



1 June 2007

Review of Sanctions for Breaches of Corporate Law  
Corporations and Financial Services Division  
The Treasury  
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PARKES ACT 2600

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Dear Sir / Madam,

## Review of Sanctions for Breaches of Corporate Law

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The Financial Planning Association (FPA)<sup>1</sup>, Australia's peak body representing financial planners, appreciates the opportunity to respond to the Review of Sanctions for Breaches of Corporate Law, and to be involved within the consultation process.

The FPA is committed to raising levels of professionalism among financial planners, and acknowledges that with increased professionalism comes increased responsibility. In this regard the FPA applauds the objectives of Chapter 7 of the Corporations Act (as set out in section 760A), which include the encouraging of confident and informed decision making by consumers in a fair and professional environment. However, implementing strict liability criminal sanctions for a failure to provide a disclosure document in a timely manner does not assist in ensuring that consumers are provided with appropriate advice, or that consumers are protected from disreputable financial planners. The FPA is concerned that the criminality sanctions contained within Part 7.7 of the Corporations Act, which create strict liability offences for a failure to provide clients with a Statement of Advice (SOA) or Financial Services Guide (FSG) is overburdening, disproportionate and unfair. The existence of these provisions provide minimal protections to the public. There are however, significant costs associated with the existence of these sanctions, so that there is actually an overall detrimental effect to the community arising as a result of the offences created within the legislation.

There are a number of legal protections in place under which financial planners who are not committed to providing appropriate advice can be sanctioned, and many of these already embody criminal sanctions<sup>2</sup>. As such, the people likely to be caught by the strict

<sup>1</sup> With approximately 12,000 members organised through a network of 31 Chapters across Australia and an office located in each capital city, the FPA represents qualified, professional financial planners who manage the financial affairs of over five million Australians with a collective investment value of more than \$630 billion.

<sup>2</sup> Relevant Corporations Act provisions include:

- Section 945A – Requirement that there is a reasonable basis for the advice and that the advice was reasonable in the circumstances
- Section 945A(1)(c) - Requirement that the advice is appropriate to the client
- Section 945A(1)(a) - Requirement to make adequate inquiry
- Sections 947B(2)(d) and 947B(2)(e) – Requirement to disclose factors which might influence the providing entity (including commissions)
- Section 912A(1)(a) – Requirement that a licensee must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly
- Section 1041E - False and misleading statements

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liability in question (who would not have already been caught under other provisions) are honest and competent persons who make administrative oversights. Furthermore, the criminal provisions relating to a failure to provide a SoA or FSG impose substantial additional compliance costs which will ultimately be borne by consumers. As such, these provisions are in fact counter-productive in the pursuit of their underlying objective.

### **Strict Liability Offences for a Failure to Provide Disclosure Documents**

#### **i) Statements of Advice**

Under sections 946A and 946C of the Corporations Act, a financial planner is required to provide a SoA where personal advice is provided to a person as a retail client. Commonly (in “time critical” cases as defined by s946C) it is a requirement that the SoA be provided within 5 days. As the failure to provide a SoA in the required timeframe is a strict liability offence (as per section 952C), should the financial planner fail to provide the SoA as required they may be subject to a jail term of up to 5 years.

The FPA is concerned with the fact that financial planners are subject to criminal sanctions under the provisions, even where the SoA confirms previously provided advice, and the consumer has not been caused any harm (simply because the advice was not provided within the required timeframe). In situations where a financial planner fails to provide what is essentially confirmation of appropriate advice, there should not be a risk that criminal sanctions will be implemented<sup>3</sup>.

#### **ii) Financial Services Guides**

Under section 941 of the Corporations Act, a financial planner is required to provide a Financial Services Guide (FSG) should a financial service be provided to a person as a retail client. Again a strict liability offence has been created (under section 952C) and imprisonment of up to 5 years may result.

As a result of various factors, FSGs are constantly being reviewed and changed. As such financial planners may hand out several different FSGs in a short period. Registers are often set up to ensure that mistakes do not occur, but it is disproportionate that a financial planner may be charged with a criminal offence for what would essentially be an administrative error. As a result financial planners are implementing expensive

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- Relevant ASIC Act provisions include:
- Section 1041F – Inducing Persons to Deal
  - Section 1041G - Dishonest conduct
  - Section 12DA - Misleading or deceptive conduct
  - Section 12DB - False or misleading representations
  - Section 12ED - Requirements to apply “due care and skill”, and that advice is “fit for the purpose”

<sup>3</sup> An example of the illogicality of this situation is illustrated is where a client wishes to consolidate their superannuation accounts. Either they can do so by going directly to a fund manager or through a financial planner. If they do so through a financial planner, the financial planner will need to prepare a SoA in respect of any advice given. A failure to do so may potentially result in a criminal sanction even where the advice given by the financial planner is appropriate. This is despite the fact that the consumer could quite conceivably have performed the same transaction without receiving any advice at all. This disproportionate regulatory approach has a negative effect on both financial planners and their clients.

administration and file preparation procedures, in order to cater for the small chance that a human error may be made.

### **Do the Relevant Provisions Achieve their Objective of Protecting Consumers?**

The Consultation Paper alerts the reader to the “Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers” (Guide to Penalties). In this document the importance of deterrence is highlighted as a motivating factor for creating criminal offences. However, in respect of deterring financial planners from undertaking criminal activities, it is highly doubtful that the criminal offence provisions provide any benefit. Anyone deliberately not providing a disclosure document would already know that they are subjecting themselves to other criminal provisions in the Corporations law. Furthermore, the risk of a financial planner being banned by ASIC, and being prevented earning their livelihood, is surely deterrent enough to ensure that financial planners provide disclosure documents in a timely manner. The additional imposition of criminal sanctions in this regard does not create a further deterrent, but rather simply adds to fear, uncertainty and mistrust within the industry.

Another factor alerted to in the Guide to Penalties is the potential harm that can be caused to individuals or society. However, behavior such as engaging in misleading conduct, fraud or the giving of inappropriate advice, are the behaviours that cause harm to the public in these cases, not the mere failure to give a record of the advice given. It is difficult to envisage how having a criminal sanction in place for a failure to provide a disclosure document in the appropriate time prevents any of these behaviours.

In Part 2.4 of the Consultation Paper it is stated that “traditionally the key characteristic of a crime is the repugnance attached to the act which invokes social censure and shame”. No doubt any financial adviser who fails to produce such a document should incur a penalty for doing so, but the act is hardly so repugnant or shameful that it should be considered a crime. A civil penalty in this regard would be far more appropriate. The Consultation Paper also goes on to explain that a key criteria in determining behaviour that warrants a criminal sanction is that it should involve wrongdoing that is ‘serious’ or ‘substantial’. A failure to produce a confirmation and/or disclosure document (where advice is otherwise appropriate) is not an act of substantial wrongdoing for which a crime would usually be associated. It is disproportionate that the failure to provide a disclosure document such as a SoA should be sanctioned as a crime.

### **Fostering an Environment in which User Friendly Documentation can be Encouraged**

The Government, the regulator, and industry bodies such as the FPA are all united in their push for the creation of user friendly documentation that will provide the greatest possible benefits to consumers who wish to obtain financial advice. In order to do this it is clear that a balance must be achieved between drafting legislation that protects consumers from criminals and disreputable advisers, and the need to ensure that consumers are not precluded from receiving affordable financial advice when they require it.

There is significant concern within the financial planning industry as to the approach that the regulator may take in its regulation of disclosure documents. As a result financial planners are spending an undue amount of time on administrative procedures (such as preparing file notes and registers) in order to 'cover all bases'. It is essential that there are balanced legislative provisions in place that both protect consumers and support the role that financial planners play within the marketplace. This will guarantee financial planners spend an optimal amount of their time ensuring disclosure documents contain appropriate advice in a clear format, and will also encourage a healthy relationship with the regulator.

### **Fairness for Individuals and the Profession**

A question of fairness is raised both in terms of the individual involved in a criminal prosecution (for what is essentially an administrative matter), and in terms of the poor manner in which criminal prosecutions effect the profession as a whole. The financial planning profession is working hard to ensure a professional environment whereby financial planners offer the best possible services to consumers. Yet at the same time the financial planning profession stands alone in that a failure to provide clients with written advice or to do so within a 5 day period can attract criminal sanctions (even where advice is otherwise appropriate). The financial planning profession does not want to shirk from its responsibilities to consumers, but at the same time members of the profession deserve a just, fair and balanced regulatory approach to be implemented.

### **Recommendation**

As discussed in the Consultation Paper, a major factor that distinguishes between civil and criminal sanctions is the focus on subjective awareness rather than objective reasonableness. Where criminality applies, there needs to be a substantial policy reason for including a strict liability provision that does not require intent. As explained in the proceeding paragraphs, in respect of the provisions requiring for a Statement of Advice to be provided (within 5 days in time critical case), or for failure to provide a Financial Services Guide, there seems little policy reason to justify inclusion of these provisions as a criminal sanctions. Furthermore, the existence of such provisions is excessive, unjust and contributes to fear and uncertainty. It is therefore probable that the criminal sanctions have the effect of increasing disclosure costs without providing additional protections for consumers. The FPA recommends that these provisions be removed so that there are no strict liability offences in place for a failure to provide disclosure documents.

Should you require any additional information please do not hesitate to contact Gerard Fitzpatrick, Manager of Policy & Government Relations (phone: 9220-4505, email: Gerard.Fitzpatrick@fpa.asn.au).

Yours Faithfully,



Jo-Anne Bloch  
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