

23 April 2019

Mr Nick Westerink
Secretariat - Treasury
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: TPBreview@treasury.gov.au

Dear Mr Westerink

AFA Submission – Consultation: Review of the Tax Practitioners Board

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for over 70 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The Board of the AFA is elected by the Membership and all Directors are currently practicing financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting their wealth.

Introduction

Financial advisers came under the Tax Agent Services Act (TASA) and Tax Practitioners Board (TPB) regime four years after tax agents and BAS agents from 1 July 2014. Tax (financial) advisers are not permitted to do tax returns or represent their clients with the ATO. Tax advice is typically only peripheral to the primary role of financial advisers, in providing financial advice. In this sense, they may provide advice with respect to the tax implications of contributing to superannuation or the capital gains tax implications of a particular transaction. For some financial advisers, tax is even less central to what they do, such as advising on the deductibility of insurance premiums and the difference between the tax treatment of insurance being held either inside superannuation or outside superannuation.

Financial advisers are also subject to oversight by the Australian Securities and Investments Commission (ASIC) and accountable to the rules of a range of regulators, such as ASIC, the Financial Advisers Standards and Ethics Authority (FASEA), AUSTRAC, the Office of the Australian Information Commissioner (OAIC) and the ATO (with respect to Self-Managed Superannuation Funds). For many financial advisers, they still remain somewhat uncertain as to why they are actually required to be registered with the TPB.

Much has changed in the financial advice sector since the 1 July 2014 commencement date for inclusion in the TASA and TPB regime. Firstly, from March 2015 all financial advisers were required to be registered with ASIC on the Financial Adviser Register. Prior to this time, it was only Authorised Representatives that needed to be included on ASIC's Authorised Representatives Register. Prior to March 2015, salaried advisers did not need to be registered with ASIC. Also in 2017, the Financial Advisers Standards and Ethics Authority was established, which has since established a new education standard for financial advisers that will be progressively introduced in the period up to the end of 2023.

The AFA has worked closely with the TPB since prior to the commencement of the applicability of the TASA regime to financial advisers. They are an accessible regulator who consults effectively on changes to the regime and have listened to the feedback from the financial advice sector. The AFA is a recognised tax financial adviser association, and many of our members are registered with the TPB under registration option 304, which takes into account experience and membership of a professional association. The TPB have regular meetings with the recognised tax financial adviser associations, which provides a useful forum for us to understand the key TPB issues, projects and consultations. We are, however, very conscious that the other stakeholders in the market, including other regulators, do not always appear to give adequate consideration to the TPB implications of any changes related to the financial adviser sector.

We are very conscious that the TASA regime was designed in part to include additional consumer protection measures. Financial advisers, as either Australian Financial Services Licensees (AFSLs) or through their AFSL, are subject to mandatory membership of the Australian Financial Complaints Authority (AFCA). AFCA provides a very consumer friendly complaint framework, where it is free to make a complaint and the decision of AFCA is binding on the AFSL. It is mandatory to include reference to access to AFCA in a Financial Services Guide (FSG), that must be provided to clients at the time of the first provision of any financial service. AFCA can consider complaints which refer to tax matters, including any loss that may have arisen as a result of inaccurate or inappropriate tax advice. It is therefore quite unlikely that consumers will approach the TPB with respect to complaints about the financial advice that they have received.

Ultimately, it would be fair to say that the ongoing direct supervision of the financial advice population by the TPB remains a matter of debate, and in our view something that is worthy of consideration as part of this review. There seems to be limited value in having financial advisers registered directly with both ASIC and the TPB. Should the review choose to consider this pathway, there would undoubtedly be a significant opportunity to reduce the extent of regulatory duplication. We anticipate that there may be a range of options to do this, including allowing the TPB to delegate certain obligations with respect to the oversight of financial advisers to either ASIC (i.e. registration) and/or FASEA (education standards and CPD).

Response to Questions raised by Treasury

1. Are the governance arrangements for the Tax Practitioners Board working effectively and could they be improved?

The TPB is a part time Board that is supported by a full time executive team including the CEO, who is also the Secretary to the Board. This is similar to FASEA, however, very different to ASIC which is made up of six Commissioners. Unlike the FASEA Board, who never directly interact with the financial advice sector, representatives of the TPB Board do both interact with the recognised tax financial adviser associations and also have presented directly to adviser audiences. We are supportive of the way that the TPB Board have interacted with the financial advice sector. The Board members who we have interacted with and the full time staff have both sought to understand the financial advice sector and have engaged constructively. We have had somewhat limited engagement on investigative matters or disciplinary matters, however, from what we have observed, it is not apparent that there are any fundamental weaknesses in the governance arrangements. The appointment of a part time Board with relevant and current experience appears to work effectively.

We are conscious that this question is also addressing the issue that the TPB operates in large part out of the ATO. We note that this may be an issue of greater concern to some other stakeholders, however, as the ATO is not a direct regulator of financial advice (other than with respect to SMSFs), we do not have any particular concern in this regard.

2. Are the qualification and experience requirements for individuals seeking to become a registered tax practitioner, or to renew their registration, appropriate?

The financial advice profession is in the middle of a very significant transition. The new degree equivalent education standard that has been implemented as part of the 2017 Professional Standards legislation, will increase the minimum education standard in a material manner. This will incorporate the requirements of the TPB, and once it has been fully implemented in terms of application to all existing advisers by 1 January 2024, there is no obvious need for a secondary education standard to be set by the TPB. It is important for the TPB to work closely with FASEA to ensure the right outcome. We also believe that the TPB should be able to rely upon the FASEA CPD standard.

At this time, we continue to operate under the existing TASA and TPB regime, where financial advisers have a number of registration alternatives, based upon their formal education, their completion of specific tax related subjects and their experience.

The majority of financial advisers rely upon item 304 that requires a financial adviser to be a member of a recognised tax financial adviser association and to have six years full time experience out of the last eight years. In the context of all the current circumstances, we consider this to be an appropriate standard for existing advisers until the new FASEA standard is fully embedded, however we do have one material concern with respect to the impact of a six years full time experience out of the last eight years requirement on anyone who has taken a break from the workforce and then returned on a part time basis. Most typically this would apply in the case of maternity leave, however it may also apply in the context of a father taking paternity leave or anyone being absent for the purposes of caring for someone.

If we use the example of a mother taking a break for maternity leave and then returning part time, then it would not be difficult to see the six years full time experience out of the last eight years requirement breached at some point. Where a mother had two breaks for the birth of two children, it would become even more challenging. The most concerning thing about this is that it places

unreasonable conflicts on the mother in forcing them to return to work sooner than they would prefer and pressuring them to come back to work full time or at least no less than 4 days a week. We believe that this requirement is discriminatory. As we understand it, this issue was raised with Treasury at the time that it was introduced, however no changes occurred. We think that this review is a good opportunity to rectify this issue. It might be that the requirement should be reduced to four or five years out of the last eight or that there should be some discretion provided to the TPB.

One other key issue that we have identified with registration and qualifications is the approval of the TPB required courses. Tax (financial) advisers, other than those who are members of professional associations and have six years full time experience out of the last eight years, are required to do an Australian Taxation Law course and a Commercial Law course. However, with respect to the recognition of courses completed in the past, this requires the higher education provider to apply to the TPB for them to approve and recognise the course. Unfortunately, however, it seems that few of the higher education providers have actually gone through the approval process for tax (financial) advisers. There are a lot of financial advisers who have previously completed Commerce and Business degrees that would like to see their applicable courses recognised. There are further complications with this TPB approval requirement, as FASEA are only recognising Australian Taxation Law courses and Commercial Law courses that are approved by the TPB. More needs to be done to ensure that these courses are approved.

3. Are the Tax Practitioners Board’s compliance and investigation powers and functions appropriate?

The AFA have been aware of just three members who have been investigated by the TPB. On the basis of this limited experience, we are therefore not in a position to assess the appropriateness of these powers. We would suggest, as part of this review, that the powers of the TPB be compared with other regulators such as ASIC, which have been the subject of significant change over recent years. It might be that there is room for an increase in the powers, however with respect to matters related to financial advisers, we do not see an obvious case for this to be substantially expanded.

4. What other legislative measures could be implemented to further protect consumers of tax service?

Given that the clients of financial advisers go to AFCA for remediation of complaints resulting from errors and inappropriate advice by financial advisers, and they have the ability to award binding judgements and monetary compensation, we see limited reason for an increase in TASA consumer protections for advice provided by tax (financial) advisers. In the financial advice space, clients can also complain to the licensee, ASIC and professional associations. Given the existing External Dispute Resolution model that is available to financial advice clients, we see no need for change in the TASA area.

We are aware that at the time that the TASA regime was extended to financial advisers, that some stakeholders were arguing that this was important on the grounds of consumer protection. This was never the case with respect to the complaints pathways. Possibly there was some relevance with respect to education, however this has also been addressed by the professional standards and FASEA reforms.

5. Is the ‘safe harbour’ provision in subsection 284-75(6) of Schedule 1 to the *Taxation Administration Act 1953* effective?

In the context of the fact that tax (financial) advisers do not do tax returns, we do not propose to comment with respect to the workings of the ‘safe harbour’ provision.

6. Are there any other suggestions to strengthen the operation of the 'Tax Agent Services Act 2009' or the 'Tax Agent Services Regulations 2009'?

We would like to raise one further issue, which is a point of contention for many financial advisers. The majority of financial advisers are self employed and operate their business as a company that is known as a Corporate Authorised Representative (CAR). They are required to register with the TPB both as individuals and for the CAR. This is because either the financial advice is issued in the name of the CAR or the fees are paid to the CAR. This means that most financial advisers need to have two registrations with the TPB and pay two registration fees. The requirement to register both has caused confusion and complication and we get a lot of feedback that it would be more sensible for registration to be done just once, at the individual level.

We are conscious that the TASA registration regime is run on the basis of sufficient numbers and that it is not necessary for all tax practitioners to be registered if they are working in a business where they are supervised by someone who is registered. We believe that it would be appropriate for the review to consider whether this remains the most suitable method. This would assist to avoid someone who has been banned by the TPB from operating as an employee of another tax practitioner. Financial advisers are also required to be individually registered on the Financial Adviser Register. This allows their clients to confirm their registration, which simply may not be the case with the TPB, if their adviser is not individually registered and is operating under the sufficient numbers exemption. Neither does this make it possible to estimate the full number of tax practitioners in the regulated population.

Concluding Remarks

The AFA welcomes the review of the TPB and the TASA regime. As we have highlighted above, we believe that it would be beneficial for the review to give consideration to how tax (financial) advisers fit into the regime, given the somewhat peripheral nature of tax, in the context of financial advice and the fact that financial advisers are already subject to oversight by other regulators and most particularly, ASIC. We believe that there is opportunity to reduce the regulatory overlap and duplication with regard to registration.

The AFA welcomes further consultation with the review and Treasury should clarification of anything in this submission be required. Please contact us on 02 9267 4003.

Yours sincerely,

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Association of Financial Advisers Ltd