THE TAX INSTITUTE

15 March 2013

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

Attn: Philip Akroyd

By email: taxagentservices@treasury.gov.au

Dear Mr Reid,

Creating a regulatory framework for tax advice (financial product) services – Exposure Draft

The Tax Institute is pleased to have the opportunity to make a submission to the Treasury in relation to the *Creating a regulatory framework for tax advice (financial product) services: Exposure Draft* (**Exposure Draft**).

Summary

The Tax Institute has long held the view that financial advisers who provide tax advice in the course of providing financial advice should be subject to the Tax Agent Services regime (**TASR**) on the basis that TASR provides a mechanism for the protection of consumers of tax advice. As the Exposure Draft amends the *Tax Agent Services Act 2009* (Cth) (**TASA**) to bring financial advisers into this regime, we are supportive of the overall intention behind the Exposure Draft.

Our submission below addresses concerns we have with the Exposure Draft. In particular:

- The policy objective of consumer protection is compromised with the full education and experience requirements not applying to financial advisers until 1 July 2016 at the earliest and the continuing uncertainty about the level of education and experience that will be required from 1 July 2016;

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- The low level of competency requirements for persons who register in the notification and transitional periods prior to the full extent of the regime applying from 1 July 2016; and
- The implied extension of the exemption for financial advisers who provide tax advice from 30 June 2013 to 31 December 2014 due to the start of penalty provision being deferred until 1 January 2015.

Overview

From the commencement of TASR in 2010, a long outstanding matter has been the way in which Australian Financial Services Licence (**AFSL**) holders (and their representatives) who provide taxation advice in the course of providing financial product advice would be treated under TASR. Initially, an exemption[1] for AFSL holders providing financial product advice was provided until 30 June 2011 while consideration was given to how AFSL holders in this position would be regarded under TASR. Subsequently, the expiry of the exemption was extended to 30 June 2012 and then 30 June 2013. On the basis that TASR is to apply to ASFL holders who provide tax advice from 1 July 2013, to ensure a timely transition, no further extension should be provided.

The Tax Institute has consistently maintained that the protection of consumers who are provided taxation advice in the context of receiving financial product advice from AFSL holders is of paramount concern. Consumers of this type of advice should be afforded the same level of protection offered in respect of tax advice provided by tax agents registered under TASR.

In this regard, the same stringent regulations that apply to registered tax agents should apply to AFSL holders who provide tax advice in the course of providing financial product advice. Accordingly, this requires these AFSL holders to be held to the same high professional and ethical standards to which registered tax agents are held, ensuring this high standard of consumer protection in respect of tax advice is not eroded.

Central to the design of the rules to bring AFSL holders under TASR should be the element of consumer protection. This accords with the policy objective of both TASR and the AFSL regime which is to ensure the provision of high quality services to consumers and to ensure consumers have a means for recourse if the services fall short[2]. There is a notable absence of a statement of the policy objective that underpins these rules in the Explanatory Memorandum (**EM**). As consumer protection is the cornerstone of these rules, this policy objective should be clearly stated in the EM.

[1] Regulation 13 *Tax Agent Services Regulations 2009* (Cth) (**Regulations**)

[2] Refer to Treasury's *Regulation of tax agent services provided by financial planners – Options Paper* (November 2010) at p 12 under the heading "Policy Considerations".

The Tax Institute has consistently called for this high standard to apply to these AFSL holders. Of particular importance are the education and experience requirements that will be necessary for AFSL holders to meet to ensure that they are in a position to provide tax advice at the level of competency that providing proper protection for consumers demands.

Discussion

1. Eligibility requirements

A new category of person, called a "tax (financial product) adviser" (**TFP Adviser**) is created through the introduction of the regulatory framework contained in the Exposure Draft. It applies to persons who provide tax advice in the course of providing advice that relates to financial products.

The education and experience requirements a financial adviser applying to register with the Tax Practitioners Board (**TPB**) under these new rules is required to comply with are of paramount concern. Education and experience comprise the main "eligibility requirements". If these standards are not sufficiently high, the quality of service to be provided by these advisers and ultimately the protection of consumers will be severely compromised.

The proposed education and experience requirements that are to have effect from 1 January 2015 are contained in the short paper issued by Treasury in conjunction with the Exposure Draft (**Draft Paper**). Based on the proposed operation of these rules, as the regime does not apply in full until 1 July 2016[3], no person registering as a TFP Adviser will be required to meet the full registration requirements before this date. Therefore, the full eligibility requirements will not actually apply to any person registering under these rules until 1 July 2016.

To date, one of The Tax Institute's greatest concerns has been the lack of detail surrounding what will be the likely education and experience requirements for these financial advisers. Based on the lack of detail in the Draft Paper, our concerns remain.

We urge the Government to issue amendments to the Regulations in a more complete form than the Draft Paper to ensure there is sufficient opportunity for Treasury to properly consult on the content of the amendments to the Regulations and finalise them well in advance of their proposed start date of 1 January 2015.

a) Education and experience

In all cases, an applicant would need to be an AFSL holder or representative of one. After this threshold is passed, there are three "categories" which have been proposed

[3] Paragraph 1.18 of the EM

which have differing education and experience requirements attached. These are set out in the table below:

Category	Education	Experience
A	- Successful completion of a "TPB approved course in Australian tax law for tax (financial product) advisers".	- 2 years full-time relevant experience in the preceding 5 years.
B	- Degree/award approved by the TPB from an Australian (or equivalent) tertiary institution in a "discipline relevant to tax advice (financial product) services"; and - Successful completion of a "TPB approved course in Australian tax law for tax (financial product) advisers".	- 18 months full time relevant experience in the preceding 5 years.
C	- Successful completion of a "TPB approved course in Australian tax law for tax (financial product) advisers"; and - Voting membership of a "recognised tax (financial product) adviser association" or a tax agent association.	- 12 months full time relevant experience in the preceding 5 years.

There are several undefined elements of the education and experience requirements that comprise these three categories which are of concern to us.

b) "Relevant experience"

Further detail is required as to what the TPB may regard as "relevant experience" and what amounts to "substantial involvement" in the work undertaken by an individual looking to register as specified in items 9.1 to 9.5 in the Draft Paper. The Tax Institute is concerned that the threshold requirements may be very low. In the interests of ensuring that a high standard is required of (and maintained by) persons wishing to register as a TFP Adviser, more detail is required about what the TPB will regard as a person having had substantial involvement in providing tax advice (financial product) (**TAFP**) services and in respect of related areas of tax law.

c) "Discipline relevant to TAFP services"

No guidance is available regarding what is a discipline relevant to TAFP services. We query whether this simply relates to tertiary qualifications attained in financial planning or the educational requirements to obtain an AFSL as governed by ASIC.

Recent experience in respect of the regulation of financial advisers by ASIC indicates that ASIC itself will be requiring re-certification of financial advisers suggesting that initial certification requirements to obtain an AFSL may not have been sufficient.

If this is the case, and the education required by the Regulations relies on the education already obtained by an AFSL holder, The Tax Institute is concerned that these threshold requirements may be very low.

Given the nature and breadth of tax advice provided by financial advisers is similar to the breadth of tax advice that registered tax agents provide, financial advisers should be required to meet no less an educational standard than that required of registered tax agents. The Tax Institute is of the view that the TPB should ideally recognise a course in a discipline which captures study in the areas of accounting, tax and commercial law. If this ideal is not practically attainable, then The Tax Institute recommends that, as a minimum, a person registering in this category should meet the educational requirements required to become a "certified financial planner" recognised by the Financial Planning Association of Australia.[4]

d) "TPB approved course in Australian tax law for tax (financial product) advisers"

No detail is available regarding the likely content of a "TPB approved course in Australian tax law for tax (financial product) advisers". At a minimum, we are of the view that a person wishing to register as a TFP Adviser would be required to have virtually the same level of tax law knowledge ordinarily expected for a person registering as a tax agent. This based on the breadth and nature of what constitutes a "financial product[5]" and the breadth of tax knowledge required to provide tax advice to a competent level in relation to financial products. It will be difficult to exclude certain parts of the tax law that a TFP Adviser would not be required to know to give tax advice in relation to financial products to a competent standard.

In this regard, the course the TPB requires a person registering as a tax agent to complete should be the same course that a person registering as a TFP Adviser should be required to complete.

e) Other requirements – Commercial law

We note that the education and experience requirements make no reference to requiring a person applying as a TFP Adviser to complete a TPB approved course in commercial law.

A commercial law course concentrates primarily on contract law and business structure law. A detailed understanding of contract law is crucial for financial adviser, given that some of the most complex contracts an individual will enter into relate to

[4] Refer to http://www.fpa.asn.au/media/FPA/CFP/CFP_2013ApprovedEducationList.pdf
[5] As defined in the Corporations Act 2001

superannuation, managed funds, managed investment schemes, share products and interest rate products, all financial products a financial adviser will commonly advise an individual on. A consumer would expect their adviser to be able to assist them in understanding their legal/contractual obligations, and often the tax implications arise directly out of a full understanding of the contractual terms.

As far as entity structures are concerned, a comprehensive understanding of commercial law is also crucial to providing proper financial advice as the legal structure often completely determines the tax treatment of a product.

Two examples are:

- How can a financial adviser advise a family trust on franked dividends without understanding the complex 45-day rules which apply to certain discretionary trusts and the various implications of making family trust elections?
- A leveraged property strategy needs to be implemented quite differently for an individual and a SMSF. It would be necessary for a financial adviser to be in a position to identify the differences and structure them appropriately.

In our view, Treasury should consider including a commercial law course requirement in the Regulations as a requirement for applicants in this category. This would ensure that a high standard of competency can be achieved and maintained by this group when delivering tax advice. We recommend that this requirement apply to all three categories (A to C) as set out in the table above.

2. Application of regime

    a) Requirement to register

A person can register under the TASA as a TFP Adviser where they provide a TAFP service. A TAFP service[6] is broadly defined as a tax agent service provided in the course of advising on one or more financial products. It incorporates two of the three elements of a "tax agent service", but does not include representing an entity in their dealings with the Commissioner. This means that a person registered as a TFP Adviser could therefore not telephone the ATO to enquire about any aspect of their client's tax affairs, even if they have sought the permission of their client to contact the ATO. This restriction is appropriate for a financial adviser registering as a TFP Adviser.

Financial advisers who do wish to represent their clients in their dealings with the Commissioner will be required to register as a "tax agent" as registering as a TFP Adviser will not be sufficient for this purpose.

The effect of the proposed changes is that three "categories" are created as follows:

[6] Draft section 90-15

i) Persons who give tax advice to their clients in the course of providing financial product advice and represent their clients in their clients' dealings with the Commissioner (ie tax agent);
ii) Persons who give tax advice to their clients in the course of providing financial product advice only (ie TFP Adviser); and
iii) Those who don't provide tax advice or only give tax-related factual advice to their clients in the course of providing financial product advice (not subject to TASR).

For persons in (iii), if a client relies on any tax-related information supplied to them, then the provision of the tax-related information could well amount to a TAFP Service, particularly where it might reasonably be expected that a person receiving the advice might rely on it[7]. It is difficult to envisage circumstances where a financial adviser could provide comprehensive financial advice without alluding to the tax aspects of the financial products being advised on.

An example is provided in the EM when a person is providing tax agent services and would need to register with the TPB as a tax agent (Example 1.1). Example 1.2 demonstrates when a TAFP service is being provided. We recommend additional examples be included that demonstrate when a person is providing tax agent services or TAFP services. This will ensure that financial advisers who are new to this kind of regulation have sufficient guidance to determine when they will be required to register with the TPB (and on what basis).

We also recommend some examples demonstrating when a person is or is not only giving tax-related factual advice[8] in respect of a financial product be included, such as:

1) *A bank teller passes on to a customer a brochure containing statements about tax for a particular financial product offered by the bank. The brochure has been prepared and reviewed by the bank's tax advisers and no discussion is entered into between the bank teller and the customer about tax. The bank teller is not providing a TAFP Service.*

2) *A financial adviser attends a party. Upon finding out there is a financial adviser in attendance, a guest approaches the financial adviser and asks them about a financial product they are considering. The financial adviser provides some general advice to the guest, including in relation to tax and suggests the guest come see them in their office. As the guest may rely on the information provided, the financial adviser may be providing a TAFP Service.*

Including examples of this nature will help a financial adviser define the circumstances where he/she may be providing a TAFP service, tax agent service or neither.

[7] Draft section 90-15(b)
[8] See para 1.25 of the EM

Based on the above, financial advisers in (i) above would need to register with the TPB as a tax agent and financial advisers in (ii) would need to register with the TPB as a TFP Adviser. Financial advisers in (iii) would not need to register with the TPB.

b) Can a registered tax agent provide TAFP services?

A critical part of whether a TAFP service is provided is whether the tax advice is provided in the course of advising on one or more financial products as defined in the *Corporations Act 2001* (Cth). Paragraph 1.28 of the EM notes the possibility of registered tax and BAS agents "inadvertently" providing tax advice (financial product) services "unless they are otherwise advising on financial products". Ordinarily a tax or BAS agent is unlikely to be providing general advice about a financial product, however they may have a client who comes to them for tax advice specifically in relation to a financial product.

Though a TAFP service is defined as a "subset" of tax agent service, it should be made clear what happens in the circumstances where a registered tax agent provides tax advice specifically related to a financial product, but is not otherwise providing general advice in relation to the financial product. In our view, the tax agent should be regarded as providing a tax agent service in this circumstance, though this result does not clearly arise on the face of the draft legislation.

The new civil penalty provision, subsection 50-5(2A), states that you are liable for a civil penalty if you provide a TAFP service and are not a registered tax agent or registered tax (financial product) adviser. By implication, a civil penalty will not apply to a registered tax agent who provides TAFP services. Notably, section 50-5(2A) does not commence until 1 January 2015, which leaves an 18 month gap of uncertainty (from 1 July 2013 to 31 December 2014) regarding whether registered tax agents can provide TAFP services. To remove the uncertainty, this provision should commence from 1 July 2013.

There is also an implication from the statement at paragraph 1.28 of the EM that a tax or BAS agent is unable to provide tax advice in relation to a financial product at all. In our view, a tax agent would be best equipped to provide this kind of tax advice. Two examples, Examples 1.6 and 1.7, have been included in the EM in relation to the operation of the civil penalties provision to demonstrate (again by implication) that a registered tax agent is able to provide TAFP Services. However, there is no example confirming that a registered tax agent who does not hold an AFSL can provide TAFP services.

To avoid any confusion and reliance on a series of implications, it would be useful if a statement clarifying that registered tax agents can provide TAFP services was inserted into the EM, or if Treasury thought necessary, an express provision inserted into the law to this effect. An example demonstrating this should also be included in the EM.

3. Registering with the TPB

a) Notification period

The notification period runs from 1 July 2013 through to 31 December 2014. In this period, a financial adviser can notify the TPB and register as a TFP Adviser if, prior to 1 July 2013, they were an AFSL holder (or representative) and were providing TAFP services[9]. This registration will last three years and retroactively begins from 1 July 2013.

This threshold is very low and does not require the registrant to have any particular level of tax-related experience or education. This detracts from the rigour of the TASR (and the policy object of it) that should otherwise apply to ensure certain competency standards are met. This also raises concerns about whether persons registering during this period will be fully equipped to deliver tax advisory services in the context of providing financial advice to a competent standard.

We acknowledge that the purpose of this may be to "ease" AFSL holders into the rigour of TASR. However, we note that the registrant will have to comply with the Code of Professional Conduct (**Code**) and this does to some extent allay our concerns about whether consumers will be afforded a suitable level of protection if these registrants fall short of the competency standards required under TASR. Persons applying to register in this period (**notifiers**) will need to be made aware that the Code will apply to them as soon as their registration has been accepted[10].

b) Transitional period

The transitional period runs from 1 January 2015 through to 30 June 2016. During this period, a person can register as a TFP Adviser and their registration will start on the date they apply and continue for three years. The relevant eligibility requirements are based on a "relaxation[11]" of the full eligibility requirements that would otherwise apply to a person registering as a TFP Adviser under the full force of the regime. Again, a person registering in this period would not have to meet the education and experience requirements that will be contained in the Regulations.

We support a person being required to meet the "fit and proper person" test, the professional indemnity insurance requirements and to satisfy the TPB they have sufficient experience to be able to provide TAFP services to a competent standard.

Apart from not having to meet the education and experience requirements, our main concerns here relate to the absence of guidance provided as to when a person will be regarded as having "sufficient experience" and what would be regarded as being able

[9] Sch 1 Item 51 in the transitional rules in the Exposure Draft

[10] The TPB will need to ensure that this requirement is highlighted to persons registering during the notification period.

[11] EM paragraph 1.18

to provide services to a “competent standard”. The TPB appears to be being given a wide discretion as to who will be able to successfully register as a TFP Adviser during the transitional period where this “relaxed” approach is being taken.

There is potential, for example, for a person applying on the last day of the transitional period (30 June 2016) to not be subject to the full registration requirements under TASA until as late as 30 June 2019. There is an integrity concern as the education and experience requirements will not apply to this person for some six years after TASR begins to apply to financial advisers who provide tax advice in relation to financial products.

In order to prevent this situation from arising, we propose that the law provides for registration to be granted for the 18 month period 1 January 2015 to 30 June 2016 retroactively applying to an applicant in the same way registration under the notification period would work, rather than granting a 3 year registration prospectively. This may cause an administrative burden on the TPB as all registrants that applied during the notification and transitional periods would be required to renew their registration on 1 July 2016. However, as for tax and BAS agents renewing their registration, section 20-50(2) would equally apply to a TFP Adviser renewing their registration preserving their registration status until the TPB has had opportunity to review their renewal application.

As consumer protection is the ultimate goal, ensuring all persons registered under these rules are required to meet the education and experience requirements from the start of the full regime on 1 July 2016 is essential.

c) Tax advice disclaimer should continue

Currently, financial advisers providing tax advice are required to provide a disclaimer in their Statement of Advice[12] provided to clients in respect of tax advice they have provided. Given that a person registering during the notification or transitional period will not have to meet the full education and experience requirements until they apply to re-register after the regime begins to apply in full from 1 July 2016, we recommend that financial advisers who have registered during the notification and transitional periods still be required to provide the disclaimer in their Statement of Advice until they have re-registered and met the full education and experience requirements.

As the education and experience requirements to be contained in the Regulations start to apply from 1 January 2015, a person who has registered during the notification or transitional period should be able to register in full with the TPB after 1 January 2015 if they can demonstrate they meet the relevant education and experience requirements. This will ensure that consumers are afforded protection by ensuring registrants have the proper qualifications to be registered as a TFP Adviser as early as possible.

This should also assist the TPB to handle the administrative burden of the numerous financial advisers likely to have to register under this regime by allowing a staggered

[12] A Statement of Advice is required by all AFSL holders.

re-registration process from 1 January 2015. This should assist to prevent an "onslaught" of re-registrations from notifiers and transitional period registrants from 1 July 2016.

4. Renewing registration obtained during the notification or transitional periods

On the basis that persons registering during the notification and transitional periods can register by meeting such low requirements, The Tax Institute queries what express requirement there is to require these registrants renewing their registration after it expires (on 30 June 2016 for notifiers and such later time for persons registering in the transitional period) to meet the full eligibility requirements after these requirements commence on 1 January 2015.

A reading of the TASA suggests that after the TPB decides to renew an application under section 20-50, section 20-25 then applies which requires the TPB to grant an application "if you are eligible". By implication, if the TPB has regard to this element, we impute that this would then mean the TPB should look to the "eligibility" requirements contained in section 20-5 and the Regulations to see if the applicant renewing their registration is eligible for registration. This relies on making assumptions and implying that the law will operate this way to require the TPB to look to the eligibility requirements. However, there is an absence of an express provision to this effect.

We acknowledge that the TPB did in fact administer the law in this way upon renewing the registration of tax agents who applied in the transitional period.

To ensure that financial advisers who have registered during the notification and transitional periods are in fact required to meet the full eligibility requirements, The Tax Institute recommends an express provision be included in the transitional rules requiring the TPB to apply the full eligibility requirements to this group of registrants. We do not doubt that the TPB will administer these rules consistently with how they were applied to reregistering tax agents. However, to ensure the TPB is required to administer the rules in this way, we seek assurance from the Government this will occur and therefore request inclusion an express provision to this effect.

The purpose of this is to ensure that this group of registrants are made aware of the full eligibility requirements that will be mandated under TASA that will apply to them. It will also ensure that the highest standard of education and experience will apply equally to and be required of all registrants under this regime from 1 July 2016, regardless of whether they registered before or after 1 July 2016.

5. Professional conduct – Complying with the Code

The greatest form of consumer protection is found in the application of the Code to persons who have registered under the TASA as a tax agent or BAS agent. The Code will also now apply to persons who register under TASA as a TFP Adviser from 1 July 2013.

This means that, from 1 July 2013, consumers of TAFP Services will have access to the protections under the Code, including the "safe harbour" rules, that traditionally consumers of tax agent (and BAS agent) services have had.

This is a significantly positive step in ensuring the protection of consumers.

We suggest, however, that, in the interests of consumer protection, a modification be made to the Code to place an obligation on a registered TFP Adviser to refer their clients on to a registered tax agent (or other registered TFP Adviser) where an issue arises that falls outside the ambit of their experience in respect of giving tax advice. This will ensure that a level of competency is required to be met by a registered TFP Adviser and those who are unable to meet that level of competency will be obligated to refer their client on to someone who can.

We suggest inclusion of a provision in the "competency" provisions in section 30-10 of TASA along the lines of the following:

> If you are a registered tax (financial product) adviser who is providing a tax advice (financial product) service and you are unable to provide that service competently, you are required to refer your client to a registered tax agent or registered tax (financial product) adviser who is able to provide that tax advice (financial product) service competently.

6. Application of Civil Penalty regime - Extension of "exemption"

The exemption from the current TASA which applies to AFSL holders who provide tax advice in the course of providing financial product advice is due to expire on 30 June 2013. The penalty provision, section 50-5 of TASA, which applies to persons who provide a tax agent or BAS agent service for a fee and are unregistered, will be amended to incorporate the unlawful provision of TAFP services by an unregistered person[13]. However, this amendment will not begin to apply until 1 January 2015. The effect of this will be to allow unregistered persons to provide TAFP services from 1 July 2013 through to 31 December 2014 without penalty[14].

We understand that the purpose of deferring the start of the application of this amendment to the penalty provision to 1 January 2015 is to allow a person who provides TAFP services on or after 1 July 2013 to do so without penalty for otherwise providing TAFP services unregistered from 1 July 2013 until they notify the TPB they wish to register as a TFP Adviser during the notification period. In effect, this will allow someone who has no intention of applying to register during the notification period to also provide TAFP services without penalty.

[13] New subsection 50-5(2A) of TASA
[14] Paragraph 1.91 of the EM

The effect of this is to impliedly extend the express exemption contained in the Regulations[15] that is due to expire on 30 June 2013 to 31 December 2014 without a corresponding legislative amendment.

To ensure this does not occur, we recommend the penalty provision be amended so that it starts to apply from 1 July 2013 and contains an exemption for persons who apply during the notification period to not otherwise be penalised for providing TAFP services unregistered. If the provision were to operate in this way, it would have the dual effect of encouraging more financial advisers who provide tax advice to be brought under TASR sooner and would prevent the occurrence of unregistered advisers from providing tax advice through to 31 December 2014 without risk of penalty. This would positively contribute to the protection of consumers by ensuring unregistered persons providing TAFP services would be penalised.

7. Continuing Professional Education (**CPE**)

There is a requirement in Exposure Draft that, upon renewing their registration, a TFP Adviser (as a well as a registered tax or BAS agent) will be required to have met CPE requirements as required by the TPB. We observe that the TPB will need to amend their CPE policy to incorporate TFP Advisers registered under TASA. In our view, CPE requirements similar to those that apply to registered tax agents should be applied to TFP Advisers.

8. Other amendments to TASA

    a) Professional Indemnity insurance

The streamlining of the requirement for professional indemnity (**PI**) insurance is a positive administrative step[16]. However, it would be useful to know the scope of the PI insurance a TFP Adviser will be required to maintain. In our view, this insurance should meet the TPB's minimum requirements that apply to PI insurance for registered tax agents.

We also note that too low education and experience requirements may inadvertently have a negative impact on PI insurance premiums. If persons registering as TFP Advisers are not required to meet sufficient education and experience requirements, this increases the risk of claims against these advisers for inappropriate tax advice because they have not been required to reach a high enough standard (of education and experience) prior to obtaining their registration to give tax advice. In turn, this could drive up premiums for PI insurance policies that not only affects TFP Advisers, but potentially registered tax advisers who are also required to have these policies.

    b) Power to TPB to notify a professional association – draft section 60-125(8)(c)(iia)

[15] Regulation 13(2)
[16] Draft sections 20-5(1)(c), (2)(d) and (3)(e).

A new power is being given to the TPB to allow them to notify a professional association accredited by the TPB where a member of the professional association has been subject to an investigation by the TPB.

Two issues flow from the introduction of this power. The first is the purpose of notifying the professional association of the investigation of its member whether the result of the investigation is that the person has or has not breached TASA. As the TPB is the body which governs the professional conduct of persons registered under TASA, notifying the professional association should not necessarily be a means to triggering a professional association's own disciplinary actions in place of any disciplinary action the TPB should take. As an example, The Tax Institute is primarily an education body and therefore is primarily is concerned with educating members of the tax profession including its own members rather than the conduct of members of the profession.

Secondly, we query what potential impact this may have on a professional association's accreditation given by the TPB if the professional association does not take any action upon being notified by the TPB of the investigation undertaken by the TPB. We recommend a safeguard be put in place to ensure that a professional association's accreditation with the TPB should not be adversely impacted if the professional association chooses not to act on the information provided by the TPB, even if the TPB's action results in the member being deregistered. At a minimum, a note to this effect should be included in the TASA, either at section 60-125(8) or included in the accreditation provisions contained in the Regulations.

c) TPB to provide a wider range of information to the ATO – draft section 70-40(3)

This is a broadening of a power that has already been given to the TPB to enable the TPB to pass on information to the Commissioner for the purpose of administering a taxation law. If properly applied, allowing the TPB such a broad power to provide information to the Commissioner to assist the Commissioner to administer a taxation law can be positive as demonstrated in the example given in Example 1.11 in the EM.

However, this broad power may potentially be used inappropriately and put the Commissioner in the position of stepping into the shoes of the TPB rather than maintain his position as administrator of the tax law.

Clear guidelines are required regarding when it is appropriate for the TPB to utilise this power. For example, the TPB could formulate a guideline in consultation with the tax profession to limit the power to apply in circumstances where the Commissioner can demonstrate to the TPB that the Commissioner requires the information for the purpose of administering a tax law. Putting guidelines in place will also provide transparency regarding when and how this power is likely to be used by the TPB.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0011.

Yours sincerely

Steve Westaway
President