FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

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General Manager
Revenue Group Law Design Practice
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: taxagentservices@treasury.gov.au

08th March 2013

Dear Mr Reid,

RE: Exposure Draft – Tax Laws Amendment (2013 Measures No.#) Bill 2013: Tax Agent Services

The Financial Planning Association of Australia (FPA)[1] welcomes the opportunity to provide feedback to Treasury in relation to the exposure draft legislation amending the tax agent services act.

In this submission we address our position in respect to financial planners and the tax agent service act regime, highlight our concerns with the consultation process and provide specific feedback on the exposure draft and proposed amendments to regulations.

Our immediate concerns relate to the ending deferral period and the commencement date as well as highlighting some fundamental misunderstandings of the financial planning profession and practical issues and implications.

Considering that the exposure draft is intended to impact every one of our 9,000 practitioner members, there is a real need to take a more considered and consultative approach to these measures.

Please note that the FPA has raised these concerns with the Assistant Treasurer and will being making representation accordingly.

The FPA would welcome the opportunity to discuss this further. If you have any questions, please contact me on 02 9220 4505 or dante.degori@fpa.asn.au.

Yours faithfully

Dante De Gori
General Manager Policy and Standards

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1 The Financial Planning Association of Australia (FPA) is the peak professional body for financial planning in Australia. The 8,000 individual professional members of the FPA have an enforceable Code of Professional Practice, including the Client First principle. 5,700 of our members have achieved CFP certification, which is the global standard of excellence in financial planning. FPA practitioner members manage the financial affairs of more than 5 million Australians whose investments are valued at $630 billion.

FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

Exposure Draft: tax agent services

FPA SUBMISSION TO THE TREASURY | DATE: 08.03.2013

Tax Agent Services Act 2009
Exposure Draft -
Tax Laws Amendments (2013 Measures No. #) Bill 2013: tax agent services

And

Proposed amendments to the regulations

FPA submission to:
The Treasury

08 March 2013

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Exposure Draft: tax agent services

Introduction & Background

The FPA has previously submitted its views on the effect of the Tax Agent Services regime (TAS regime) on the financial planning industry. We stated that taxation implications of financial strategies and financial products are an essential part of providing financial advice and this is borne out by ASIC's guide RG146 Licensing: *Training of financial product advisers,* which gives details of the taxation knowledge necessary for the giving of financial product advice. Providing advice regarding the tax implications of financial products and strategies is a regulatory requirement with which AFSL holders are required to comply. Further in RG175 Licensing: *Financial product advisers – conduct and disclosure*, ASIC states that normally a client's tax position is a relevant personal circumstance that should be considered where advice relates to a financial product advice with an investment component.

When the Tax Agent Services Bill was released in 2008, the then Assistant Treasurer, the Hon Chris Bowen MP, stated that the normal activities of financial planners were not intended to be caught within the regime. This was borne out by the Explanatory Memorandum (EM) which states that that certain advice on the tax implications of financial products or financial transactions, or advice relating to ascertaining tax liabilities for the purpose of calculating a future income stream, should not be considered a tax agent service, particularly as financial planners do not represent client interests in dealings with the Australian Taxation Office (ATO). The EM also gives examples of the type of financial advice that is **not intended** to be captured by the TASA regime.

Clarification was provided in the EM to the Tax Agent Services Bill, and we refer specifically to paragraph 2.36 and subsequent examples 2.7 to 2.10 which provides clear interpretation of how the Tax Agent Services Act is to apply to advice provided by a financial services licensee under the Corporations Act 2001.

In addition to the EM the Second Reading Speech on the Tax Agent Services Bill made by the Assistant Treasurer further states that:

> *"the definition of 'tax agent service' in the Bill and the relevant paragraphs in the explanatory memorandum clarify the intention that financial services licensees can provide tax advice that is incidental to financial services, provided that the service would not be relied upon in satisfying a tax obligation or claiming an entitlement under taxation laws".*

The 'normal' role of financial planners routinely deals with taxation matters which are considered to be incidental or tax advice within the context of financial planning advice, and would not be relied upon in satisfying a tax obligation or claiming an entitlement under taxation laws, as stated above. Some examples will highlight the nature of the financial planning advice:

- How much concessional contributions an individual can make to a superannuation fund each year without incurring taxation penalties;
- How much non-concessional contributions can be made to superannuation without incurring taxation penalties;
- Should life insurance be sought inside or outside a superannuation fund;

- Should investment monies be placed with a superannuation fund, managed trust or life insurance bond and the tax advantages of each;
- Should an individual salary sacrifice contributions to a superannuation fund;
- Should a transition to retirement pension strategy be adopted;
- What are the tax consequences of withdrawing monies from the superannuation environment now as against later.

This is not intended to be an exhaustive list (the FPA would welcome the opportunity to provide further examples) but shows how common it is for financial planners to have to advise on taxation obligations and entitlements both direct and indirect, but very much only within the context of financial planning advice.

The current uncertainty within the financial planning industry stems from the interpretation of the Act that requires an individual or organisation to be registered if it is providing tax agent services for a fee.

Failure to be registered can result in civil penalties. The meaning of tax agent services is contained in section 90–5 of the Act. That meaning includes:

> *…advising an entity about liabilities, obligations or entitlements of the entity…that arise, or could arise under a taxation law…" [s.90-5(1)(a)ii]*

Section 90–5(2) provides that services may be prescribed in the regulations to not be a tax agent service.

Recommendation

The FPA recommends that the current uncertainty, confusion and unnecessary costs and regulatory duplication can be rectified by permanently enacting Part 5 section 13(2) of the regulations, which is due to expire on 30 June 2013:

> *For subsection 90-5 (2) of the Act, a service that is financial product advice is specified if it is:*
>
> *a) provided by a financial services licensee or an authorised representative of the licensee; and*
>
> *b) accompanied by a statement that:*
>
> *i. the provider of the advice is not a registered tax agent under the Tax Agent Services Act 2009; and*
>
> *ii. if the receiver of the advice intends to rely on the advice to satisfy liabilities or obligations or claim entitlements that arise, or could arise, under a taxation law, the receiver should request advice from a registered tax agent.*

Consumer Protection

We support the key principle of ensuring that consumers are protected when receiving any form of personal financial advice, including tax related advice of the kind provided by financial planners and that there is regulatory certainty and integrity in this regard.

We note that the Financial Ombudsmen Service (FOS) does not maintain a record or list of complaints in regard to tax advice provided by financial planners. FOS has previously explained that tax advice is sometimes raised as one issue among others in disputes about inappropriate advice. Anecdotally, FOS states that tax would be an issue in approximately 5% of cases in which inappropriate advice is alleged. Therefore, out of the 19,107 disputes that FOS handled in 2008/09, 374 concerned allegations of inappropriate advice provided by a financial planner, of which 5% or 19 cases included a tax issue. Accordingly, we query whether there is substantive evidence to suggest that consumers are not currently sufficiently protected in respect of tax advice of the kind provided by financial planners.

In any event, we agree that competency standards should be increased both for tax related advice given by financial planners and for financial product advice generally. A key tenet of the FPA's drive towards achieving the highest standards of professionalism is the requirement for higher levels of education for planners. We also note that ASIC is will be soon releasing for consultation amendments to RG146 Licensing: *Training for financial product advisers* with a view to lifting competency standards.

The principles of providing greater consumer protection should be viewed in light of the Future of Financial Advice (FOFA) reforms, which are due to commence on 1 July 2013. We expect the FOFA reforms to have the effect of raising financial advice standards generally and tax advice must be a part of those standards. The introduction of a statutory best interest duty through the FOFA reforms will provide financial planners with an obligation to ensure that all aspects of financial advice including the tax component are provided in the client's best interest and at a high standard. Maintaining the process of raising standards with the current regulator, ASIC, will promote greater consistency and certainty, while to isolate tax advice from this broad push for improved standards will have the opposite effect.

It is therefore our view that, on the basis that tax advice of the kind provided by financial planners cannot be meaningfully separated from the advice provided by a planner on financial products and strategies, the issue of taxation qualifications, training and competencies should be streamlined and included in ASIC's review of RG 146 and proposed national competency exam (CP153).

Regulatory Uncertainty

We feel that to designate a special category of advice that falls outside the Australian Financial Services Licensing (AFSL) regime, will and is already creating uncertainty within the regulatory process. An example of this is complaints handling by the respective External Dispute Resolution (EDR) schemes such as the Financial Ombudsman Service (FOS). FOS is approved by ASIC as having the processes and expertise to deal with all matters related to financial product advice and

dealing services. It is a legal and regulatory requirement that an AFSL holder belongs to an approved EDR Scheme that can deal with complaints relating to all financial services authorised by their license. At present, FOS deals with all financial advice complaints in a holistic manner and they have the expertise to deal with tax advice matters within the context of financial advice. FOS will not deal with a complaint where that complaint is being heard in another forum and therefore if a category of tax agent services related to financial advice is being dealt with by the TPB, FOS may hesitate to continue to deal with these matters to the disadvantage of the complainant. We therefore submit that as the requirement for a greater level of tax expertise in the regulator appears to be implied by the new designation this will have the effect of undermining the existing regulatory regime, which currently provides an appropriate method of recourse to consumers.

Another example of regulatory uncertainty relates to the requirement for professional indemnity (PI) insurance. We are concerned that PI insurers may target this newly designated category for additional requirements, even though the giving of tax advice within the context of financial planning is nothing new and there have been no systemic examples of market failures previously evident. We understand this has happened in respect of credit licensing where there was regulatory uncertainty whether existing PI thresholds for AFSL activities also cover credit assistance. Credit is similar to tax advice in this respect – it has always been part of financial advice but having received a new categorization under legislation, separate PI coverage has become an issue and potentially an extra cost as the PI underwriters have uncertainties regarding the risks involved and therefore price in a risk premium for the sake of underwriting certainty.

The following diagram (fig 1.1) provides a snapshot of the regulatory oversight that the financial planning sector is already subject to and demonstrates that there has been no consideration of the duplication and costs that the Tax Agent Services Act regime will have on the sector and consumers.

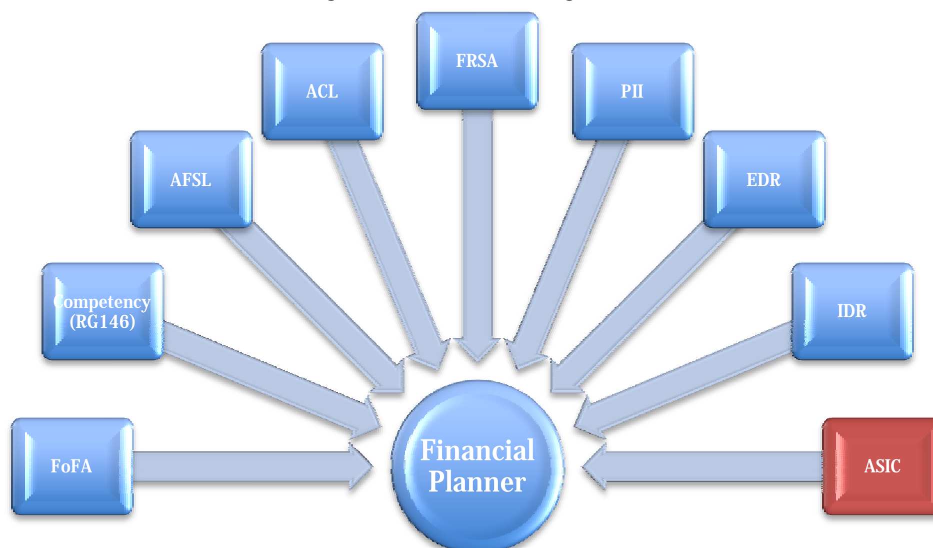

Fig 1.1

Recognised Tax Agent Association (RTAA)

The FPA was approved by the TPB as a recognised tax agent association on 21 March 2012.

The FPA is the largest financial planning professional association in Australia with around 9,000 practitioners as voting members of the association.

As a member of a professional association, recognised by the TPB, there should be greater regulatory efficiencies for financial planning practitioners. In particular in the form of competency, continued professional development, relevant experience and adherence to a Code of conduct.

The FPA submits that greater consultation and consideration is required on how a professional association can assist in efficient regulation of those who voluntarily sign up to higher standards and become a member of a TPB approved professional association.

Specific comments on the Exposure Draft

Introduction

We are now three months away from the existing deferral arrangements ending and we are still not clearer on the exact requirements and obligations for financial planners in respect to complying with the Tax Agent Services Act. Further the only possible sitting days to have this legislation passed by parliament fall in June, leaving no room for error and no time for industry to implement.

Considering that the Tax Agent Services Act will impact every one of our 9,000 practitioner members, the lack of consultation and the tight time frame has been of real concern and communication to this effect has been made to the Assistant Treasurer.

The FPA's original recommendation was that if this regime had to proceed it should be regulated within the existing financial services regulatory framework, but rather than adopting a full scale TASA regime within the AFSL regime, a cooperative relationship and information exchange mechanism be put in place between ASIC and the Tax Practitioner's Board (TPB) to enable ASIC to access the TPB's tax expertise if and to the extent required. This mechanism would assist in addressing taxation issues considered by ASIC to require advice or input from the TPB.

The FPA submits that ASIC must continue to regulate the provision of financial advice under its existing Corporations Act powers and only when a specific matter that they feel requires additional tax expertise would ASIC seek input/advice from the TPB.

The cooperative process would involve the TPB providing input and advice on relevant tax aspects to ASIC, which will then make the ultimate decision about the regulatory outcomes. It is important to note that ASIC must still be responsible for imposing sanctions and this cooperation process is designed only to assist ASIC in their investigations – this provides certainty and clarification for all stakeholders.

ASIC is already responsible under the Corporations Act for financial planning related tax advice. Such tax advice is so interlinked and entrenched in the financial planning advice that they can't be

separated. We also do not believe that ASIC representatives are required to be tax experts - they need to understand tax as much as they understand financial planning advice.

We consider that having a cooperative relationship between the two regulators would avoid duplication and have very minimal costs because there is no duplication – ASIC remain as the sole regulator and would retain complete responsibility for financial planners, ensuring consumer protection, certainty and efficiency.

Complainants should not be required to determine if their matter is tax or financial planning related. This is a very important advantage in that clients of financial planners seeking to lodge a complaint will still access the normal dispute resolution avenues – the Internal Dispute Resolution (IDR) and External Dispute Resolution (EDR) schemes and ASIC. EDR schemes are better placed to deal with financial planning complaints as they have the power to adjudicate on all aspects of the advice and dealing services provided, including taxation aspects. This will relieve the client from the confusion and burden of having to determine the nature of the complaint themselves and knowing who and how to make their complaint – therefore maintaining integrity and protection to the consumer;

The Tax Practitioners Board (TPB)

The TPB is not resourced to register and regulate the expected 24,000 plus financial planners and advisers in this country. If you widen the definition to those operating as employed financial product representatives of Australian Financial Services Licensees this could equate to more than 40,000.

Further, it is our understanding that at present the TPB is not competent or experienced to regulate financial planning advice. It is also unknown if the TPB has any plans, funding or desire to develop these competencies. It is our view that the TPB will have to spend millions to increase its capabilities and size to regulate a large number of financial planners when the majority of whose activities are outside of the scope of the TPB's focus.

According to the most recent annual report[2], the TPB had 52,000 agents registered at 30 June 2012. They included around 38,000 tax agents and over 14,000 BAS agents. The financial advice sector could potentially become the largest category within the TPB membership, yet would be the least represented in respect to all aspects of TASA and the TPB.

There is currently a lack of certainty about the compliance requirements that would be imposed by the TPB. Aside from the registration process, there is limited information about how the TPB will go about scrutinising those it regulates. It is also unclear as to how the TPB would administer and manage the inclusion of up to 40,000 additional registrations. Once registered, will the tax agent operate without any contact from the TPB, or will there be regulator facing obligations, such as breach notifications or the requirement to participate in projects, as there are with ASIC? We note, in the TPB's 'Information sheet' on 'Investigations' that it may respond to complaints by a third party or may start an investigation of its own motion when no complaint has been made. Will its approach to supervision be similar to ASIC's? Will it have the resources for this and in fact will those resources be skilled to

[2] *TPB Annual Report 2011/12, page ii*

assess tax advice in the context of the financial planning advice associated with it? Or will it merely respond to complaints?

By its nature, the requirement for financial planners to register to become tax agents in the context of financial advice will mean a barrier to continuing or commencing to practice. Therefore corresponding safety nets need to be implemented during the transition period to ensure that agreed service level agreements are in place between the applicant, ASIC and the TPB. By safety nets we refer to publically available (and consulted) processes and procedures including: application processing time frames, an appeals process and options for planners who may suffer a loss of business as a result of any delays in the registration process. The reality that approximately 24,000 (and possibly as high as 40,000) financial planners could register at or about the same time requires assurance that the TPB will be able to meet this demand so as not to impede advice providers from operating their existing businesses.

Further, given the registration is effectively a gateway requirement (a financial planner can not continue nor commence to operate their business with the registration), appropriate safeguards are required for this transition period and beyond to ensure prospective entities seeking registration have sufficient opportunity to comply with these new legal obligations.

Commencement Date

The deferral arrangement for financial planners is due to expire on 30 June 2013. The commencement of the regime for financial planners is 1 July 2013. Should this measure proceed, the Bill is likely to only be passed by parliament in late June and there are still regulations and guidance documents required by both the TPB and ASIC that would need to be released.

We strongly recommend that the government consider extending the deferral arrangement of TASA to financial planners for another six to twelve months. This will support and provide scope for industry in implementing other significant legislative changes such as the Future of Financial Advice (FoFA) reforms and Stronger (MySuper) Super reforms.

The extension of the deferral period can be worked into the transition period. For example the notification period could be shortened from 18 months to 6 months to accommodate the new start date.

Recommendation
The FPA recommends the extension of the deferral period for another six to twelve months.

Definition of tax advice (financial product) service

The FPA has real concern with the definition of financial planning being defined in the Tax Agent Services Act when it is not even defined in the Corporations Act. Further there is still pending legislative amendments to the Corporations Act on enshrinement of the terms financial planner and

financial adviser as part of the FoFA reforms. The absence in co-ordination and consideration of this issue has been both alarming and disappointing.

This is highlighted by the definition proposed in the exposure draft (s90-15):

> A ***tax advice (financial product) service*** is a *tax agent service provided in the course of advising on one or more financial products to the extent that:

The definition relates to 'financial products' and only applying to some aspects of the advice provided by the financial planning process. This will exclude many financial planners from being eligible to use this category of registration. The drafting ignores the fact that a significant portion of advice provided is strategic advice, which does not make a financial product recommendation in all cases.

In order for this category to be relevant the exposure draft would have to be re-drafted to link back to licensing and capture financial advice providers regardless of whether they recommend a financial product or not.

Recommendation

The FPA recommends that the category title and definition should be placed on hold until the finalization of legislation to enshrine the terms financial planner and financial adviser. Further the FPA submits that government should actually consult with industry on what would be an appropriate category name and definition should this measure be proceeded with.

New financial planners from 1 July 2013

The exposure draft is silent on the treatment of new financial planners that enter the financial services sector after 1 July 2013. There is no process or guidance for financial planners who enter the industry within the notification period.

A new financial planner who enters the financial advice industry after 1 July 2013 and satisfies their competency requirements under ASIC regulatory guide 146 (RG146) would be able to provide financial advice to their clients on general tax information. However, given TASA will apply from 1 July 2013 – what are the requirements applicable to a new entrant and when will the requirements become known publically?

Recommendation

The FPA recommends that there needs to be a definitive process and transition period for new financial planners as well as competency and experience requirements that the TPB will impose.

Competency, Education & Relevant Experience

The exposure draft and proposed regulations lack detail in respect to competency requirements. This needs immediate attention not only for clarity and understanding among financial planners but also in respect to how these competency requirements will be aligned with existing requirements in RG146 and the proposed ASIC national entrance exam for financial planners due to commence in 2014.

According to the proposed educational requirements a financial planner has to have "successfully completed a TPB approved course in Australian tax law for tax (financial product) advisers" (regulations paragraph 8.3). As you would be aware, there are currently no courses listed on the TPB website that match this requirement.

The FPA is disappointed that the industry has been given less than four weeks to consider these proposed regulations and do not accept that this results in consultation.

According to the TPB annual report[3] it is clear that they have been ready and wanting to consult with industry and the profession for many months now and have not be given the opportunity to do so.

The FPA calls on government to permit the TPB to commence consultation with the profession and the financial advice industry immediately to develop suitable competency, training and educational material.

Recommendation

We recommend that the TPB make public and consult on the training/competency and experience requirements applicable for financial planners immediately. This includes Treasury and the TPB to work with ASIC to ensure that competency requirements are appropriate, streamlined and aligned to satisfy the practice of financial planning, including tax advice within the context of financial planning advice.

Ongoing Continued Professional Development (CPD)

Continuing Professional Development needs to be dynamic and up-to-date with the changes in the industry, financial services market, regulatory environment and economic conditions, and evolving consumer needs. Therefore, the FPA recommends the responsibility for setting, over-seeing and maintaining compliance with CPD requirements should be placed with the profession rather than the Regulator (ASIC or TPB).

The profession is already well established in developing, maintaining and monitoring CPD requirements for financial planners. For example, the following table summarises the key CPD requirements for practitioner members of the FPA.

CPD Points	**CFP® Professionals** 120 points/triennium with a minimum of 35 points each year	**Associate Financial Planners** 90 points/triennium with a minimum of 25 points each year
Non Accredited CPD	Capped at 60 points per triennium	Capped at 45 points per triennium
Ethics Points Requirement	Minimum of 3 points per triennium in the Professional Conduct specifically covering Ethics	

[3] *TPB Annual Report 2011/12, page 6*

Content Requirements	• CPD activities undertaken *must* be captured in a Professional Development Record • Members are encouraged to take a holistic approach to CPD and as such should look to include CPD activities across all professional dimensions
Record Keeping	The following records must be kept for 5 years • Professional Development Record (or CPD register) • Professional Development Plan • Additional Evidence for non accredited activity

The FPA uses a Professional Dimensions Model for developing, maintaining and monitoring its CPD requirements. Being a professional is more than being technically competent. It's about being a rounded individual with ability to think critically and respond to client needs in a professional way. The Professional Dimensions describe the holistic skills and knowledge that it takes to be a professional.

Adherence to the FPA's CPD Policy is a practitioner member requirement and failure to comply may ultimately result in suspension of membership.

The FPA undertakes audits of a random sample of Member Professional Development Records at the conclusion of each triennium. Members are be required to produce the following:

- An up-to-date Professional Development Plan
- A copy of their Professional Development Record
- Supporting materials for non accredited CPD (if requested)

To comply, the Professional Development Record should show evidence of CPD activity that:

- Links to the Professional Development Plan;
- Includes 3 points in the Professional Conduct Dimension specifically on Ethics;
- A minimum of 25 points annually[4] with a minimum of 90 points over the triennium;
- No more than 45 points accumulated through non accredited activities; and
- No more than 15 points accumulated through non-accredited professional reading.

Recommendation

The FPA recommends that treasury and the TPB consult with the profession on how to streamline existing CPD obligations for financial planners when considering the number of points required for tax related learning.

Professional Indemnity Insurance (PII)

The exposure draft requires that financial planners hold professional indemnity insurance (PII) approved by the TPB. As previously stated all financial planners are required to operate under an

[4] *The FPA measures CPD over financial years, from 1 July to 30 June.*

Australian Financial Services License (AFSL), and it is a licensing requirement that the Licensee hold PII cover[5].

Further to the potential increase in costs to existing PII cover, the FPA submits that it is both redundant and inefficient for the TPB to require financial planners to also hold PII cover. This requirement will simply add to the cost burden of operating an advice business. We recommend the TPB recognise the PII held by a licensee as sufficient to meet their requirements.

Recommendation

The FPA recommends that the TPB recognise the PII held by an AFS licensee as sufficient to meet the requirements obligations of financial planners registered with the TPB.

Code of Conduct

It is expected that all financial planners will be subject to the TPB Code of conduct from 1 July 2103, even if they have not given notice to the TPB. We do not believe that this is appropriate to impose retrospective conduct requirements on a financial planner.

It should be recognised that members of the FPA (a registered tax agent association) are already subject to a Code of conduct, providing certainty for the TPB and protection for consumers.

The FPA's concern with the TPB Code is that we have not had an opportunity to consult on how the Code relates to financial planning especially as the Code was developed specifically for BAS and registered tax agents whose services are different from those provided by a financial planner.

Recognition that the financial planner may already be subject to a Code of Conduct and flexibility on this requirement is required to ensure that undue burden and cost is not created for a profession, which is undergoing considerable reform and competency escalation.

Recommendation

The FPA recommends that Treasury and the TPB consider that a financial planner is not subject to the TPB Code of Conduct if they are a member of a Recognised Tax Agent Association and/or ASIC approved Code of Conduct;

Licensees and Sufficient Number

Based on the exposure draft it is incumbent on the company/licensee to satisfy the TPB that they have a sufficient number of individuals who are registered as either financial product tax advisers or tax

[5] *Section 912B of the Corporations Act requires that licensees have compensation arrangements for loss or damage caused by breaches of their legislative obligations under Chapter 7 of the Act:*

> *"Under these arrangements, licensees must obtain PI insurance that is adequate having regard to the nature of the licensees business and its potential liability for compensation claims, or be approved by ASIC as alternative arrangements. In determining what is adequate insurance, ASIC will take into account what is available in the market."*

agents, to be able to provide tax advice (financial product) services to a competent standard and to carry out supervisory arrangements.

This does not consider or recognise the difference in approach for Australian Financial Services (AFS) licensees who may appoint financial planners to provide specified financial services on their behalf.

One potential solution would be to accept the licensee's statutory registration with the TPB and require those financial planners who provide tax advice services in the context of financial planning/advice to operate in a similar fashion to "monitored members". In this case the licensee retains ultimate professional responsibility for the conduct of the member, similar to the role of partners in accounting centric firms.

We agree that the company/licensee should be required to satisfy the TPB that they are capable of providing tax advice services in the context of financial advice to a competent standard and to carry out supervisory arrangements. However, we submit that this satisfaction may be achieved without the requirement to register individual financial planner with the TPB. For example, a licensee may be able to satisfy the TPB by demonstrating overall capability relating to the training and experience of representatives as well as the monitoring and supervision processes the licensee has in place.

Furthermore, we submit that the legislation should prescribe how the TPB will determine "sufficiency" with relation to the number of individuals registered or able to provide tax advice (financial product) services to a competent standard. At the very least the EM should be updated to provide guidance on this matter.

It is worth mentioning that ASIC consultation paper 153 is reviewing the monitoring and supervision requirements for financial planners generally (Part D of CP 153). The FPA again calls for Treasury, the TPB and ASIC to co-operate and communicate on streamlining the obligations and requirements for financial planners rather than just duplicating the obligations.

Recommendation

We submit that the TPB recognise and accept the licensee's statutory registration with the TPB and require those financial planners who provide tax advice services in the context of financial planning to operate in a similar fashion to "monitored members".

Australian Securities & Investment Commission (ASIC)

The policy position that was agreed with the then Assistant Treasurer[6] was to streamline and reduce duplication in process by including ASIC in the role of registration, information sharing and in the dispute resolution process for consumers. The policy was to allow the interaction between financial planners and the Tax Practitioners Board (TPB) to be facilitated through ASIC.

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[6] *Media Release No 049 and No027: Future regulation of financial planners providing tax advice*

The TPB annual report[7] even makes reference to co-regulation with ASIC and how the registration process will be through ASIC.

As we do not know how the TPB proposes to conduct its compliance activities nor the level of their knowledge of the financial advice regime and we submit that compliance cannot be streamlined when a financial planning business is subject to regulation by both the TPB and ASIC.

We assume there will need to be some coordination between the two regulators to address the manner of regulation and any complaints/issues that may arise but there is likely to be initial uncertainty regarding which regulator is the most appropriate to address a problem initially.

It would also seem likely that the current disclosure documents financial planners must provide to clients would be required to include additional references to TPB requirements, including the need to add reference to the TPB on the complaints handling procedures that financial planners currently provide to clients.

Customer complaints are likely to relate to financial advice set out in a Statement of Advice (SOA) or other disclosure document, and the tax advice component will not be clearly distinguishable or separable from the non-tax advice component but rather contain information about the tax implications relevant to the total advice. As such, the client may not know which regulator to approach. The appropriate AFSL procedure is that the client should first approach the AFSL holder and if not satisfied would be directed to an EDR scheme such as FOS. Rarely do complainants approach the regulator and in the case of ASIC they are usually referred back to the AFSL holder in the first instance. Would the TPB follow the same protocol? Which regulator will do the initial assessment? Would the TPB have the expertise to assess whether an SOA/other advice document complies with the law outside of the tax advice component? And how do we stop matters falling through the cracks because the most appropriate regulator is not immediately obvious? We consider that this problem can be solved by placing the responsibility for the assessment of the complaint on one regulator, ASIC, who would then have the ability to seek input from the AFSL in respect to their conduct and advice from the TPB, if appropriate.

With ASIC as the regulator and the cooperation mechanism to seek input and advice on appropriate tax matters from the TPB, consumer protection will be enhanced and will be done so without duplication. In a matter where the quality or accuracy of tax advice is in question by ASIC they will be able to engage the TPB for their advice, providing an additional resource for ASIC in their investigation, which will result in a more accurate conclusion and the application of appropriate sanctions.

While we have reviewed the TPB's Information Sheet on 'Investigations' and 'Supervisory arrangements and supervision and control', it is not obvious how the TPB can provide better consumer protection than ASIC. The licensee obligations under the Corporations Act and the ASIC guidance on

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[7] *TPB Annual Report 2011/12, page 7.*

meeting licensee obligations provides far more detail than that provided by the TPB. Furthermore, ASIC's complaints and investigatory processes are more developed than those of the TPB and should therefore provide superior consumer protection. ASIC also has the expertise to scrutinise financial advice services as a whole, which the TPB is unable to do. The TPB has different scopes of power and you cannot expect the same breadth of compliance activities. ASIC regulates the person, the business and the actual advice. The TPB is limited to the conduct of the person.

A fundamental difference is the existence of established complaints handling procedures in the financial services industry from Internal Dispute Resolution (IDR) to EDR and to the regulator. This process is supported by industry, government, consumer organisations and the regulator as effective with a demonstrated track record. To have, as it seems to be suggested, the possibility of the TPB being the first and only arbiter in any dispute about tax-related issues is against established public policy.

Recommendation

ASIC should remain as the primary regulator for financial planning. The TPB should be invited to provide advice and support on matters that ASIC believe are beyond their expertise.

FPA response to proposed amendments to Tax Agent Services Regulations

Eligibility requirements to be registered as a tax (financial product) adviser

4. A new regulation 8A inserted into Part 2 of the Regulations would prescribe the requirements for tax (financial product) advisers. Consistent with the approach in existing regulations 7 and 8 that apply to BAS agents and tax agents respectively, the specific requirements would be inserted into a new Part 3 to Schedule 2. This new Part would consist of two Divisions — Division 1 would set out the specific requirements and Division 2 would provide the meaning of relevant experience.

5. These changes would have an application date of 1 January 2015.

FPA response

The notification period does not consider new financial planners joining the advice sector after 1 July 2013 but for the conclusion of the notification period.

FPA recommends that the category title and definition should be placed on hold until the finalization of legislation to enshrine the terms financial planner and financial adviser. Further the FPA submits that government should actually consult with industry on what would be an appropriate category name and definition should this need to be proceeded with.

Specific requirements

6. The overarching requirement would be that the individual is either:

6.1. a financial services licensee, as defined in Chapter 7 of the *Corporations Act 2001*; or

6.2. a representative of a financial services licensee, as defined in paragraph 910A(a) of the *Corporations Act 2001*.

FPA response

FPA recommends that the category title and definition should be placed on hold until the finalization of legislation to enshrine the terms financial planner and financial adviser. Further the FPA submits that government should actually consult with industry on what would be an appropriate category name and definition should this need to be proceeded with.

7. To provide flexibility in situations where an individual has had a change of circumstances (such as becoming a representative of a different financial services licensee due to a change of employment), it would only be necessary for the individual to meet this requirement at some point during the preceding 30 day period.

FPA response

Item 7 does not provide any detail of the consequence for not meeting the 30 day period. There will be instances when a financial planner will be in transition to a new licensee provider that will take longer than 30 days. Further consultation is needed with the industry on whether 30 days is an appropriate period.

8. In addition, the individual would need to:

8.1. have successfully completed a TPB approved course in Australian tax law for tax (financial product) advisers and engaged in the equivalent of two-years of full time relevant experience in the preceding five years; or

8.2. hold a degree or award that is approved by the TPB from an Australian tertiary institution, or an equivalent institution, in a discipline that is relevant to tax advice (financial product) services; have successfully completed a TPB approved course in Australian tax law for tax (financial product) advisers and engaged in the equivalent of 18-months of full time relevant experience in the preceding five years; or

8.3. have successfully completed a TPB approved course in Australian tax law for tax (financial product) advisers, be a voting member of a recognised tax (financial product) adviser association or a tax agent association and engaged in the equivalent of 12-months of full time relevant experience in the preceding five years.

FPA response

The FPA submits that further consultation on the course and experience requirements with the profession is required immediately. The release of this paper for four weeks is not sufficient.

Further, financial planners who are members of existing professional bodies (ie. recognised

tax agent associations) must be recognised and acknowledged by the TPB when considering specific requirements for registration.

Relevant experience

9. Relevant experience would include work by an individual:

9.1. as a tax (financial product) adviser registered under the Act;

9.2. as a tax agent registered under the Act or as a tax agent registered under Part VIIA of the *Income Tax Assessment Act 1936*;

9.3. under the supervision and control of a tax (financial product) adviser registered under the Act;

9.4. under the supervision and control of a tax agent registered under the Act or as a tax agent registered under Part VIIA of the *Income Tax Assessment Act 1936*; or

9.5. of another kind approved by the Board;

where the individual has had substantial involvement in one or more types of tax advice (financial product) services or substantial involvement in a particular area of the tax laws to which one or more of these types of services relate.

FPA response

The FPA submits that further consultation on the relevant experience requirements with the profession is required immediately. The release of this paper for four weeks is not sufficient. Further, financial planners who are members of existing professional bodies (ie. recognised tax agent associations) must be recognised and acknowledged by the TPB when considering the relevant experience requirements.

Recognised tax (financial product) adviser associations

10. Part 1A of the Regulations provides for the system to allow the Board to accredit professional associations. Of this Part, Division 1 applies in relation to recognised BAS agent associations and Division 2 applies in relation to recognised tax agent associations. A new Division 2A inserted into Part 1A would apply in relation to recognised tax (financial product) adviser associations and would mirror the existing Division 2 as modified for recognised tax (financial product) advisers.

11. Part 1A also contains Division 3. This Division provides for the publication of various notices on the TPB's website and the review of decisions relating to recognised BAS agent associations and tax agent associations. Both provisions in this Division would be updated to apply to recognised tax (financial product) adviser associations.

11.1. Specifically, new paragraphs (e) and (f) inserted into regulation 6 would require the TPB to publish on its websites its decisions to recognise an organisation as a recognised tax (financial product) adviser association and its decisions to terminate the recognition of an organisation as a recognised tax (financial product) adviser association respectively.

11.2. Similarly, new paragraphs (e) and (f) inserted into regulation 6A would allow application to be made to the Administrative Appeals Tribunal for review of the TPB's decision not to recognise an organisation as a recognised tax (financial product) adviser association and a decision to terminate a recognised tax (financial product) adviser association's recognition.

12. A new Part 3 to Schedule 1 would set out the requirements that an organisation would need to meet in order to become a recognised tax (financial product) adviser association. These requirements would mirror the requirements that apply in relation to registered tax agent associations as modified for recognised tax (financial product) advisers.

13. These changes would have an application date of 1 July 2013.

FPA response

Should this be required, the FPA submits that as a financial planning association that is an existing professional association as recognised by the TPB (ie. 21 March 2012, the FPA was approved as a recognised tax agent association), we should be automatically approved as a 'recognised tax (financial product) adviser association'.

Prescribed fees

14. The table in regulation 9 would be amended to include:

14.1. a new item 5 for an application for, 'Registration as a financial adviser who carries on a business as a financial adviser' with a fee of $400; and

14.2. a new item 6 for an application for, 'Registration as a financial adviser who does not carry on a business as a financial adviser' with a fee of $200.

15. This change would have an application date of 1 January 2015.

FPA response

The FPA requests that further clarification and explanation is required in defining a financial planner who 'carries on business' and one who 'does not carry on a business'.

Is there any alignment with the licensing costs and obligations under Corporations Act? How was the fee of $400 and $200 determined and is it expected for on an individual or entity level?

Further what costs analysis has been conducted on not only the impact of the registration costs but the costs of complying with this TASA regime in total? What impact will the additional regulatory costs have on the access to financial advice to Australians? Has this been considered in respect to the policy objective of the FoFA reforms?