publicly confirmed this position.

Financial advisers to retail clients have a clear obligation to act in the best interests of their clients. Any financial adviser providing advice to retail clients must:

- act in the best interests of its clients in relation to the advice;
- only provide advice if, in light of the actions the advice provider should have taken to comply with the best interests duty, it is reasonable to conclude that the resulting advice is appropriate for the client;
- give a warning to the client if it is reasonably apparent that the advice is based on incomplete or inaccurate information about the client's objectives, financial situation or needs; and
- generally prioritise the interests of the client over its own interests and those of some of its related parties.

Recommending an investment in an LIC or LIT does not cause a financial adviser to be in breach of their obligations. Similarly, receipt of a stamping fee in relation to an LIC or LIT IPO does not mean the financial adviser is acting improperly. Assertions made to the contrary (including in recent press articles) are, in our view, without substance.

We acknowledge that:

- complying with the best interests duty and related obligations does not affect whether the conflicted and other banned remuneration provisions have been complied with; and
- the best interests duty and related obligations and the conflicted and other banned remuneration provisions impose separate obligations on an AFS licensee and its representatives (see ASIC Regulatory Guide 246, Table 2).

However, in our view, these obligations to act in a retail client's best interests must be considered when assessing whether the receipt of stamping fees by financial advisers is adverse to any retail client's interests.

We also note that the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth) (**New Laws**) (effective April 2021, although early adoption has been encouraged) will impose express design and distribution obligations on LIC and LIT issuers. It will empower ASIC to proactively intervene by making orders to prohibit conduct that is, or is likely to be, detrimental to retail investors (noting that ASIC already has a power to issue stop orders).

The New Laws will require issuers to make a target market determination for each product, as well as setting out any conditions and restrictions on dealings in, or providing financial product advice in relation to, financial products. The New Laws also specify a number of reporting obligations for distributors. An important component of these New Laws is the restriction on a product's promotion and distribution outside its target market.

To comply with the New Laws, a target market determination must be "appropriate". This means in relation to each product, the issuer must:

- make an assessment of the likely objectives, financial situations and needs of potential investors in that product (taking into account all relevant factors); and

- determine which retail investors it reasonably believes the products would meet the likely requirements of.

The New Laws will complement the existing legal regime. The New Laws are designed to help ensure issuers and financial advisers promote financial products (including securities issued by LICs and LITs) to retail clients only in circumstances where such products are suitable.

We submit that, for the reasons detailed details above:

- the current regulatory framework that applies to financial advisers provides sufficient protection to retail clients; and

- a ban on stamping fees is not required.

B. Stamping fees are appropriate for LIC and LIT IPOs

There is no "loophole" in the conflicted remuneration regime; in our view these recently oft made public claims are without substance. Simply stating something in the press "over and over" does not make it correct.

The legislative changes in 2015 to include an exemption to the conflicted remuneration regime to allow for stamping fees on listed IPOs by investment entities (regulation 7.7A.12B) recognised that:

> "*This amendment also addresses concerns that the current regulation creates an inappropriate, market-distorting distinction between the types of entities that are otherwise legitimately permitted to raise capital from retail investors. The current regulation prevents investment entities (that is, entities whose primary purpose is to provide a financial investment) from accessing the stamping fee provision.*
>
> *This amendment clarifies that, where stamping fees are paid to facilitate capital raising activities involving certain approved financial products, these fees are not captured by*

the ban on conflicted remuneration—including where these fees relate to capital raising activities undertaken by investment entities."[1]

We agree with these statements from the explanatory statement.

We note that the change implemented by regulation 7.7A.12B also apply to other entities; not just listed investment entities.

C. Banning stamping fees would have adverse consequences

In our view, moves to further regulate the IPOs made by LIC and LIT entities by banning the payment of stamping fees could have a number of negative results. These include, but may not be limited to:

- specialist investment managers with impressive performance history may decide that a listed investment entity in Australia is "too hard" and either:
  - forgo plans to create a listed investment entity altogether;
  - focus on Australian wholesale investors only; or
  - seek to list the investment entity on a securities exchange elsewhere (e.g. Singapore or the UK);
- reputational damage may result to the Australian investment market which may be considered over regulated and prone to changes without good commercial reason;
- it would likely be detrimental to retail investors. Access to new specialist investment managers with a further diversified product offering may reduce or become in-accessible to those retail investors. Retail investors could then be limited to new offers only in areas where investors will be limited to operational equity issuances, highly illiquid real property investments and low yielding cash and cash alternatives;
- retail investors may be forced to invest in riskier and less well understood investment options in order to ensure they hold a balanced investment portfolio; and
- there could be significant job losses at reputable advisory firms and service providers that specialise in the listed investment entity market.

D. Retail clients do not pay the stamping fee on an LIC or LIT

Typically, an investment manager wishing to promote a particular investment thesis will instigate the establishment or listing of an LIC or LIT.

The investment manager that promotes an IPO of an LIC or LIT now pays for all upfront costs of the offer and associated listing on ASX (this includes listing fees, legal and accounting fees and importantly all stamping fees). Retails clients do not pay the stamping fees.

This means that for each $1.00 invested, the investor receives $1.00 of value on the IPO listing day. Before September 2017, IPO costs were usually born by shareholders; so for each $1.00 invested, an investor would receive approximately $0.97 of value on the listing day.

Generally, the total cost now borne by an investment manager in relation to the listing of an LIC or LIT to market is generally between 2.5-3.0%. The costs of the IPO of an LIC or LIT includes charges associated with ASX, legal, accounting, marketing and administration.

In our experience, this total IPO cost for a listed investment entity compares favourably with the costs of an IPO of an operational company (in comparison to a listed investment entity) which is estimated to usually be between 4.0-8.0% of funds raised. We note that in operational

[1] Explanatory Statement Select Legislative Instrument No. 208, 2014 issued by authority of the Treasurer.

IPOs the amount raised reduces the funds available to the listed company (there is no manager to pay the costs of the IPO). Given that operational entities can pay upfront fees to brokers it would appear to be inequitable to treat listed investment entities differently.

Considered from another perspective, stamping fees are paid on an IPO of listed investment entities in lieu of brokerage. In our experience, most other primary and secondary market issuances on ASX incur brokerage whether it is an equity, hybrid, ETF, LIC or LIT. The level of brokerage will usually vary in line with the services received and business model (i.e. execution will incur a lower charge whereas advice and execution will incur a higher charge).

The change to make the investment manager responsible for IPO offer costs was driven by new LIC or LIT investment managers in conjunction with the advisers and brokers that participate in the LIC or LIT market; it is not the result of additional regulation.

E. Retail clients know what fees are paid

LIC's and LIT's are also required to lodge a full form disclosure document (a prospectus for an LIC or product disclosure statement (**PDS**) for an LIT) with ASIC. There is a disclosure period during which time ASIC may consider the disclosure document and market participants may provide comments before the offer period opens.

The information contained in these disclosure documents is much more fulsome than for other investment products (including ETFs and unlisted managed funds).

Upfront fees that are paid in relation to the IPO are described in detail in the disclosure documents. In a PDS this disclosure is in the form prescribed by the Corporations Act (and associated regulations). There is clear ASIC regulatory guidance on these matters in addition to the detail required by legislation.

There is full form due diligence conducted on LIC and LIT offers as a matter of course and there is potential personal liability for the preparation of a misleading disclosure document for those participating in its preparation and listing on ASX. These two things are designed to further protect retail investors. Retail investors are fully informed of the fees which will be paid when they invest in an LIC or LIT IPO.

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