8 March 2013

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

By Email: taxagentservices@treasury.gov.au

Dear Mr Reid,

TAX AGENT SERVICES ACT: Tax Laws Amendment (2013 Measures No.#) Bill 2013: Tax agent services and Proposed changes to related regulations

The FSC thanks The Treasury for the opportunity to provide comments on the proposed legislation and draft regulations[1] to amend the Tax Agent Services Act/Tax Act to apply in a relevant manner to financial advice providers.

The Financial Services Council represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and Public Trustees. The Council has over 130 members who are responsible for investing more than $1.9 trillion on behalf of 11 million Australians. As the representative body of Advice Licensees –our members are responsible for more than 80% of financial advisers/planners in Australia (including accounting professionals licensed today to provide advice).

The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The Financial Services Council promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

The tax advice provided by financial advisers is most frequently (general) information in nature (for example, the difference in tax treatment between investing inside or outside super or stating that your super earning pay 15% tax) and generally much simpler in nature than tax advice provided by a tax agent. On this basis, many in the industry do not support the classification of this type of service provider as a tax agent. However, we understand that the government intends to bring all tax advice providers under the auspice of the same legislative regime to "ensure the consistent regulation of all forms of tax advice irrespective of whether it is provided by a tax agent, BAS agent or entity in the financial services industry"[2]. We therefore support the amendment of that Tax Agent Services Act to create a different type of tax adviser, which is congruent with the tax advice a financial advice provider gives in the context of financial planning.

[1] Noting that these draft regulations are not the final draft regulations and subject to change once the draft legislation is completed.
[2] Draft Tax Laws Amendment (2013 Measures no. #) Bill 2013: Tax agent services, page 3.

Commencement

We note that the government has extended the start of this regime for advice providers/financial planners to 1 July 2013. Whilst the industry had an opportunity to consult on the potential application of this regime in later 2010, the industry has not had an opportunity to consult on the application or details of this regime until the issue of this draft Bill issued on 8 February 2013, with only a four week consultation period to comment on the draft legislation and pre-final regulations.

We strongly urge the government to consider extending the exemption of TASA to financial advice providers for another six to twelve months so that the industry may consult with the government and Treasury on this significant initiative in a considered manner. As this paper highlights, there are a number of key concerns which may have significant impacts to the advice industry and ultimately impact consumers negatively.

The extension of the exemption need not extend the full transition period – it could be that the notification period could be truncated from eighteen months to twelve or six months subject to the Tax Practioners Board ("TPB") capabilities to process the approximately 16,000-24,000 applications twice in the next three years.

A cohesive financial advice provider competency framework

The FSC notes that ASIC has to date licensed and regulated financial advisers activities (at the Licensee and authorised representative level rather than at the employee advisers level) including determining advice providers competency which integrally includes the provision of tax advice in relation to financial advice. The FSC is concerned the co-regulation framework being contemplated will add complexity and red tape which will ultimately result in higher costs of advice for consumers and duplication of competency requirements for advice providers.

It is critical that Treasury and the Board consider registration of financial planners/advisers who provide tax advice in the context of financial advice in a balanced and pragmatic manner. The Tax Act Services Act was tailor made for the tax service agent/BAS service provider to ensure that those providers (not licensed by ASIC or operating under the Corporations Act provisions relevant to providers of financial product advice) were adequately trained, competent and acting in a manner consistent with a relevant code of conduct to ensure their clients received quality tax advice and representation to the Tax Commissioner.

TASA was expanded to apply to financial advisers in 2010 "to ensure consumer protection through adequate supervision to provide competent services"3. However, now that the Future of Financial Advice reforms have been enacted, the FSC queries the relevance and appropriateness of requiring the registration of financial advisers who provide tax advice in the context of financial advice and the requirement to abide by a Code of Conduct which is tailored for true tax agents and which has now been superseded by the Law (with regards to financial advisers).

The FSC submits that the government may better meets its objective with regards to financial planners/advisers, without duplication, red tape and increased costs, by the Board continuing to set competency and supervision requirements for providers of tax advice in the context of financial

[3] Tax Agent Services Act 2009 (TASA) and related Regulations – a proposed new regulatory framework for financial advisers providing taxation advice, Page 24

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advice in conjunction with or by advising the soon to be established National Exam Organisation (Self Regulatory Organisation which ASIC is seeking to establish). In this manner, the Board would eliminate all duplication and ensure that its key objective of raising provider competence is achieved in an efficient manner and without putting advice out of reach of Australians.

To the extent that the Government proceeds with these proposals and regulates advisers under the TASA regime, we wish to highlight the following observation. The proposed regime appears to be based on an assumption that registration by all participants should occur in a manner similar to that which applies to tax accountant businesses today. In fact the registration regime is ideally suited to the typical accountant business structure. In FSC's view it fails to adequately cater for financial advisers who generally operate, and are licensed, under an Australian Financial Services Licence. It is critical for financial advice businesses and their advisers that the model of registration and compliance is flexible enough to cater specifically for the AFSL model. We expand on this argument below in Section 1 under the heading 'Licensee Registration vs Individual Registration'

This paper aims to highlight the FSC's key concerns and provides recommendation for consideration to enable the law to apply appropriately to tax advice providers in the context of financial advice. We may submit a further supplementary submission post the 8th of March as these are complex legislative instruments that the industry is considering in full for the first time.

We look forward to working with you to ensure that the costs of complying with the new law (for financial advice providers) do not outweigh the consumer protection benefits available to tax advice recipients.

If you have any questions regarding the FSC's submission, please do not hesitate to contact me on (02) 9299 3022.

Yours sincerely

CECILIA STORNIOLO
SENIOR POLICY MANAGER

FSC SUBMISSION

Tax Agents Services Act

Tax Laws Amendment (2013 Measures No.#)
Bill 2013: Tax agent services
And
Proposed changes to related regulations

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KEY ISSUES

We have identified the following key issues with regards to the draft legislation and regulation:

1. **Scope**
2. **Transition for existing advice providers and application to new advice providers**
3. **Cost of advice: efficiency measures**
    a. **Professional Indemnity Insurance**
    b. **Code of Conduct**
    c. **Competency Requirements**
4. **Monitoring and Enforcement**
5. **Tax deductibility of advice**

Each of the above are discussed in details following.

1. Scope

As noted previously, we understand the government aims to apply the Bill to **all** financial advice providers. However, we submit that the definition of tax advisers in the draft Bill and related instruments is unclear and may result in unintended consequences.

General tax information only

We submit that any persons who provides tax information (generally available tax information) should be exempted from registration with the Tax Practioners Board ("TPB"). Paragraph 1.25 of the accompanying Explanatory Memorandum seems to imply that provision of information even if tax related and given in the context of giving advice is not a tax agent service. However, we submit that drafting (in the legislation) linking the provision of the information to "reliance" on part of the recipient will result in capturing within the regime persons and information provision which we believe the government does not intend to capture.

Proposed s 90- 15 Meaning of "tax advice (financial product) service" in particular needs to be amended as paragraph (b) currently captures general information that may be relied upon by members of the public.

For example, a brochure suggesting that a taxpayer can contribute up to $25,000 a year to a superannuation fund can reasonably be expected to be relied upon by one of the many people who receive the brochure. This is the case even though the information is not part of advice prepared for a particular person or entity.

A recommend a requirement that the information be provided to a specific entity or person may be included as a means to mitigate this issue. We note that this information is generally given without the charging of an express fee but the consumer may be in a fee arrangement – therefore the fee nexus may exist and may not be relied on by the giver of the advice to claim exemption.

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Recommendation

We submit that the provision of tax information (generally available information) is not a tax agent service and should be expressly exempted in the TASA (for example as an express exemption to s90-15) or related regulations for licensees and individuals.

Further we recommend the drafting be amended such that there provision of the tax information (generally available information) is exempted regardless of whether the information can reasonably be expected to be relied upon.

The EM should also include examples of these circumstances and clarify tax (financial product) advice can only be provided directly to the end client via the provision of personal advice. We would be happy to provide examples for consideration.

Computer program advice , Licensee websites and other online information

Consideration must also be given to advice provided by computer programs/calculators. The Future of Financial Advice reforms supported and provides for advice to be provided by computer programs and calculators.

We submit that the legislation should specify the requirements for calculators and other information posted on licensee websites in the regulations and expressly carve them out. These are provided at the outset for the general public free of charge. Arguably online calculators & written materials do not demonstrate the direct nexus to fees required by the legislation[4]. Persons who utilise the calculators and other information may not even be or become a client of the licensee.

We submit that the legislation should specify the requirements for calculators and other information posted on licensee websites in the regulations. For consistency the approach taken in ASIC Class Order 05/1122 *Relief for providers of generic calculators* should be adopted by government/Treasury in clarifying the application of this legislation to calculators.[5] This should ensure that where a licensee provides tax advice in the context of financial planning/advice through a financial calculator they are not required be registered with the TPB, consistent with ASIC's approach.

Recommendation

We submit that the legislation should specify the requirements for calculators and other information posted on licensee websites in the regulations and expressly carve them out.

In the absence of an express carve out, we submit that the existing use of disclosures and disclaimers on licensee websites be retained as an appropriate mechanism to deal with any potential risk to consumers.

[4] Para 1.20 of EM alludes to the fact that TASA is really only meant to capture "fees for services" and this being now extended to financial products tax advice.

[5] CO 05/1122 provides an exemption from AFSL licensing requirements (subsection 911A(1) Corps Act) and obligations to provide an FSG, SOA and other disclosure requirements (Division 2,3,4 Part 7.7 Corps Act).

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Tax advice given in the context of financial planning/advice

Critically, we note that the definition used in the draft Bill will only apply to a subset of tax advisers in the context of financial planning/advice and will therefore place a significant portion of the industry outside the regime – which we do not believe is the intent of the government. For example, the draft Bill applies to only those financial planners who make financial product recommendations. This drafting ignores the fact that a significant portion of advice provided (including tax advice in the context of financial planning) is strategic advice (usually centred on tax structuring) which does not make a financial product recommendation in all cases. For example, there are advice providers whose business model concentrates on the provision of strategic financial planning/advice on topics such as superannuation salary sacrifice, tax structures (invest inside or outside super or via an self managed super fund (SMSF)), transition to retirement strategies. As drafted presently, these types of tax advisers in the context of financial planning/advice will not fall within the definition of a tax adviser (financial products) service as they do not make financial product recommendations. Our concerns are that if the intent is to ensure consistency, then the definition applicable for financial advice providers needs to be amended to ensure all tax advice provided in the context of financial planning/advice are captured by the application definition alternatively, they may be deemed by the TPB to be operating outside the regime (with all the consequences this entails).

Recommendation

We recommend that the draft Bill be re-drafted to capture all financial advice providers regardless of whether they recommend a financial product or not[6] to meet the government's policy objective.

We would be happy to provide drafting options for Treasury's consideration.

Licensee Registration vs. Individual Registration

Amendments to approach in relation to individual registration, ED schedule 1 paragraph 6 and EM paragraph 1.32 – Based on these sections 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 agents, to be able to provide tax advice (financial product) services to a competent standard and to carry out supervisory arrangements.

EM paragraph 1.34 indicates that this is consistent with the existing approach in relation to partnerships registering as tax agents or BAS agents.

Unfortunately, it does not recognise the difference in approach for Australian Financial Services (AFS) licensees who may appoint 'authorised representatives' to provide specified financial services on their behalf. This approach aligns with the "nominee model" that operated prior to the introduction of the Tax Agents Services Regime (TASR).

[6] The definition could link the tax advice provider to an ASIC license (as an authorised representative, or representative) for the purposes of providing financial advice services.

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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 planning/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/adviser (or tax agent) 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 operating under the license
- 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 advisers generally (Part D of CP 153). We have been engaged with ASIC on this consultation and submit that the final standards in relation to monitoring and supervision requirements for advisers generally should be considered adequate for the monitoring and supervision of tax advisers in the context of financial planning/advice. We submit that the TPB have regards for ASIC's licensing requirements of licensees and individual advisers so as to minimise duplication of efforts which will only result in increasing the cost of running advice businesses and increasing the cost of advice without commensurate benefits to the recipients of the advice.

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/advice to operate in a similar fashion to "monitored members".

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.

2. Transition for existing advice providers and application to new advice providers

By its nature, the requirement for financial advisers to register to become tax agents in the context of financial planning/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

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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 advisers who may suffer a loss of business as a result of any delays in the registration process. The reality that approximately 16,000-24,000 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 (an adviser 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.

Critically, what happens to a new adviser who enters the industry post 1 July 2013? What competency and experience requirements will the TPB impose on them in addition to those imposed by ASIC's licensing requirements? Today, that adviser must complete their ASIC set RG146 training and either hold their own AFS License or operate under a Licensee's authority or as the Licensee's representative. But effectively, a new adviser post 1 July 2013 (without TASA) would be able to advice their clients on general tax information. However, given TASA will apply from 1 July 2013 – what are the requirements applicable to a new entrant commencing on 1 July 2013?

When will the requirements become known publically, so individuals can ensure they commence the appropriate training/supervision to enable them to operate as advisers?

Currently, the industry is only informed on requirements at *What courses will meet the educational requirements, Regulations section 8* . The educational requirements for financial product tax advisers include the adviser having "successfully completed a TPB approved course in Australian tax law for tax (financial product) advisers" (regulations paragraph 8.3). Understandably, there are currently no courses listed on the TPB website that match this requirement given the new concept of tax (financial product) adviser born in this legislation. Will the new adviser need to meet experience requirements (which they may not meet for some years)? If so what are these requirements? See section 5 of the Key Concerns section, for some practical implications to this key concern – namely that the Bill and regulations have not yet informed the industry of the requirements which will impact advice providers from 1 July 2013 (new requirements which impacts an advisers ability to provide advice in four months time).

We submit that the TPB should work with the financial advice industry and ASIC to develop suitable training and educational material to this end.

Recommendation

We recommend that Treasury and the TPB make public the training/competency and experience requirements applicable for tax advisers in the context of financial planning/advice as soon as possible and allow the industry to consult on these requirements. Furthermore, we submit the TPB have regard for ASIC's training/competency (including ongoing "continuance development" and experience requirements in setting their requirements for this segment of tax advisers. The industry would also welcome the opportunity to consult on these matters noting the Board may not have deep experience in financial planning/advice.

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3. Cost of Advice: Efficiencies

Whilst we appreciate and support higher education standards of advice providers generally, the TASA regime enforces a number of inefficient business practices on financial advice providers which will increase the cost of running an advice business and ultimately increasing the cost of advice across the board.

We note a few measures below which may assist in minimising or reducing duplication of efforts and help maintain reasonable business operating costs in an attempt to not disadvantage Australians seeking advice from financial advice providers.

a. Professional Indemnity Insurance

The Bill requires that those registered hold professional indemnity insurance ("**PII**") approved by the TPB. We note that all advice providers (except certain exempted individuals) are required to operate under an Australian Financial Services License, and it is a licensing requirement that the Licensee hold PII cover today[7].

We submit that it is redundant and therefore inefficient for the TPB to also require registered individuals 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.

An approach the TPB could consider with regards to tax advisers in the context of financial planning/advice is that licensees may be to extend their PI coverage to incorporate the provision of tax (financial product) services and that such should be considered adequate by the Board (provided it meets the Board's requirements with respect to level of cover). This could be conducted through normal commercial negotiations if the TPB doesn't prescribe the level and scope of PI needed. It should be specifically clarified that where an employer entity takes out PI insurance in respect of employee financial planners then each registered employee planner is not required to take out separate PI insurance.

We submit that the TPB recognise in certain circumstances that some licensees may be able to demonstrate requisite financial strength (underwritten by a parent company, for example) such that the Board may determine self-insurance as meeting their requirements. We would welcome clarity in the EM that ensures consolidated groups/entities who chose to self-insure are able to either self-determine their sufficiency be able to attest/certify?/readily demonstrate this through the registration process.

[7] 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."

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Recommendation

We recommend the TPB recognise the PII held by a licensee as sufficient to meet the requirements obligations of individuals/licensee entities registered with the TPB in the Act and Code as required.

Further, we recommend the TPB recognise that there are circumstances where self insurance may be a viable alternative to extra PII requirements.

b. Code of Conduct

We note all financial advice providers will be bound by the TPB Code of Conduct from 1 July 2013 even if they have not given notice to the TPB. We submit that it is not appropriate to impose retrospective conduct nor PII requirements on a TPB applicant from 1 July 2013 if they apply post that date (they have until 1 January 2015 at present to notify the TPB). That is to say, there should not be an earlier start date for compliance with the code of conduct than for other requisite elements of registration, such as the competency requirements (education and relevant experience).

Other concerns with the Code of Conduct:

The FSC is concerned with the requirement that advice providers must be subject to the Board's Code of Conduct for the following reasons:

- The financial advice industry has not had an opportunity to participate in the development of nor provide feedback on the Code of Conduct.
- The Code has been developed specifically for BAS and registered tax agents whose services are different from those provided by a financial adviser.
- The financial advice industry operates under distinctly different and greater legislative requirements (the tax competency component is only a part of an advisers legal obligations).
- Whilst it may be appropriate for BAS and registered tax agents to have an ethical code of conduct with a common law type best interest duty, recent amendments to the Corporations Acts have added a statutory Best Interest Duty plus related obligation which covers similar grounds to the conduct requirement of the Code for providers of financial advice.

It is important to note that some financial advice providers may already be subject to a number of ethical codes of conduct.

For example, a financial adviser who is a Certified Financial Planner working for a bank owned advice licensee may operate under

- a Banking Code of Conduct
- the FPA Code of Conduct; and potentially

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- An accounting body's code of conduct (if that financial planner is also a member of a professional accounting body);
- TPB's Code of Conduct

Recognition that the provider may already be subject to a or a number of Codes 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.

Therefore we submit that Treasury and the TPB consider the following alternatives to the requirement contained in the Bill that a tax (financial product) agent must comply with the Board's Code of Conduct :

- The Board to stipulate that the provider be a member of an 'approved' professional body or ASIC approved Code of Conduct;

- As an alternative for those who are not members of a professional body nor a future ASIC approved Code of Conduct; regarding the TPB Code of Conduct which is directed in many areas towards the specific obligations and activities of a registered tax agent. If this code is to apply to the activities of financial planners/advisers, that specific recognition that advice providers are required to comply only in so far as it is relevant to their activities and which are not already covered elsewhere, for example by being a member of a professional body. The focus should be on covering the gaps, not duplicating regulatory effort.

Recommendation

We submit that it is not appropriate to impose retrospective conduct nor PII requirements on a TPB applicant from 1 July 2013 if they apply post that date (they have until 1 January 2015 at present to notify the TPB).

Further, we recommend that the TPB requirements regarding the application of the Code of Conduct be amened to the following two options under which registrants can meet Code of Conduct requirements (registrants need only satisfy one of these options);

1 The Board to stipulate that the provider be a member of an 'approved' professional body or ASIC approved Code of Conduct. OR

2 That the Board's Code of Conduct make specific recognition that advice providers are required to comply only in so far as it is relevant to their activities and which are not already covered elsewhere, for example by being a member of a professional body. The focus should be on covering the gaps, not duplicating regulatory effort.

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c. Competency requirements

We also note that TASA will create potentially a third set of minimum competency/experience requirements on a financial advice provider. A financial advice provider from 2013 is likely to be required to complete the following just to operate as a financial advice provider:

- RG146 – competency requirements set by ASIC of all advice providers (ongoing minimum training requirements also apply);
- Potentially pass a national entry exam and only knowledge update exams;
- Competency (entry and ongoing) and experience required by the TPB (yet to be articulated by the TPB for this industry); and
- As today there is no "one set of competency requirements" which are portable between Licensees, individual Licensees often provide their own additional training to ensure their authorised representatives/representative are at a consistent level.

Each layer is an additional cost to simply be able to operate as an advice provider and these impacts need to be considered in light of other government initiatives aimed at increasing access to and lowering the cost of advice.

Recommendation

We submit that the TPB work with ASIC and the soon to be established Self Regulatory Organisation, to ensure that competency requirements are appropriate but not mutually exclusive (that is that there are not two different sets of educational requirements covering the same topic area (tax) for the same providers).

4. Monitoring and Enforcement

Monitoring and Supervision

The FSC acknowledges the need for robust monitoring and supervision processes for new and existing advisers and for ongoing training and development of advisers' competencies and knowledge.

Whilst we agree in principle with the rationale for robust monitoring and supervision and ongoing development of advisers, we note monitoring and supervision practices in the financial advice/planning industry are potentially distinct from those employed in the accountancy industry. Without knowledge of the TPB's proposed requirements for the advice industry we raise the following matters to your attention for consideration – and note that these are important matters that need to be publically consulted to ensure that there is not a decline in the supply of financial advice providers in the market and particularly, that rural and remote locations are not left without these crucial services.

Relevant experience requirements will require (according to the regulations) that an applicant for registration have worked "under the supervision and control of a tax (financial product) adviser" and that a person cannot provide tax advice unless they are registered.

Is it the TPB/Treasury's intention that a financial adviser who is yet to qualify for registration:

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- Should never provide their client with the tax component of the advice the client requires (thereby hindering the ability of the adviser to comply with the Future of Financial Advice Best Interest Duty and related obligations) and that only registered tax (financial product) advisers can 'give' the advice (that is two financial advisers are meeting with and providing the advice to the client – one that tax component)? OR

- Can the financial adviser (who does not yet qualify for registration) give the client the tax advice, but be physically supervised when giving the client the advice by a registered tax (financial product) adviser (still two advisers in the meeting with the client)? Or

- Can the financial adviser (who does not yet qualify for registration) give the client the tax advice without the registered tax (financial product) agent being physically present at the time of giving the advice – the tax advice component being approved prior to the client meeting by the registered tax (financial product) agent, that the tax advice meets industry and regulatory standards, including Best Interests Duty and TPB's "competent" requirement? OR

- What happens if the financial adviser is a new entrant in a rural or remote location? Does this mean this individual would need to relocate to a city[8] or larger town to work under a registered tax (financial product) adviser (where a registered tax (financial product adviser) is not available in their current location) until they can obtain the required level of experience to qualify for registration?; OR

- Can the financial adviser work under a local tax agent (who may not have any qualifications or competency in financial planning advice and indeed may not be licensed as an Australian Financial Services Licensee – will this meet the appropriate experience competency requirements)?

- Noting that FoFA places the best interest and related obligation on the provider of the advice, whilst a financial adviser is under supervision and not registered, who bears the statutory FoFA best interest duty and related obligations given it is the individual who provides the advice) in addition to the TASA obligation (the registered entity)? Is the registered entity responsible?

We remain uncertain how the industry is to supervise its new entrants and advisers wishing to up-skill. This uncertainty may create a supply side issue in the availability of advice providers. We welcome the ability to consult on these matters to enable the development of pragmatic obligations to ensure that tax advice providers do meet appropriate competency levels for the benefit of consumers in a manner which does not put advice out of the reach of Australians.

Further, as the advice industry re-assesses their advice model in light of the Future of Financial Advice, TASA and MySuper reform changes, which include the potential to provide scalable advice, the reality is that the supervisory and monitoring processes will need to be tailored to meet the need of the advice business and its target client. The FSC proposes that the AFSL is best placed to

[8] Noting that city tax advice providers in the context of financial planning may not be 'competent' to provide the tax advice an adviser in rural locations may need to provide.

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tailor the supervision and monitoring model and as such enables scalable advice and facilitate greater access to advice (by keeping costs in check).

Further we note that Licensees have Licensing obligations to monitor and supervise their advisers and ASIC has been reviewing these requirements in their 2011 ASIC Consultation Paper 153: Licensing: Assessment and professional development for financial advisers. Submissions were made by the FSC and a number of other industry participants on matters such as monitoring and supervision.

Recommendation

In the interest of ensuring that advice remains affordable (demand side) and accessible (that the supply side is not impeded), we submit that the TPB work with ASIC to develop and streamline the monitoring and supervisory requirements Licensees/registered entities need to have in place to monitor and supervise new entrants. The industry would be pleased to work with the TPB and ASIC to develop a single advice competency framework.

Consumer complaints and Enforcements

We submit that consumer disputes should be handled through licensees existing internal and external dispute resolution (IDR/EDR) processes and their general EDR obligations under the Corporations Act rather than though both TPB and IDR/EDR processes.

That is, the obligation for consumers to complain about the tax component of their advice (which is only a subset of the advice they may have received from the adviser) to both Financial Ombudsman Services [9] and the TPB may result in confusion on the part of the consumer and increases the risk of a complaint not being addressed by the right body.

As such we recommend that the TPB recognise that advice Licensees and their authorised representatives/employee advises are today a party to an IDS/EDS process (required by law) and that the consumer are best served and have a greater chance of their complaint being heard at one point of call rather than multiple bodies. By the Board working with (not additional to) any external complain body should the tax component of the advice be at questions, the consumer has the best chance of redress.

Recommendation

We recommend the Board recognise that Advice providers already have statutory/licensing obligations to have IDR/EDR processes in place and that the consumer is better served by the Board working (in consultation) with existing EDR providers such as FOS rather than separately.

[9] FOS is but one of the EDR bodies an advice provider may use as an EDS process.

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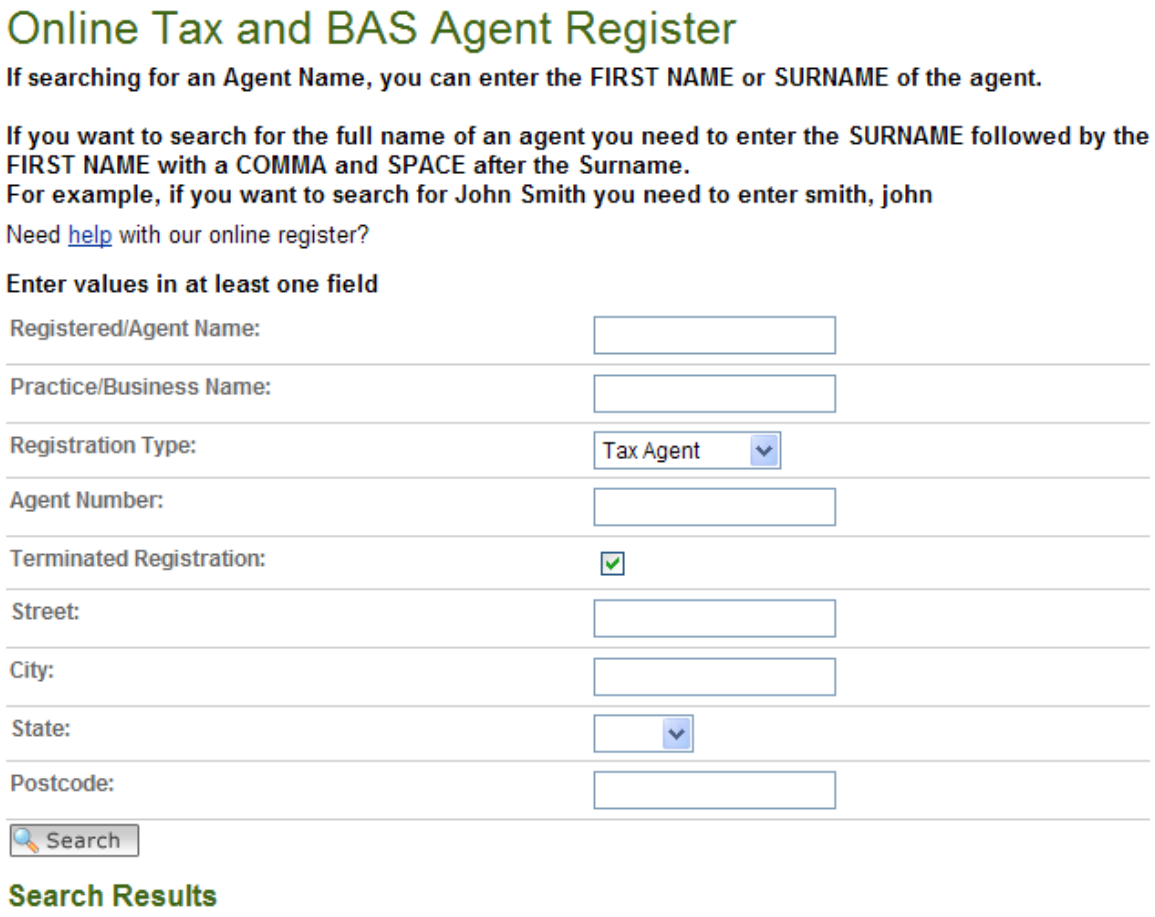
Civil Penalties

Currently, the TPB allows you to search for registered tax agents and BAS agents and terminated registration via their online website.



Online Tax and BAS Agent Register

If searching for an Agent Name, you can enter the FIRST NAME or SURNAME of the agent.

If you want to search for the full name of an agent you need to enter the SURNAME followed by the FIRST NAME with a COMMA and SPACE after the Surname.
For example, if you want to search for John Smith you need to enter smith, john

Need help with our online register?

Enter values in at least one field

Registered/Agent Name:	
Practice/Business Name:	
Registration Type:	Tax Agent
Agent Number:	
Terminated Registration:	☑
Street:	
City:	
State:	
Postcode:	

Search

Search Results

Paragraph 1.43 of EM says that Licensees could potentially be fined 1,250 penalty units @ $170 per unit, if they use the service of a person that had been struck off the register. In relation to the civil penalties, prima facie it would prohibit a licensee employing any person who is not registered and perhaps even using any tools/calculators issued by any vendors who are also not registered.

This obligation will have a number of significant implications for advice Licensees.

First, it defeats the purpose of registering at the Licensee level and contradicts the idea that you only need a sufficient number of individual registrations and not every single employee (to support a licensee registration).

Secondly, there is definitely a need to remove the penalty on Licensees, based on the assumption that the Licensee nominee model is endorsed.

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Thirdly, the penalty regime would also be a barrier to re-entry for advice providers who decide to terminate their registration and work for a Licensee, as it implies Licensee would be fined for employing a deregistered entity.

Lastly, if the regime extends to vendors or providers of calculator tools and other advice computer programs must Licensee cease using these providers in the interim or seek confirmation from the providers that they will be registered. This requires clarification.

Again, and in summary, the penalty regime net appears too wide and hopefully unintended. There is a need to at least exempt licensees from these penalties

On the basis of the retention of the civil penalties, it is imperative that TPB and/or ASIC have systems in place from 1 July 2013, that enable a Licensee to ensure they are using the services of a currently registered entity (for example another Licensee's authorised representative or other independent tax (financial product) advice).

Recommendation

The FSC submits that the civil penalty applicable to Licensees as contained in paragraph 1.43 of the EM be removed (also from the Bill).

On the basis of the retention of the civil penalties, it is imperative that either or both of the following be in-place from 1 July 2013:

1 That the TPB's Online Tax and BAS Agent register be amended to accommodate for the new type of registration type – that is "tax (financial product) agent) – in recognition that some may qualify for this registration from 1 July 2013 and that the penalties apply from 1 July 2013; and/or

2 ASIC and the TPB deliver an online interface to enable a Licensee to conduct the search they will be required to do to demonstrate they have only used the services of a registered entity.

3 Exemption be extended to Licensees' reliance or use of computer programs or calculator tools provided by persons not registered with the TPB.

4 Further, we would suggest clarification in the EM as to how the licensee can demonstrate that they satisfied reasonable checks on that individual.

5. Tax deductibility of advice

Given the short timeframe afforded the industry to consider the implications of the Bill and regulated regulations we note that preliminary assessment of this Bill by our members indicates that advice provided in the future by a tax (financial product) advice provider may be tax deductible for their clients. We note that this may have budget implications.

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Recommendation

The FSC recommends a delay of the application of TASA to financial advice providers so the key concerns raised may be addressed.

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COMMENTS ON THE DRAFT REGULATIONS

We note that the draft regulation is a preliminary draft which may be amended/developed once the draft legislation is completed. As such, we note that we reserve the right to be able to consult on the final draft version of the regulations. The following is a comment on the current preliminary draft regulation.

What courses will meet the educational requirements, Regulations section 8

The educational requirements for financial product tax advisers include the adviser having "successfully completed a TPB approved course in Australian tax law for tax (financial product) advisers" (regulations paragraph 8.3). Understandably, there are currently no courses listed on the TPB website that match this requirement given the new concept of tax (financial product) adviser born in this legislation.

It is worth mentioning that ASIC consultation paper 153 is reviewing the competence requirements for advisers generally (Parts B, C and E of CP 153). We have been engaged with ASIC on this consultation and submit that congruence with the final competence standards and framework for advisers generally should be considered in the development of an educational framework for tax (financial product) advisers. For example, TPB approved modules for tax (financial product) advice could be included as part of the national exam proposed by ASIC in CP 153.

Recommendation

We recommend that the TPB work with the financial advice industry and ASIC to develop suitable training and educational requirements (within a consistent single advice framework).

"Substantial involvement", Regulations section 9

In order to meet the relevant experience requirements in the proposed regulations, individuals will need to have performed certain types of work (per the terms of section 9) "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."

We seek further clarification as to what may be considered substantial involvement to meet the relevant experience requirements?

Recommendation

We submit that in relation to licensee registration not all individuals who may provide financial services tax advice should be required to demonstrate such involvement. Rather, the licensee should be required to demonstrate substantial involvement via the collective experience of its representatives.

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TECHNICAL ISSUES

1. Factual information is not a tax agent service

We recommend that Part 5 of the *Tax Agent Services Amendment Regulations 2010* is amended to include an exemption for tax comments that are considered factual information as mentioned in the EM paragraph 1.25.

To this end, section 90-5(2) refers to these Regulations by stating that: *"A service specified in the regulations for the purposes of this subsection is not a tax agent service"* On the back of this, we could assist Treasury with more examples of general factual information. Some examples are listed following.

> Existing obligations exist for the accuracy of representations made in relation to factual information. Where this is inaccurate, subject to the nature of the representation, the inaccuracies could be regarded as misleading or deceptive conduct or professionally negligent
>
> Suggested Examples could be developed for inclusion on the following scenarios:
>
> 1. How different entities are taxed.
> 2. How superannuation contributions and income streams are taxed.
> 3. Treatment of super on death of member.
> 4. How tax residency rules work and how income and capital gains are taxed for non-resident.
> 5. Tax Guides that accompany Annual Tax (Distribution) Statements and Pension Pay as You Go Statements.

Recommendation

We recommend amending the Regulations so that the provision of factual information is expressly excluded from the definition of tax agent service.

2. Definition of a tax agent service applicable to an advice provider in the context of financial planning

The proposed Section 90-15 which defines a "tax advice (financial product) service" limits this advice to "financial products" as defined by the *Corporations Act 2001*. However, financial advisers do not always provide advice on financial products. That is, financial advisers may provide strategic or tax structural advice such as the following (which does not involve providing financial product advice):

Examples:

- The tax benefits and risks of using different types of investment structure such as company, trust, own name, partnership;

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- Family discretionary trusts – why make family trust elections, income streaming to different beneficiaries;
- Advice to executors in relation to different tax outcomes in meeting their obligations pursuant to a will for example: Whether to invoke a Testamentary Trust;
- Testamentary trusts – tax benefits;
- Gearing and tax benefits such as
    - Security offered; or
    - Structure of repayments (Principle and Interest or Interest only);
- Philanthropic advice: tax benefits from Private Ancillary Funds (PAF) [10] and charitable endowment funds;
- Provision of financial analysis and projections of future wealth that are dependent on current interpretation of tax rules;
- Any advice regarding the acquisition and disposal of real estate ;
- Strategies that focus on improving the after tax value of an estate that are not directly related to the acquisition or disposal of assets. Such as:
    - Cash out/re-contribution strategies; or
    - Refreshing the cost base of assets within the pension environment

Financial advisers may still be required to address tax implications of such strategies. Therefore we submit, the definition should be expanded (by redrafting or by regulation) to ensure that it does not exclude these providers of strategic (non financial product advice) tax advisers.

We recommend that a section similar to section 90-5(2), a section 90-15(2) is included to state: *"A service specified in the regulations for the purposes of this subsection is not a tax advice (financial product) service"* (this will then refer to the *Tax Agent Services Amendment Regulations 2010* which includes the relevant exemptions, including the suggested exemption for general factual information). Please note this has currently been done for a BAS Service in section 90-10.

Recommendation

We recommend including a new section, 90-15(2), along lines similar to section 90-5(2), to read for example, *"A service specified in the Regulations for the purposes of this subsection is not a tax advice (financial product) service*"* (the Regulations include the relevant exemptions, including the suggested exemption for general factual information).

***Noting this terminology is misleading and ill-defined as previously identified – but used here to provide context.**

[10] A Private Ancillary Fund (PAF) is a form of charitable trust to which businesses, families and individuals can make tax deductible donations. The fund may make distributions only to other deductible gift recipients that have been either endorsed by the ATO or are listed by name in the income tax law.

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3. Transition

Use of disclaimers during transition

We submit that guidance should be provided in relation to disclaimer requirements during transition (the current requirement expires on 1 July 2013). Up until 31 Dec 2014 advisers are allowed to continue as per current practice but the disclaimer requirement falls away. So for this period tax (financial product) advice can effectively be provided prior to notification or registration in the absence of any disclaimer.

We note there is inherent conflict between the operation of the transition phase and existing disclaimers which effectively state that the person giving the advice is not a registered tax agent and tax advice should be sought before relying upon the tax advice contained within the SOA. This is contrary to what will happen via the operation of this legislation as:

- advisers can continue to provide tax (financial product) advice but are actually taken for the notification period to be operating as if they are tax (financial product) advisers (simply because of the operation of the notification period), and
- if advisers notify they will also be taken to be a tax (financial product) adviser.

Both scenarios mean that the current disclaimer in the SOA is contradictory. In the case an alternative disclaimer is considered to be an appropriate policy measure, it will be extremely difficult or impossible for licensees to amend disclaimers given the short timeframe until the start of the notification period. We are of the view that this issue provides further support for an extension of the current exemption to provide tax (financial services) advice until 1 July 2014 and that the current disclaimer requirements should be similarly extended.

Recommendation

We strongly urge an extension of the current exemption to provide tax advice services in the context of financial planning/advice until 1 July 2014 and that the current disclaimer requirements should be similarly extended.

Interaction of notification phase, transition phase and registration process

The TPB has indicated that it can take up to 6 months to complete the registration process. There may be significant volumes of licensees (and advisers if the individual registration requirements remain) applying to the TPB to register at the same time (from an administrative efficiency perspective, this adds weight to licensee level registration as a palatable alternative).

Will the TPB issue guidance on the potential for a bridging' registration for the period for when they are considering applications? A clear 'no action' stance (by ASIC or TPB) on 'breaches' whilst applications are pending may be appropriate so that advice can be provided during this period.

Furthermore, it is unclear whether there is anything to stop a person who has 'nominated' actually applying for registration during the 'transition phase'? We would want some guidance (in the EM at

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least) confirming it is the intention of the draft legislation that the acceptable methods of application are:

I. To nominate in the 'notification phase' – the first 18 months - then go for registration from 1 July 2016, or
II. To hold back and not nominate in the 'notification phase' - first 18 months - then go for registration in the period 1 Jan 2015 to 30 June 2016, and
III. That applicants cannot both nominate in the 'notification phase' and then register during the 'transition phase'.

Recommendation

We strongly urge that guidance be provided, in the EM at least, to clarify acceptable methods of applying to the TPB.

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