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Mr Gerry Antioch
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Dear Mr Antioch,

## Tax Agent Services Act – Tax (financial) advisers

The Australian Bankers' Association (ABA) appreciates the opportunity to provide comments on the exposure draft regulations to the *Tax Agent Services Act 2009* (TASA), which prescribe ongoing registration requirements for tax (financial) advisers as well as a number of other related amendments.

The TASA reforms seek to bring financial advisers who provide tax agent services within the TASA regime administered by the Tax Practitioners Board (TPB), by allowing advisers to register or re-register as tax (financial) advisers.

Financial advisers seeking to register as tax (financial) advisers will be required to meet substantive ongoing education and experience requirements from 1 July 2017. Prior to this, advisers may seek to register with the TPB, without having to meet these ongoing requirements.

The ABA notes that it is important for all financial advisers to be competent to provide high quality financial advice. It is important to ensure that any new legal and regulatory requirements are not ambiguous and do not impose unreasonable regulatory burdens or unnecessary compliance costs on the banking and financial services industry and advice profession. Significant parts of the TASA regime remain uncertain, and in particular, the intent and scope of the legislation and the new and additional obligations, such as the competency requirements.

The ABA has a number of concerns regarding the application and operation of the regime across the banking and financial services industry. It is important to note that compliance costs are not just associated with registration and the competency requirements, financial advisers and their businesses will need to make significant changes across their compliance systems, including changes to policies and procedures, existing training programs, existing customer interface and service approaches, and all regulated disclosure documents and other relevant disclosures across their advice channels.

### Definition tax agent service

The ABA believes that the broad definition of what constitutes a "tax agent service" means certain services provided by banks and banking groups may be inadvertently captured without clarification. It is important to ensure that any new legal and regulatory requirements do not create legal uncertainty and/or different interpretations across the industry.

Banks and banking groups could be captured by the TASA regime in a number of contexts and in a number of ways, for example:

- Information about not providing a Tax File Number (TFN) when opening a bank account, information about how interest on a savings account may be subject to tax, or information about government-designated special purpose deposit accounts, such as the different tax treatment of first home saver accounts (FHSAs) or Farm Management Deposits (FMDs) compared to other deposit accounts (in a basic banking context);
- Information about how a mortgage offset account (a separate savings account to a borrower's home loan) can offset interest applied to the savings account to the loan (in a credit and basic banking context);
- Information about how different companies or entities are taxed (in a small business context);
- Information about the concessional tax treatment of superannuation funds (in a superannuation context);

- Information about how life risk insurance can be tax deductible (in a wealth management context);
- Information about how the earnings on securities and investments may be subject to tax (in a stock broking context);
- A document or statement containing general information about tax liabilities or summary information about the performance, interest or earnings relating to a financial product (in the context of AFS licensees and their authorised representatives meeting various legal and regulatory requirements as well as fulfilling commercial and administration functions); and
- A document, resource or tool containing general information about tax liabilities in relation to certain classes of financial products (in the context of financial literacy information).

This tax information may be included as part of the provision of factual information, general advice or personal advice as defined in the Corporations Act. For example, a bank may provide a marketing brochure in their branch or a webpage on their website which relates to a deposit product and contains factual tax information about not providing a TFN when opening an account. Similarly, a bank teller or bank specialist may provide "general advice" (as defined under section 766B(4) of the Corporations Act) to a bank customer about the banking group's superannuation products, which includes information about the concessional tax treatment of superannuation. A bank teller or bank specialist may provide "personal advice" (as defined under section 766B(3) of the Corporations Act) to a bank customer about basic, retail banking products (albeit it would be rare, if ever, that bank staff in this instance would provide tax advice that relates specifically to the customer's particular tax situation or liabilities. Similarly, a bank financial adviser may provide "personal advice" to a bank client outlining a financial plan that provides recommendations relating to the client's personal needs and circumstances, which includes information about the tax treatment of different assets (i.e. income versus capital), but does not relate specifically to the client's particular tax situation or liabilities.

Invariably bank staff and financial advisers only incidentally touch on tax matters and provide factual tax information to their customers and clients, without interpretation of tax laws and application of tax laws to the individual's personal circumstances. While there are at times some tax complexities in an advice situation, many of the tax considerations are quite simple and reflect factual tax information or generic advice. Banks and their staff providing this type of factual tax information may be inadvertently captured.

The ABA strongly believes that this is contrary to the policy intent of the legislation to ensure that persons or entities providing tax advice, which is not merely incidental or generally available tax information, are covered by the legislation. Therefore, we consider that the definition of "tax agent service" should only relate to a service that is provided in the course of giving "personal advice" and only where the tax advice relates to the client's personal circumstances and involves the application and interpretation of tax laws in relation to those personal circumstances.

The ABA believes that law reform and explanation is needed to clarify the definition of a "tax agent service" and exempt factual tax information that is generally available tax information and incidental to the provision of financial product advice. This is consistent with the policy intent and the TPB's proposed guidance.

Therefore, the ABA is specifically seeking clarification via the regulations to exempt AFS licensees from the definition of a "tax agent service" if:

- Providing "factual information" and "general advice" as defined by the Corporations Act – this type of information and advice is by its very nature unable to contain information (including tax information) that relates to an individual's personal needs and circumstances; and
- Providing "personal advice" where the tax information or advice provided is generally available and incidental. "Factual tax information" should relate to information that does not involve the application and interpretation of tax laws. In practice, this would mean that bank staff providing personal advice would only be caught if they also provide tax advice (personalised) – this approach would remove any unnecessary duplication between licensing (under the FSR regime) and registration (under the TASA regime). It would also relieve administrative burden for the TPB.

The explanatory material should also confirm these exemptions and provide some details about certain circumstances by way of example (noting our examples outlined above).

Importantly, we note that additional exemptions, as announced by the previous Government and agreed with by the current Government, with regards to the definition have not been included in the draft regulations.

## Registration and competency requirements

The ABA notes that the registration application fee for a tax (financial) adviser who carries on a business as a tax (financial) adviser is $400 and a tax (financial) adviser who does not carry on a business as a tax (financial) adviser is $200. (We note that financial services licensees and authorised representatives that provide tax (financial) advice services may register with the TPB as registered tax (financial) advisers. However, to register, the entity need only notify the TPB that they are providing such services and that they are either a financial services licensee or an authorised representative. Therefore, during the notification period, entities are not required to pay the registration application fee.)

The ABA broadly supports the approach in the draft regulations to the competency requirements. We consider that the competency requirements should provide options for existing and new advisers to register, including:

- A degree or post-graduate award from a tertiary institution in a relevant discipline (such as, commerce, finance, economics, accounting, business or equivalent tax related discipline), coupled with a TPB approved course in Australian tax law completed (if not completed as part of the degree); or
- A diploma or higher from a registered training organisation or an equivalent institution in a relevant discipline, coupled with a TPB approved course in Australian tax law completed; or
- Three years full-time experience in the preceding five years, coupled with a TPB approved course in Australian tax law completed; or
- Six years full-time experience in the preceding eight years, coupled with membership in a recognised professional association meeting certain minimum requirements. However, we consider that membership requirements should be more flexible and professional accounting bodies should be able to satisfy this option[1]. (We note that additional supervision due to membership means a TPB approved course in Australian tax and commercial law does not have to be completed. In this regard, existing supervision models for AFS licensees should also be acknowledged).

While the ABA supports higher education and competency standards for financial advisers, the TASA regime would impose a number of additional obligations and inefficient business practices on AFS licensees and their representatives, which will increase compliance costs and administrative burden without additional benefit for consumers or the industry. We consider that the training and competency requirements for tax (financial) advisers should be aligned across the FSR and TASA regimes to minimise unnecessary compliance costs for financial advisers. This will ensure consistency and a comprehensive training and competency framework.

The TPB should not create contradictory requirements and should have regard to the existing education and training requirements a financial adviser is required to have to operate as a financial adviser (noting the different education and training requirements applicable to different advisers). With this in mind, we note that currently, financial advisers are not required to hold a tertiary degree, and therefore, we consider it is appropriate for either qualification to be deemed adequate for registration. We also note that existing supervision models for financial advisers should give assurances about advisers holding and maintaining appropriate competence.

Specifically, the ABA believes that the TPB should work with the Australian Securities and Investments Commission (ASIC) to ensure that relevant competency standards and the competency framework is aligned. Specifically, guidance should be prepared and amended to address legal and technical matters, such as with regards to ASIC's guidance – *Regulatory Guide 175: Licensing: Financial product advisers – Conduct and disclosure* [RG 175] to enable a financial adviser to comply with the best interest duty in the provision of personal advice and *Regulatory Guide 146: Licensing: Training of financial product advisers* [RG 146] to enable a financial adviser to meet their training requirements under both the FSR and TASA regimes. It is important that a holistic approach is taken to the development and implementation of a training and competency framework which allows the industry to meet its compliance obligations for the purposes of both the FSR and TASA regimes.

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[1] There are a number of the organisations recoginised by the TPB that financial advisers are typically a member which may not currently meet the criteria in the draft regulations e.g. 1000 voting members (of whom at least 500 are registered tax (financial) advisers). We also consider that the criteria should include 500 members that are either registered tax (financial) advisers **or** registered tax agents to ensure that professional accounting bodies are included, such as the CPA and the ICAA.

With this in mind, we note the continuing education approach (being a subset of the competency framework) proposed in the TPB's guidance – *TPB(EP) 06/2014 Continuing professional education policy requirements for tax (financial) advisers* (noting transitional arrangements still need to be considered).

Furthermore, the ABA believes that it is not appropriate to require tax (financial) advisers, particularly advisers that provide marginal tax advice, to complete standalone taxation **and** commercial law subjects. Specifically, we do not consider that the completion of a commercial law subject is necessary. While it may be relevant for a tax agent to be across commercial law, this is not relevant for the role of a financial adviser, unless they are providing advice to business or corporate customers, and in this instance, they would be required to gain specialist knowledge. A financial adviser providing advice to individual clients does not require competency in commercial law. Therefore, we consider that the options with a TPB approved course should require competence in Australian tax law (not commercial law as well) and that relevant concepts should be incorporated into existing subject areas and topics within the existing RG 146 framework rather than a standalone and new course requirement.

The ABA believes that the duplication for licensing (under the FSR regime) and registration (under the TASA regime) is excessive. Ultimately, we are concerned that additional compliance costs will increase the cost and/or reduce the availability of information and advice for Australian consumers and businesses. For this reason, we consider that it is important to reduce the impacts of regulatory duplication and compliance costs and streamline the training and competency requirements across both the FSR and TASA regimes. We would welcome the opportunity to work with the Government and other industry representatives on identifying a new and improved training and competency framework as part of the Government's current review of professional standards for financial advisers.

## Supervision

The ABA remains concerned about the uncertainty as to how the supervision framework is intended to operate. It is necessary to clarify the supervision requirements applicable to tax (financial) advisers. Both the draft regulations and the explanatory material have not addressed supervision requirements. Specifically, the 'sufficient number' requirement is problematic and greater flexibility should be accommodated and clarified via the regulations. Additionally, the terms 'substantial involvement' and 'under the direct supervision' are unclear and greater flexibility should be accommodated and clarified via the regulations, especially for smaller financial advice businesses and financial advisers working for banks and banking groups located in remote and regional areas. This will also assist the TPB to provide guidance to the industry.

The ABA notes there are existing supervisory models for banks and banking groups and the imposition of separate registration requirements relating to supervision which could impose unnecessary regulatory burden, administrative complexity and compliance costs is inappropriate. Banks and banking groups have in place sophisticated compliance systems which ensure their internal policies, processes and procedures meet their various legal and regulatory obligations and operational requirements relating to corporations, banking, financial services and credit laws. We consider that the supervision requirements applicable to a tax (financial) adviser should be consistent with existing requirements and for the purposes of complying with the Corporations Act.

We note the detailed comments about supervisory models and registration for authorised representatives made by the Financial Services Council.

## Conclusion

The ABA believes the concerns we have raised are important matters that need to be considered in order to clarify the intent and the scope of the law, provide certainty to the industry, and minimise unnecessary regulatory duplication and compliance costs.

Yours sincerely,

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**Diane Tate**