FSLAA on hold: Stay of execution granted for the Financial Advisers Act

April 1, 2020

It's official. The implementation of financial advice provider licensing and the new financial advice regime has been delayed until March 2021, 'at the earliest'. Surprised? No. Welcome relief? For most, and for the most part, yes. But the length of the extension brings with it a range of complications – and opportunities – that will need to be carefully worked through.

In this Financial Law Insight we look at the implications for financial advice providers (FAPs), the regulatory development programme, the opportunities and risks created, and consider what this will mean for the current regime.

In brief:

- Implementation of the new regime for regulating financial advice has been delayed until at least March 2021
- The delay provides opportunity for providers to revisit their plans and ensure all is in order, as well as opportunity for MBIE to ensure the supporting Regulations are optimally cast
- While there may be a temptation to shelve FSLAA implementation plans, be wary of losing momentum
- While most will welcome the delay, those who had prepared themselves to go early may need to unwind things
- The current FAA regime is now set to govern financial advice until well into 2021

In full:

The announcement of the delay in the implementation of the Financial Services Legislation Amendment Act 2019 (**FSLAA**) by the Ministry of Business, Innovation & Employment (**MBIE**) late on Thursday 26 March was just one of a number of financial services regulatory responses to the COVID-19 pandemic. The delay is yet another example of the very pragmatic approach that the Council of Financial Regulators (**CoFR**) – the Reserve Bank of New Zealand (**RBNZ**), the Financial Markets Authority (**FMA**), the Commerce Commission, MBIE, and The Treasury – have taken to help the financial services sector manage the twin burdens of current regulatory obligations and pending regulatory reforms, while the country focuses on managing the coronavirus outbreak.

Delaying the implementation of FSLAA is unquestionably the right move.

The FSLAA regime will bring providers of financial advice within the net of Financial Markets Conduct Act 2013 (**FMCA**) licensing, with all its attendant systems and compliance complications. It also exposes a large cohort of individuals who have historically been very lightly regulated (if at all) to the full force of FMCA regulation. It presents a once-in-a-generation regulatory upheaval, and has been a monster piece of reform five years in the making. With the end-line of 29 June 2020 in sight, many were scrambling to get there in time.

For the vast majority of those caught up in the reforms, the nine months (or more) reprieve will provide an opportunity to ensure everything is in order to welcome in the new regime.

But this relief is not just about freeing up market participants so they can concentrate on looking after their customers in this extraordinary period of economic upheaval. Resources at the FMA and MBIE were already stretched, trying to implement a tsunami of regulatory reforms. Delaying the go-live date for the FSLAA reforms frees up critical resources to ensure the CoFR is as well-placed as possible to help New Zealand navigate its way through troubled waters.

Time to take a breather?

Adding a minimum of nine months to the new regime’s gestation period is a significant delay. Stress levels for those involved in gearing up for the new licensing regime had been high. And then COVID-19 hit, bringing with it a whole extra layer of stress and challenges.

Taking time out from preparing yourself for FSLAA and the stresses the fast approaching deadline was creating, and concentrating on ensuring your business can continue to meet the needs of your customers during the lockdown, is the right thing to do. However, that nine month – or possibly more – delay will flash by faster than you might expect from the midst of our lockdown crisis.

The FSLAA regime is complex. Taking your foot completely off the pedal carries with it a significant organisational risk Would-be FAPs should all be well advanced in their plans to manage the complexities involved. Put those plans on the shelf for 6 months or more, and it may be hard to regain that momentum. Switching resources away from FSLAA implementation on anything other than a short term basis risks those resources being unable to switch back into gear when the time comes. Larger organisations potentially face the unpleasant prospect of needing to train new project teams.

So by all means, take a breather on FSLAA implementation, and focus on the immediate tasks at hand. But don’t take too long a breath!

Opportunities created

The decision to make the deferral at least nine months provides welcome certainty in these uncertain times. Even then, the only real certainty we have is that the new regime won’t come into effect any earlier than March 2021! It could be later, depending on how long it takes to come out of lockdown. The length of that period provides a fantastic opportunity to take stock of where you are at, and what your optimal financial advice proposition should look like in a FSLAA world.

For those who went early and already have their FAP licence locked away, two key opportunities present themselves:

- Most obviously, there is now an additional nine months available to get all your processes and controls in place, and ensure all of your financial advice team members and other personnel are fully trained up on the new systems and your organisation’s approach to discharging the new range of statutory obligations.
- There is also opportunity to re-think your FAP proposition in light of the new world we will live in once we come out the other side of the current lockdown. If you rushed your FAP licence through in order to get it out of the way, there is now time to rethink your approach, without the same pressure of a looming regulatory deadline.

For those who had yet to apply for their FAP licence before the lockdown, or who had yet to commit to another provider's FAP proposition, there is now a relatively generous buffer of time to rethink the approach you are going to take.

We had previously predicted April as being 'moving month' in the FAP applications timetable. That was the month we anticipated when most providers of financial advice would have got their plans in place and would be ready to go.

Now, it is hard to predict. For those who were ready to go, there may be little to gain by delaying your licence application. The fundamentals of the new regime won't change, so you may as well get it out of the way.

However, the size of the window created by a nine months-plus delay is likely to prompt corresponding delays in new FAP licence applications. There is now an opportunity to revisit your approach, and the approach of third parties you may have been intending to collaborate with, and critically assess whether or not you have got it right. Don't look a gift horse in the mouth – but equally, don't let that gift horse trample you into the dirt of procrastination.

Delayed finalisation of supporting regulations

Perhaps the biggest opportunity presented by the delay in the FSLAA implementation date is the opportunity presented for MBIE to get the disclosure regulations right. MBIE's announcement of the FSLAA delay simply referred to the 'disclosure regulations that were due to be made this month have now been delayed so that the commencement dates of those regulations can be updated'. The hope was expressed by MBIE that the regulations would be made available 'within the next couple of months'.

With all due respect, that's a little disingenuous. It doesn't take two months to change a commencement date in a set of draft regulations. That aspect of the announcement is more likely to be about managing expectations to allow MBIE time to revisit the workability of the draft regulations that were so widely criticised when they were released in October.

We hope that MBIE will take this opportunity to conduct a more transparent consultation round in relation to the proposed disclosure regulations, to ensure that all of the unintended consequences and impracticalities of the initial exposure draft are ironed out. Yes, we all want certainty as soon as possible as to what the final disclosure regulations will look like, but more important is the need to get those disclosure regulations right.

The development of the disclosure regulations to date has been dominated by the need to ensure that they would be workable with next to no time available for providers to gear up to implement them. We now have the possibility that the final form of the regulations will look quite different to those that had been poised to be released when the lockdown was announced. There is now time to get it right, and to get it right and finalised in plenty of time for providers to be able to update systems to accommodate the new rules. We hope that MBIE will make the most of that opportunity.

Opportunity could also be taken to revisit aspects of the regime that have been causing confusion and unnecessary challenges for the sector. The complex rules around the use of interposed persons in the financial advice chain are top of mind on that front. We don't think that will happen, but anything is now possible.

There is also a raft of other implementation regulations in the pipeline that have yet to see the light of day. While these might be relatively mechanical and supposedly non-controversial, there is now opportunity for all of those to be finalised more than 6 months out from the new implementation date. This would give the sector an unprecedented amount of time to prepare for the implementation of a new regime with all of the regulatory settings set in stone. Or maybe that's just wishful thinking!

Collateral damage

Those who had heeded the FMA's call to go early may have some cause to feel aggrieved. They will now need to put their planning on hold, and in some cases will need to reverse out systems changes and training programmes that are already in place.

That's unfortunate. For those affected, hopefully it will be more of a case of an early investment taking more time to pay off, than an early investment being wasted, or causing more costs to be incurred.

Implications for the current regime

The delay in the implementation of FSLAA means that the current regime for the provision of financial advice under the Financial Advisers Act 2008 (**FAA**), and the current settings of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 continue in force until at least March 2021. The current Code of Professional Conduct for Authorised Financial Advisers gets an extended period of application, and all the deficiencies identified with the FAA regime back in 2016 will be with us for a while longer.

That means current plans to switch off current compliance systems need to be put on hold. This should mostly be mechanical, but when FSLAA received the Royal Assent back in April 2019, few would have predicted that it would be nearly two years – possibly more – before FAP licensing commenced and the FAA was repealed.

One piece of foresight that was included in FSLAA was locked in relief for authorised financial advisers (**AFAs**) and Qualifying Financial Entities (**QFE**), with renewals of their authorisations and QFE status not required during the period leading up to the repeal of the FAA. That was seen as a pragmatic approach to take at the time. However, given the unexpected length of the initial transitional period through to implementation, there may now be a question mark over the wisdom of removing the regulatory health check that had been built into the FAA, which would have otherwise required AFAs and QFEs to renew their status periodically (in most cases, every five years).

Under the current regulatory settings, AFAs and QFEs are not completely off the hook, with all of them currently required to complete annual returns. For AFAs, their annual AFA return information will need to be submitted by 30 September 2020, and for QFEs the obligation is to provide an annual report to the FMA within five months of the end of their financial year. Each of them are also required to maintain their Adviser Business Statements and in an up to date form, and notify the FMA of any other developments of relevance to their status, as set out in their standard conditions.

Whether the FMA will insist upon these annual reporting obligations remaining in place for the current year remains to be seen. AFAs and QFEs would have anticipated last year's returns being the final roll of the dice in that regard. COVID-19 brings a new perspective on these things: is there really any point in distracting business resources from the job at hand to attend to these sorts of regulatory reporting obligations when the legislation they are reporting under should have been repealed long before?

Final thoughts

At the time of finalising this Financial Law Insight we were still awaiting the details of how the delay to the implementation of FSLAA will be effected. Those details may take a while to surface. The previous Commencement Orders will need to be replaced, and there may be some consequential regulatory amendments to get everything re-aligned to the new timing. There's still a lot of water to flow under the bridge before FAP licensing comes into effect.

The one thing we can say for certain is that things will change before we get to the final implementation date – we just can't predict what those changes will be.

The FAA has been given a minimum nine-month extension to its time on death row, and FSLAA licensing has to wait in the wings a corresponding period longer. Financial advisers who were thinking of throwing in the towel rather than face another round of regulatory upheaval may now have a rethink, and possibly hang on to that towel for another year.

All this carries a risk of standards being lowered over the extended transitional period until the implementation of FSLAA. The acid will be on the CoFR – and in particular, the FMA – to try and strike a balance between its current refreshingly pragmatic approach to helping the financial services industry continue functioning through the lockdown, and ensuring existing consumer protection measures are not unduly compromised as a consequence.

All stakeholders have a one-off golden opportunity to ensure the new financial advice regulatory regime, and their participation in it, is optimal. There is plenty to distract us all at present, but let's hope that opportunity is not wasted.

Start a conversation

If you would like a briefing on any of the financial services regulatory responses to the COVID-19 pandemic, or would like assistance with reviewing plans for implementing your financial advice proposition under FSLAA in light of the delay, please contact Catriona Grover on +64 4 498 0816, David Ireland on +64 4 498 0840, Liz Lim on +64 9 909 6341, Pauline Ho on +64 9 909 6345, or Megan Mcluskie on +64 4 498 0876, or email the team at bankingandfinancialmarkets.nz@dentons.com.

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