

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Minister for Finance, for the Treasurer**

*Tax Agent Services Act 2009*

*Tax Agent Services Regulations 2009*

Section 70-55 of the *Tax Agent Services Act 2009* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Tax Agent Services Amendment (Tax (Financial) Advisers) Regulation 2014* (the Regulations) gives effect to the *Tax Laws Amendment (2013 Measures No. 3) Act 2013*, and brings financial planners within the regime administered by the Tax Practitioners Board (the Board). The Regulations do this by prescribing registration requirements for tax (financial) advisers, and also set out a number of other changes, which are designed to give effect to the regime and bring tax (financial) advisers in line with other entities regulated by the Board.

These Regulations allow financial planners who provide tax (financial) advice services to register with the Board with different qualification and experience requirements to tax agents. This recognises that tax (financial) advisers provide a subset of the services that tax agents can provide. For example, tax (financial) advisers may not make representations to the Commissioner. The qualification and experience requirements are tailored to reflect the different nature of the service offered, when compared to the service offered by tax agents.

In order to fully bring tax (financial) advisers within the regime administered by the Board, a number of other amendments are made in the Regulations. These include allowing the Board to recognise tax (financial) adviser associations, and requiring the listing of tax (financial) advisers on the Board's register of registered and deregistered tax practitioners.

In addition, the amendments clarify that services which are required under a law of the Commonwealth a State or Territory to be provided by an actuary, are not a tax agent service. Similarly, services provided by a trustee to members of a trust or a managed investment scheme are not tax agent services.

The amendments also alter the experience requirements for BAS agents to better account for career disruptions due to extenuating circumstances.

A detailed explanation of the amendments is contained in the Attachment.

The Government consulted on the draft legislation in the *Tax Laws Amendment (2013 Measures No. 3) Act 2013* and the design of potential amendments to the Regulations between 8 February 2013 and 8 March 2013. At the same time, consultation was conducted on the possible content for regulations. Thirty-three submissions were received, including three confidential submissions. The non-confidential submissions are available on the Treasury website. A discussion paper on the content of the draft regulations was released on 14 June 2013 and closed on 11 July 2013. Eight submissions were received.

An additional roundtable consultation was conducted by Treasury with key industry stakeholders, the Board and the Australian Securities and Investments Commission (ASIC) on 13 May 2013 to discuss issues raised during the public exposure of the draft legislation and proposed regulations.

Throughout 2013 and 2014 there has been ongoing dialogue between key industry stakeholders, the Department of the Treasury, and the Board.

On 21 May 2014, there was a further roundtable consultation conducted by Treasury with key industry stakeholders and the Board, to discuss details of the proposed regulations.

The entirety of these regulations will commence on the date after registration.

## ATTACHMENT

### Regulation 1 – Name of regulation

This regulation provides that the name of the Regulations is the *Tax Agent Services Amendment (Tax (Financial) Advisers) Regulation 2014*.

### Regulation 2 – Commencement

This regulation provides that the entirety of the Regulations commence on the day after the instrument is registered.

### Regulation 3 – Authority

This regulation provides that the Regulations are made under the *Tax Agent Services Act 2009*.

### Regulation 4 – Schedule(s)

This regulation provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule to this instrument has effect according to its terms.

### Schedule 1 – Amendments

#### Eligibility for registration as a tax (financial) adviser

Item [33] provides that Division 1 in Part 3 of Schedule 2 to the *Tax Agent Services Regulations 2009* sets out the requirements for registration as a tax (financial) adviser. To register, an individual must satisfy one of a number of qualification and experience combinations, set out in that Division. These requirements recognise the types of services to be provided by financial advisers or financial planners, and ensure they meet minimum standards of education and experience to provide tax (financial) advice services.

#### Requirements under the *Corporations Act 2001*

For all qualification and experience combinations under this Division, it is required that an individual must be, or has been in the past 90 days, a financial services licensee as defined in Chapter 7 of the *Corporations Act 2001*, or a representative of a financial services licensee as defined in section 910A(a). This ensures that individuals who are seeking to register under these combinations are currently, or have very recently been, engaged as financial planners.

As this is an ongoing registration requirement, a 90 day transitional period is used to ensure individuals do not automatically cease to be registered if they are on career break, or are transitioning between jobs. This is a fixed period, to ensure certainty in the system. The length of the period balances maintaining the integrity of the regime and ensuring that there is sufficient flexibility to account for reasonable transitional arrangements.

#### Tertiary qualifications

An individual seeking registration on the basis that they have a relevant tertiary qualification must have the equivalent of twelve months full time relevant experience in the preceding five years.

A relevant tertiary qualification will be one which could include a finance related discipline, such as commerce, finance, economics, accounting, business or equivalent, or a tax related discipline, or a discipline such as law.

Though not necessarily part of their tertiary qualification, it is a requirement that the individual has completed a Board approved course in both commercial law and Australian taxation law. In approving a course, the Board may approve specific courses provided by certain organisations and institutions, or simply approve course content. As outlined above, there are a range of different degree options available to individuals seeking to become a financial planner. Not all of these qualifications may include an Australian taxation law course or a commercial law course, which are core aspects of tax (financial) advice services. Accordingly, to ensure that individuals providing tax (financial) advice services have the minimum education requirements to do so, it is a requirement that they complete a Board approved course in both commercial law and Australian taxation law. However, if they have already done so as part of their tertiary qualifications, then they will not be required to complete any additional courses.

#### Diploma or higher award

An individual seeking registration as a tax (financial) adviser may also have a diploma or higher award from a registered training organisation or an equivalent institution in a relevant discipline. An individual with an award of this type must also have completed a Board approved course in Australian taxation law and commercial law, as these courses relate to the types of services provided.

An applicant seeking registration on the basis of a diploma or higher award must also have engaged in 18 months full time relevant experience in the preceding five years.

#### Work experience

An alternative avenue to registration is on the basis of work experience that a person has completed. This will allow an applicant to register without formal qualifications, provided that they have completed both a Board approved course in Australian taxation law, and commercial law. To meet this requirement, an applicant must have three years of full-time relevant experience in the preceding five years.

#### Membership of a recognised professional association

The final avenue for registration is on the basis of membership in a recognised professional association. Significantly, to be a voting member of a recognised professional association, an individual must meet certain minimum requirements set out in the Regulations. A recognised professional association which accepts members who do not meet these requirements may have its recognition terminated.

Professional associations have an important supervisory function, which is in addition to the regulatory function by the Board. The requirements to become a recognised tax (financial) adviser association are consistent with the high standards required to become a recognised tax agent or BAS agent association, but are tailored to reflect the different circumstances for financial planners.

Accordingly, applicants who are voting members are subject to this additional layer of supervision, and are not required to complete a Board approved course in Australian taxation law or commercial law. This aspect is equivalent to the position of tax agents who are seeking registration on the basis of voting membership in a recognised tax agent association.

To recognise that an individual does not have to complete Board approved courses, an applicant seeking to register under this option must complete significantly more relevant experience. This must total six years of full time relevant experience in the preceding eight years. This is a reduced requirement compared to tax agents seeking to register as a voting member of a recognised association, and recognises that services offered by tax (financial) advisers are not as broad as services provided by tax agents.

#### Relevant discipline

A discipline which is relevant to financial planning includes ones such as finance, tax, accountancy or law, as well as other disciplines which may be relevant.

#### Relevant experience

A key concept for all of the qualification and experience combinations is relevant experience. The definition of what constitutes relevant experience for tax (financial) advisers operates in a similar way to the test which applies to tax agents, except that it applies in relation to tax (financial) advice services and tax agent services. There is no difference in how the ‘substantial involvement’ test operates for tax (financial) advisers. Whether these tests are satisfied is determined by the Board in the first instance.

Generally, an individual accrues relevant experience when they are substantially involved in providing the service of a tax (financial) adviser or a tax agent, whether they are registered in their own right, or are under the supervision of an entity registered with the Board. This requirement for supervision does not necessarily imply an employer-employee relationship. Services which are provided under a contract for service may, depending on the circumstances, be considered relevant experience.

The Board also has discretion to recognise other types of experience which do not meet the above descriptions. At least initially, it is expected that this discretion will cover a range of individuals who provide tax agent services, subject to the transitional arrangements in Regulation 13. Putting this discretion in the registration framework provides greater flexibility to recognise experience which may not have been obtained while working as a registered entity, or under their supervision, but may be relevant experience nonetheless.

There is no requirement that the full-time relevant experience be accrued in a single continuous period. The Board can consider and aggregate smaller periods, in assessing if an applicant has met the requirement.

#### Application fees

Item [15] brings tax (financial) advisers in line with tax agents and BAS agents, by making a fee payable on the lodgement of an application for registration. The application fee is the same, whether the applicant is already registered with the Board or seeking registration for the first time.

The registration application fees 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.

### Register of registered and deregistered tax agents, BAS agents and tax (financial) advisers

Items [16]-[23] provide that tax (financial) advisers are registered entities under the *Tax Agent Services Act 2009*, the Regulations prescribe that they should be listed on the register of registered and deregistered agents, in the same way that BAS agents and tax agents are.

The information which is required to be published on the register for tax (financial) advisers mirrors the information required for tax agents and BAS agents, which includes:

- the name of the entity;
- the contact details of the entity;
- any relevant professional affiliation;
- duration of registration;
- conditions on the registration; and
- any sanctions that have been imposed by the Board on the entity (other than a caution or termination).

The following information must be included on the register for deregistered entities:

- the name of the entity;
- contact details of the entity;
- date of effect of the termination; and
- the reason for termination.

### Accrediting registered tax (financial) adviser associations

Consistent with the arrangements for tax agent and BAS agent associations, the requirements for recognising tax (financial) adviser associations are designed to ensure that recognised associations meet minimum standards of propriety. To this end, the recognition criteria for tax (financial) adviser associations mirror those used for recognised tax agent associations, except in some minor aspects in order to recognise the differences between the constituent members.

To qualify as a recognised tax (financial) adviser association, Items [9], [28] and [29] provide that an organisation must satisfy the Board that it meets certain basic eligibility criteria, including that:

- it is a non-profit organisation;
- it has adequate corporate governance and operational procedures to ensure that it is properly managed and internal rules are enforced;
- it must be able to pay its debts as they fall due; and

- the management of the organisation must be accountable to its members and abide by the corporate governance and operational procedures of its organisation.

Voting members must be subject to rules controlling their conduct in the practice of that profession and must be subject to discipline for breaches of those rules. If the voting member is permitted by that organisation to be in public practice, the voting member must be required to have professional indemnity insurance.

The organisation must have satisfactory arrangements in place for notifying clients of its members (or of members of its member bodies) as to how to make complaints and for receiving, hearing and deciding those complaints and taking disciplinary action if complaints are justified. The organisation must have satisfactory arrangements in place for publishing annual statistics about the kinds and frequency of complaints (except complaints under the Act about registered tax (financial) advisers), findings made as a result of complaints, and action taken as a result of those findings.

There are two criteria set out below that, if the Board is satisfied are met, entitle an organisation (that meets the basic criteria explained above) to recognition. However, Item [9] sets out that the Board may, if it considers appropriate, still recognise an association in some cases, where either of these two criteria are not met.

The first of these criteria is that the organisation has at least 1,000 voting members, 500 of which are registered tax (financial) advisers. This establishes that the organisation is large enough to effectively administer its professional governance arrangements for its members and also ensures that the organisation is representative of tax (financial) advisers.

The second is that the organisation's voting members are required to comply with at least one of the following requirements:

- been awarded a degree or a post-graduate award from an Australian tertiary institution or an equivalent institution in a relevant discipline;
- been awarded a diploma or higher award from a registered training organisation or equivalent institution in a relevant discipline; or
- have the equivalent of six years of full-time experience in providing tax (financial) advice services in the last eight years.

These arrangements are broadly consistent with the qualification and experience requirements for individual tax (financial) advisers.

#### Exclusion from the meaning of a tax agent service

Section 90-5 of the Act defines tax agent services, and subsection 90-5(2) allows services to be excluded from this definition through regulations.

As set out in the explanatory memorandum to the Tax Agent Services Bill 2009, this regulation making power is necessary because the broad definition of what constitutes

a tax agent service may inadvertently capture some services which should not be regulated.

The taxation laws often require taxpayers to use actuarial calculations and certifications for the purpose of determining specific tax outcomes. These services may only be provided by someone who is registered with, and meets the professional standards required by, the Institute of Actuaries of Australia. These services generally involve the certification of amounts, as well as other ancillary services. There are also a number of other services which can only be performed by a member of the Institute of Actuaries of Australia. This primarily relates to work for various forms of managed funds and insurance companies.

All of the actuarial services described above can only be performed by an actuary, and accordingly, those services are regulated by the Institute of Actuaries of Australia Code of Professional Conduct. If the services are not performed adequately, actuaries are subject to the disciplinary scheme administered under that code. To ensure that actuaries are not subject to regulation under multiple standards for the same service, the amendment to Regulation 13 contained in Items [26] and [27] provides that a service which is required to be performed by an actuary under a law of the Commonwealth a State or Territory is not a tax agent service.

Items [24] and [25] also clarify that some forms of advice provided by a trustee to members of a trust or a managed investment scheme are not tax agent services.

#### BAS agent requirements – extension of period to accrue relevant experience

Part 1 of Schedule 2 to the Regulations prescribes the eligibility requirements for registration as a BAS agent. At present the relevant experience requirements for registration are:

- 1,400 hours of relevant experience in the past three years where the individual has the requisite bookkeeping/accounting qualifications; or
- 1,000 hours of relevant experience in the past three years where the individual has the requisite bookkeeping/accounting qualifications and is a voting member of a recognised BAS agent or tax agent association.

The three years over which an individual is able to accrue the relevant experience has led to difficulties for some applicants who have had disruptions to their career, for example, by reason of parental leave, or extenuating circumstances, such as health conditions. Significantly, approximately 80 per cent of individual BAS agents registered with the Board are women, so the shorter period over which they may accrue their relevant experience can disproportionately affect those women who take maternity leave.

Accordingly, Item [32] in the amendments increases the period over which individuals can accrue the requisite relevant experience to four years, which better accommodates these disruptions, while also ensuring that BAS agents still have the requisite experience to perform services competently.



### Change of Certificate IV

Item [31] updates the names of ‘Certificate IV Financial Services (Bookkeeping)’, with ‘Certificate IV Bookkeeping’; and ‘Certificate IV Financial Services (Accounting)’ with ‘Certificate IV Accounting’. This is due to a change in the name of the courses.

### Consequential and miscellaneous amendments to the principal regulations

Items [1]-[4], [10]-[11], [14], [16]-[23], and [30] amend various provisions with references to tax (financial) advisers and recognised tax (financial) adviser associations throughout the principal regulations.

Items [5]-[8] and [12]-[13] clarify the operation of certain provisions, without substantively changing the operation of the relevant provision.