15 March 2013

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

By email: taxagentservices@treasury.gov.au

Dear Mr Reid

Creating a regulatory framework for tax (financial product) advisers –
Proposed amendments to the *Tax Agent Services Act 2009* and the accompanying *Tax Agents Services Regulations 2009*

CPA Australia and the Institute of Chartered Accountants Australia, ("the Institute") welcome the opportunity to comment on the proposed amendments to the Tax Agent Services Act 2009 (TASA) and the accompanying Tax Agents Services Regulations 2009 (TAS Regulations).

CPA Australia and the Institute represent over 200,000 professional accountants in Australia. Our members work in diverse roles across public practice, commerce, industry, government, not-for-profits and academia throughout Australia and internationally. Increasingly, members of the accounting profession are becoming more widely involved in financial services and related advisory and service roles.

CPA Australia and the Institute remain strongly supportive of the Federal Government's endeavours to develop a framework that will provide a robust and equitable structure for the regulation of taxation advice in Australia and those who provide such advice.

In general terms, we support many of the proposed amendments. However, we are of the view that there are a number of critical issues that require further clarification to ensure the appropriate policy objectives are achieved. These issues are discussed in order of importance in the attached submission.
Our specific recommendations in response to the proposed regulatory framework and proposed amendments to TASA and the TAS Regulations are:

- Additional commonplace and more complex examples are included in the Explanatory Memorandum to provide greater clarity to the industry of what will constitute 'tax (financial product) service.
- The proposed definition of 'tax (financial product) service' is reviewed to ensure that it appropriately reflects of the scope of advice provided by financial planners.
- Activities that are clearly 'tax agent services' should be expressly excluded or otherwise clearly conveyed as not being within the definition of 'tax (financial product) advice'.

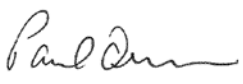
- The appropriate balance between the strength of academic qualifications and length of experience to provide consumer protection is achieved by requiring:
    - o 'degree' qualified applicants to have a minimum of 12 months experience; and
    - o 'professional' applicants to have a minimum of 18 months experience.
- Two further pathways for registration as a tax (financial product) adviser should be added to the Regulations which would permit registration if you are:

    - o a voting member of a recognised tax agent association, and
    - o have 3 years relevant experience out of the past 5 years

    OR
    - o a voting member of a recognised tax (financial product) adviser association, and
    - o have 4 years relevant experience out of the past 6 years.
- The academic requirements to register as a tax (financial product) adviser include a requirement to complete an appropriately designed semester length commercial law course approved by the Tax Practitioners Board.
- Immediate consultation is undertaken to develop the TPB approved course in Australian taxation law for tax (financial product) advisers to ensure that the appropriate scope, content including sub-topics, number of subjects and duration is determined.
- The accreditation status of financial product adviser associations as recognised tax agent associations is converted into the new category of recognised tax (financial product) adviser association.
- The notification period is reduced to no longer than 6 months, consistent with the notification rules for BAS agents, given the Board will effectively have no powers to order sanctions for breach of the code against financial planners who do not notify the Board during the notification period.
- The commencement date for the transitional period be bought forward to 1 July 2013, creating a 3 year transitional period until 30 June 2016.
- Item 52 in Part 3 – Transitional provisions is clarified to ensure that financial planners can only either notify the Board during the notification period or alternatively apply for transition arrangement.
- An appropriate transition period is implemented to ensure that the reforms are implemented as intended and that additional time is permitted if necessary to ensure that the appropriate policy settings are achieved.
- The commencement date for the new civil penalty provision be brought forward to 1 January 2014, to align with the recommended six month notification period.
- A new provision is included in the Regulations that clarifies a financial planner cannot provide a client with a disclaimer that they are not providing tax (financial product) advice in order to avoid their obligations under the new reforms.
- Consultation is undertaken with relevant stakeholders to determine an appropriate term for registration with the Tax Practitioners Board.
- ASIC and the Board must develop new processes to ensure not only efficient exchange of information between the two regulators, but also processes to ensure effective regulatory oversight of financial planners providing tax (financial product) services.

If you have any questions regarding this submission, please do not hesitate to contact Keddie Waller (CPA Australia) at keddie.waller@cpaaustralia.com.au or Hugh Elvy (the Institute) at hugh.elvy@charteredaccountants.com.au.

Yours sincerely



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1. Definition of 'tax advice (financial product) services' (TAS Act 2009 – Part 8)

1.1 What is tax (financial product) advice

CPA Australia and the Institute consider that the clarifying definition of 'tax advice (financial product) services' is, arguably, the most fundamental issue that arises from the exposure draft materials.

The final definition of 'tax advice (financial product) services' will play a key role in defining the scope of the new regulatory regime for 'tax (financial product) advisers'. Given this importance its drafting must be guided firstly by very clearly developed and defined policy parameters in terms of what it is intended to be covered, and what, for example, is regarded as crossing the line into tax agent services. Accordingly the examples of what is, and what is not, "tax advice (financial product) services" in the draft Explanatory Memorandum (EM) accompanying the amendments need to be fully developed and realistic.

While the examples provided in the EM are of some use, that utility is limited, by their relatively straightforward nature. Consideration needs to be given to including more complex examples in the EM in order to provide both clarity and certainty to the industry as to what will be a 'tax advice (financial product) service' and what is a "tax agent service" that can only be provided by a Registered Tax Agent.

We consider it desirable that the EM be expanded to include examples which address the following commonplace, but more complex examples:

- A recommendation to implement a recontribution strategy before acquiring an income stream, in order to reduce tax payable.
- Client who is close to retirement and wishes to commence a transition to retirement strategy.
- Client who wishes to sell their business to fund their retirement, where the advice would require discussion of the CGT discount and small business tax concessions.
- Advising a client on the appropriate choice of entity for investment which choice may include a family trust or self managed superannuation fund. Discussion and recommendations would consider practical, operational and exit issues.
- Client is recommended to donate $100,000 from their cash management account to the Salvation Army from proceeds of the sale of their business. The recommendation is based on a long held view they would like to support this charity because their mother received assistance from them on the death of their father 50 years ago. The advice would include timing the donation to be made this year so as to obtain a tax deduction, which will help offset the significant capital gain on the sale of their business.
- Client who is recommended to accept the buy-back offer for shares because they will generate taxable income of $1,000 which includes an imputation credit of $300 and a capital loss of approximately $400.00 if the final buyback price is $5 per share. This will provide the client more cash flow over the next 12 months to support that person in retirement.
- Client who is recommended to buy a $200,000 portfolio of dividend paying AA shares listed on the Australian Stock Exchange with capital growth expectations. It is recommended that they borrow $150,000 to finance this acquisition in addition to using $50,000 in their cash management facility. Interest on the borrowing can be prepaid. This should result in an entitlement to a tax deduction for the interest this financial year of approximately $12,500.

We are of the view that clarification on whether the above more complex examples constitute tax (financial product) advice, or a tax agent service, is needed to ensure clarity and consistency in the industry understanding of what will be considered licensed financial product advice and what will be considered a tax advice (financial product) service.

Recommendation:

Additional commonplace and more complex examples are included in the Explanatory Memorandum to provide greater clarity to the industry of what will constitute 'tax (financial product) service.

1.2 Limitations of the definition

The purchase and sale of a direct interest in real property is not a financial product. Accordingly, we understand that advice on such transactions would not fall within the proposed definition. However, financial planners commonly recommend such investments, where discussion would include consideration of related taxation implications such as negative gearing strategies, tax deductibility issues, CGT cost base calculations and access to the CGT discount.

Salary packaging for superannuation is another common accumulation strategy recommended by financial planners. Financial planners may also advise eligible clients on, amongst other things, salary sacrificing, and salary packaging their car or employee shares or other benefits. It is our understanding, given the proposed definition, that financial planners would be able to discuss the taxation implications of salary sacrificing their superannuation however they would not be able to discuss other salary packaging arrangements.

Other advice provided by financial planners that would also fall outside the proposed definition would include estate planning and succession planning advice.

We believe the above examples are important areas of advice that should be permitted to be provided as part of a tax (financial product) service. We recommend that further consideration is given to the proposed definition of tax advice (financial product) service to ensure that financial planners are able to continue to provide relevant and appropriate advice to their clients.

Recommendation:

The proposed definition of 'tax (financial product) service' is reviewed to ensure that it appropriately reflects of the scope of advice provided by financial planners.

1.3 Exclusions

We consider that to the extent the Government / Treasury considers activities that are clearly 'tax agent services' from a policy perspective, i.e. activities the Government does not intend financial advisers to be undertaking, should be expressly excluded or otherwise clearly conveyed as not being included within the definition of tax advice (financial product) service. We are of the view that this demarcation is not sufficiently clear under the proposed definition of tax (financial product) service.

For example, we query whether tax return preparation falls outside of the definition? While lodgement of a return may be excluded, it should be made expressly clear in the legislation that tax return preparation for a client (in draft form) is also excluded from the definition of 'tax advice (financial product) service'. This is by virtue that it is a 'tax agent service', as envisaged and assumed in the Explanatory memorandum at paragraph 145. It is perfectly foreseeable that the scope of a financial planner's engagement letter may include preparation of draft tax returns.

Recommendation:

Activities that are clearly 'tax agent services' should be expressly excluded or otherwise clearly conveyed as not being within the definition of 'tax (financial product) advice'.

2. Academic requirements (TAS Regulations)

2.1 Relevant experience and academic qualification – mix of the two

We note that the regulatory approach taken in both Parts 1 and 2 of Schedule 2 of the TAS Regulations is to prescribe the relative mix of academic qualifications and relevant experience requirements for Tax agents and BAS agents as follows:

- the highest academic requirements are matched with the lowest relevant experience requirements, e.g. for tax agents Item 201 'degree' avenue only requires 12 months relevant experience within the past 5 years, whereas item 206 requires no specified academic qualifications other than professional membership and relevant experience of 8 years within the past 10 years; and
- where all academic requirements for different pathways are identical, a 'discount' in terms of the relevant experience required is given if the applicant is a voting member of a recognised professional association, e.g. Item 101 and 102 in Part 1 of Schedule 2 in relation to BAS agents.

The principle evident on the face of the existing TAS Regulations is one of finding the appropriate balance between the strength of academic qualifications and length of experience to provide consumer protection.

By contrast, the approach taken in the proposed amendments to the TAS Regulations for financial planners providing tax (financial product) services departs from this principle of matching the strength of academic qualifications with a compensating length of experience (and vice versa). Specifically, applying the existing regulatory approach we would have expected that out of the three proposed pathways the strongest academic qualification, being the 'degree' pathway (paragraph 8.2), would have been matched with the lowest relevant experience requirement. We would then expect the next strongest academic qualification, being the 'professional membership' pathway (paragraph 8.3), to have been matched to the second lowest relevant experience requirement. Finally, the weakest academic qualifications prescribed in 8.1 would in turn be matched against have the highest relevant experience requirements. However, this is not the approach that has been taken in the draft amendments to the TAS Regulations.

Accordingly, as it is currently proposed, we recommend that the relevant experience requirements for the 'degree' (8.2) and 'voting member of a recognised tax (financial product) adviser or a tax agent association' (8.3) should be reversed so the prescribed requirements would be degree qualified plus 12 months experience and voting member' plus 18 months experience.

Recommendation:

The appropriate balance between the strength of academic qualifications and length of experience to provide consumer protection is achieved by requiring:

- **'degree' qualified applicants to have a minimum of 12 months experience; and**
- **'professional' applicants to have a minimum of 18 months experience.**

2.2 Additional pathways to increase certainty and flexibility

In addition to the three proposed pathways for meeting the eligibility requirements to register as a tax (financial product) adviser, we recommend that the Regulations be drafted to include at least one pathway which does not contain any requirement for a 'course approved by the Tax Practitioners Board' ('the Board').

Based on our experience with how the existing TAS Regulations have been interpreted by the Board in the context of tax agents and BAS agents, we believe that this is an important and necessary addition to ensure certainty for applicants.

Where *all* pathways contain a requirement which is subject to approval by the Board, it leaves a vital but unknown element to be decided at some point in the future, which we have found to give rise to unforeseen consequences that were not intended by Parliament and not anticipated by the professional accounting bodies. For example, the problematic 'three commercial law subjects' requirement that has arisen for tax agent registration. We have encountered a similar obstacle with the professional accounting programs being surprisingly not accepted as 'an approved course in basic GST/BAS taxation principles' for BAS agent registration purposes.

As such, we consider two further pathways for registration as a tax (financial product) adviser should be added to the Regulations which would permit registration if you are:

- a voting member of a recognised tax agent association, and

- have 3 years relevant experience out of the past 5 years

OR

- a voting member of a recognised tax (financial product) adviser association, and
- have 4 years relevant experience out of the past 6 years.

We believe that there should be a difference in the required relevant experience between these two pathways in the event that we expect there may be some material differences in the prescribed requirements for accreditation of recognised tax (financial product) adviser associations compared with those for accreditation of recognised tax agent associations.

We make further comment on 'recognised tax (financial product) adviser associations' at point 2.5 below.

Recommendation:

Two further pathways for registration as a tax (financial product) adviser should be added to the Regulations which would permit registration if you are:

- **a voting member of a recognised tax agent association, and**
- **have 3 years relevant experience out of the past 5 years**

OR

- **a voting member of a recognised tax (financial product) adviser association, and**
- **have 4 years relevant experience out of the past 6 years.**

2.3 Commercial law course

We note that none of the academic requirements specified in the proposed framework document include a requirement to complete an approved commercial law course.

Based on our recent discussions with Treasury, we understand that the absence of any mention of commercial law requirements in the framework document relates to the fact that the Government is currently awaiting a report from the Board on its view of what constitutes an 'approved course in commercial law'. That is, we should not take the absence of commercial law to mean that the Government has decided that there will be no commercial law requirements for tax (financial product) advisers.

We welcome this clarification as we would expect that at least a base level of knowledge in commercial law would be required to register as a tax (financial product) adviser. This would be a reasonable expectation given:

- the highly commercial nature of the advice that tax (financial product) advisers provide – financial advisers need to understand complex arrangements and provide investment and divestment advice appropriate for a wide range of entities, including sole traders, partnerships, companies, trusts and self managed superannuation funds; and
- in comparison, tax agents require three semester length subjects in commercial law, under the Board's current proposed guideline (TPB(PG) 02/2010 - *Course in commercial law approved by the Board*).

Recommendation:

The academic requirements to register as a tax (financial product) adviser include a requirement to complete an appropriately designed commercial law course approved by the Tax Practitioners Board.

2.4 Australian taxation law course

Paragraph 8 of the framework paper states that one of the academic qualifications required to register as a tax (financial product) adviser will be having 'successfully completed a TPB approved course in Australian taxation law for tax (financial product) advisers'.

This Australian tax law course requirement will apply under each of the three eligibility pathways currently proposed.

Subject to our comments at 2.2 above on the need for additional flexibility in the potential eligibility pathways available, we support the requirement under the three proposed eligibility pathways for tax (financial product) advisers to successfully complete a course in Australian taxation law.

For substantially the same reasons discussed above in the context of 'commercial law', but with even stronger arguments applying in the tax context, we consider that it is vitally important for tax (financial product) advisers to have a sound and relevant knowledge of Australian taxation law given that:

- understanding the taxation implications of investment and divestment actions is an integral part of providing financial planning advice to consumers, including understanding complex arrangements and transactions in relation to a wide range of entities, structures and circumstances, and across a broad range of taxes; and
- in comparison, tax agents require two semester length subjects in Australian taxation law, under the Board's current proposed guideline (TPB(PG) 03/2010 - *Course in Australian taxation law approved by the Board*).

We are therefore strongly of the view that at least the following topics need to be covered in a TPB approved course in Australian taxation law for tax (financial product) advisers. Alternatively these topics could be found in existing courses, if an existing eligibility item in the TAS Regulations, allowing degrees or higher awards of financial planners to be recognised, were used.

- Basic concepts of residency and source
- Principles of income
- General and specific deductions, including capital allowances
- An overview of tax administration and of the place of taxes in society
- Tax rules applicable to various entities and structures (or a combination thereof)
- Capital Gains Tax (CGT)
- Fringe Benefits Tax (FBT
- Franking credits
- Negative gearing
- The general anti-avoidance provisions of Part IVA
- Superannuation (including contribution caps and transitions to retirement); and
- TASA, in particular the Code of Professional Conduct.

Further to this, we believe to provide competent advice on *capital gains tax in respect of investments* a 'Tier 1' financial planner would need to have a base level understanding of the following:

- CGT Events: including - disposal, hire purchase, events dealing with end of an asset usually intangibles such as debt, contractual rights such as restrictive covenants and non share options, trust events, lease events, capital returns, deposits and gain where no asset disposal, ceasing residency, clawback of gains especially under small business concessions, share value shifts, personal assets, certain deceased estate disposals
- Definition of CGT assets: including - special rules for collectables, personal use assets, composite assets, contractual rights
- List of CGT exemptions including main residence exemption
- List of CGT deferrals via rollover (e.g. marriage breakdown; incorporating a company)

- Calculation of a capital gain: including - cost base elements, deemed consideration, indexation, CGT discount eligibility and exemptions
- Discrete rules on special topics impacting investors: for example main residence exemption; partnerships; small business concessions; share rights, options and convertible notes; and possibly
- Non residents with investments comprising taxable Australian property.

Similarly, topics that would need to be covered under *entities and structures* could be further broken down into:

- Individuals - including non -commercial loss rules and personal services income
- Companies - including Division 7A
- Trusts - being principally taxation of trusts under Division 6, trust losses, trust reporting and trust CGT events; and
- Partnerships (as distinct from joint ventures used for property ventures).

Conversely we believe the following topics would not be relevant:

- R&D tax incentive
- transfer pricing; and
- international taxation law.

We have included this detail as we believe it is important to note that the broad headings listed will need to be thought through and expanded to ensure that all relevant sub-topics are also covered. This is to ensure that tax (financial product) advisers have the required skills to understand the tax implications of financial products (rather than have a detailed understanding of the tax provisions and related interpretative products).

CPA Australia and the Institute would appreciate being involved in the consultation process which needs to be undertaken in order to develop the details for an appropriate approved course in Australian Tax Law, including number of subjects, duration, and topic scope and content. Given the transitional period is scheduled to commence 1 July 2013, we believe there is now an immediate sense of urgency to finalise these details.

At this stage, we have not been able to ascertain any of these details, but believe that the Australian tax law course requirement plays a vital part of meeting the policy objectives of this reform for financial advisers, and as such, will be integral to its integrity and success.

Recommendation:

Immediate consultation is undertaken to develop the TPB approved course in Australian taxation law for tax (financial product) advisers to ensure that the appropriate scope, content including sub-topics, number of subjects and duration is determined.

2.5 Recognised tax (financial product) adviser associations

We note that the framework document contemplates a new type of recognised association being established, i.e. a recognised tax (financial product) adviser association. This is intended to cover associations that are the professional bodies for financial product advisers.

We believe it would be appropriate with the introduction of the special category of registration under the Tax Agent Services regime for financial planners, that accreditation status of financial product adviser associations be converted into the new category of recognised association, i.e. from recognised tax agent association (RTAA) to recognised tax (financial product) adviser association (RTFPAA).

Recommendation:

The accreditation status of financial product adviser associations as recognised tax agent associations is converted into the new category of recognised tax (financial product) adviser association.

3. Transitional Provisions (Transitional Act)

3.1 Notification Period

We note that the proposed 'Notification period' is an 18-month period from 1 July 2013 to 31 December 2014. By contrast, for tax agents and BAS agents, the notification period was substantially shorter, being only 3 months and 6 months respectively. Our observation in this respect is that we believe the proposed notification period for financial advisers is too long. Essentially, the proposed notification period will provide financial advisers an 18 month window before they need to bring themselves to the Board's attention and register.

We acknowledge that the notification process effects retrospective registration once it occurs. However, what powers will be at the Board's discretion to regulate a financial adviser who refuses to notify during the notification period? As discussed further in section 4, it is proposed that the civil penalty provisions will not operate until 1 January 2015.

We therefore query what constitutes notification? If the Board discovers a financial adviser who should have notified the Board, is there deemed notification once the Board becomes aware of the person?

We note that notification in 'a form approved by the Board' is required. However, if this does not constitute notification, then we would query whether the notification provision (and therefore retrospective registration) becomes invoked. If registration is not invoked, then the Code of Conduct will not apply, and the Board will have no powers to order sanctions for breach of the code.

It is our understanding that under the proposed transitional rules, the Board would have no regulatory powers to compel registration, impose PI insurance requirements or to regulate such an unregistered adviser for conduct in breach of the Act prior to 1 January 2015, when the civil penalty provisions then commence operation.

As such, we consider that there is a risk that the notification period - the first 18 months of the new TAS regime applying to financial advisers - is effectively 'optional' for financial advisers. We would therefore recommend that the period be shortened to no longer than 6 months, in line with the notification rules for BAS agents.

In addition, we recommend that complementary changes be made to the transitional period, as discussed below.

Recommendation:

The notification period is reduced to no longer than 6 months, consistent with the notification rules for BAS agents, given the Board will effectively have no powers to order sanctions for breach of the code against financial planners who do not notify the Board during the notification period.

3.2 Transitional period

The proposed 'Transitional period' is an 18-month period from 1 January 2015 to 30 June 2016. The notification period for BAS agents, being a comparable category of registration given they too were a new registration with the Board, was substantially longer being three years. Given this, we believe the proposed transitional period for financial advisers is too short by comparison.

We are of the opinion the transitional period should commence from "day one" of the new provisions operating, i.e. from 1 July 2013. If the transitional period does not commence until 1 January 2014, as currently proposed, there will be no option to apply for transitional registration at any time during the notification period. We envisage that this could create an unintended gap in the available registration rules for those financial planners who otherwise need to register but will not be able to utilise the transitional rules. For example, consider the following scenario:

> *After taking a career break for 12 months to travel the US and Canada, Mr Finn Planner starts providing financial advisory services on 1 August 2013. Prior to his break, Finn had gained three years relevant experience working as a financial adviser in Australia.*
>
> *Under the proposed rules, Finn cannot notify as he was not providing the financial advisory services immediately before 1 July 2013, and he cannot apply for transitional registration as that avenue is not open until 1 January 2015. This means that Finn will have a 17 month wait before being able to register, unless he meets the full eligibility rules to qualify for standard tax agent registration.*

We see no reason for delaying the start of the transitional period, and would recommend that the commencement date be brought forward to 1 July 2013, so that the transitional period runs for a 3 year period from 1 July 2013 to 30 June 2016. This would be consistent with the approach taken for BAS agents.

In terms of having an overlap between the notification period and the transitional period, we believe that the existing drafting of the transitional registration provision (item 52 in Part 3 – Transitional provisions) should address any concerns about double dipping. It includes the proviso "(other than an entity taken to be a registered tax (financial product) adviser under item 51 of this Schedule)". One potential area of uncertainty in interpreting this proviso, however, is whether the word "taken" is intended to have both a present and past tense meaning, i.e. "who is or was taken". If so, we would recommend that this be clarified particularly if the two periods do overlap.

Recommendations:

The commencement date for the transitional period be bought forward to 1 July 2013, creating a 3 year transitional period until 30 June 2016.

Item 52 in Part 3 – Transitional provisions is clarified to ensure that financial planners can only either notify the Board during the notification period or alternatively apply for transition arrangement.

3.3 Registration period

We note that the proposed registration period gained under both the notification and the transitional avenues is for three years. This contrasts with the approach taken for tax agents and BAS agents which was to allow two years registration period for notification, and three years registration for transitional registrations.

We do not envisage any major issues arising with the proposed increase in the notification registration period to three years for tax (financial product) advisers. Rather, we believe that three years should be an appropriate transitional period to allow advisers to undertake the necessary study to ensure they have the requisite levels of knowledge in Australian taxation law and commercial law relevant to tax (financial product) advice, or to take steps to gain professional membership of a recognised tax (financial product) adviser association, together with gaining the appropriate amount of relevant experience.

In addition, we understand that most financial planning degrees and diplomas currently offered by tertiary institutions contain appropriate Australian taxation law content, and as such, the academic requirements should not create any significant dislocation to the existing financial planning industry or create the need for universities to make onerous changes to programs to accommodate such content. However, this observation is subject to one other aspect - the ultimate decision on whether there will also be a commercial law course requirement. If so, a longer transitional period may need to be considered, or alternatively, if the three year period is considered to allow adequate lead time to implement necessary changes, the Board will need to work

promptly with the universities so that programs can be ready to offer the appropriate content to new students by the end of the three year transitional period, i.e. 1 July 2016.

Our experience under the TASA regarding the 'commercial law course' requirements for tax agents (which now apply under all avenues for registration other than item 206) was that the Board's decision to require 3 semester length subjects could not be implemented by the universities within the 3 year time frame, nor at all in the future for a variety of reasons and constraints. This has created significant angst for the professional bodies, our members and the universities as a result of the measures not being feasible to implement, nor achieving the intended policy objectives. Accordingly, we caution the Government and Treasury to include in the law as many built-in safeguards to ensure that these reforms are ultimately implemented as intended by the policy makers.

Recommendation:

An appropriate transition period is implemented to ensure that the reforms are implemented as intended and that additional time is permitted if necessary to ensure that the appropriate policy settings are achieved.

4. Civil penalty provisions (TAS Act 2009 – Part 5)

We note that the proposed civil penalty provision, that will apply to tax (financial product) advisers, new sub-section 50-10(2), will not operate until 1 January 2015. For the reasons discussed above (at 3.1), our sense is that this time frame is too long a period for the Board not to be able to take action against a financial adviser for providing tax (financial product) services without being registered. It should be noted that there is no positive obligation under the TASA to register. Rather, you simply cannot provide the relevant services for a fee while unregistered because of the civil penalty provisions.

As such, without the threat of the civil penalty provisions being able to be enforced, registration is effectively 'optional' for financial advisers during the initial 18 months of the new rules. In the absence of being registered, financial advisers will not be subject to any of the Board's regulatory powers, e.g. the important Code of conduct obligations, and the obligation to obtain PI insurance cover.

On this basis, we recommend that the commencement date for the new civil penalty provision be brought forward to 1 January 2014, i.e. to align with the earlier end date for the notification period that we recommended above (i.e. 6 months).

Recommendation:

The commencement date for the new civil penalty provision be brought forward to 1 January 2014, to align with the recommended six month notification period.

5. Other issues

Potential to Disclaim the Provision of tax advice

We believe there needs to be a new provision included in the Regulations that clarifies a financial planner providing financial planning service cannot provide a client with a disclaimer that states they are not provided tax advice or tax (financial product) services and recommending the client seek the advice of a registered tax agent or a tax (financial product) adviser.

This measure is necessary to ensure the intent of the new reforms is not undermined.

Recommendation:

A new provision is included in the Regulations that clarifies a financial planner cannot provide a client with a disclaimer that they are not providing tax (financial product) advice in order to avoid their obligations under the new reforms.

Public identification - Tax (Financial Product) Adviser

It is our opinion that consideration should be given to reviewing the proposed term tax (financial product) adviser. We believe this term implies or has the potential to imply specific expertise in providing tax advice solely related to financial planning. In fact it could be perceived by consumers that a tax (financial product) adviser has a higher level of qualification and expertise than a registered tax agent. It is important that consumers are able to identify that being a registered tax agent requires a higher level of qualification and expertise than a tax (financial product) adviser within this regime.

Further, as discussed at 1.2, financial planners often provide advice that does not involve the recommendation of a specific financial product. Therefore the sole nexus between tax and a financial product does not adequately nor appropriately reflect the scope of advice that a financial planner does and should be able to continue to provide when providing financial planning advice.

We believe that further consultation needs to be undertaken with relevant stakeholders to determine an appropriate term for registration.

Recommendation:

Consultation is undertaken with relevant stakeholders to determine an appropriate term for registration with the Tax Practitioners Board.

Supervision requirements

Fundamental to the ability of the framework to regulate financial planners for tax advice will be the mechanisms implemented by both ASIC and the Board to not only exchange information but also work collaboratively and efficiently in regulating tax (financial product) advisers.

For example, processes will need to be amended to ensure that an applicant who applies for and is granted an Australian Financial Services Licence then also registers to the Board to become a tax (financial product) adviser.

Alternatively if the Board ceases the registration of a financial planner for tax (financial product) services, what impact will this have on the financial planner being able to continue being licensed? It is assumed this would prohibit the financial planners from discussing the tax implications of an investment strategy with a client, however it would be required to ensure compliance with the best interests obligations.

It is evident these scenarios need to be worked though in order to implement new processes, which will inturn underpin the ability of the new regime to achieve its objectives.

Recommendation:

ASIC and the Board must develop new processes to ensure not only efficient exchange of information between the two regulators, but also processes to ensure effective regulatory oversight of financial planners providing tax (financial product) services.

ASIC Clarity

We understand that ASIC has committed to updating its guidance following the finalisation of the new regime, including amendments to *Regulatory Guide 175 Licensing: Financial product advisers – conduct and disclosure* and *Regulatory Guide 244 Giving information, general advice and scaled advice*. It is imperative that the revised guidance provide clarity to the industry on the interaction between the obligations of the best interests duty (and related obligations) when providing tax (financial product) advice.

We recommend that ASIC work with the Board when making these amendments to ensure the guidance provided by both regulators is consistent and provides clarity to the industry, including what is financial planning advice and what is tax (financial product) advice.

Recommendation:

ASIC work with the Board in reviewing and amending relevant AIC regulatory guides to ensure guidance provided by both regulators is consistent and provides clarity to the industry, including what is financial planning advice and what is tax (financial product) advice.

Consumer complaints: External Dispute Resolution schemes, ASIC and TPB

One issue that must be resolved is how consumer complaints will be handled and integrated between the Board, ASIC and ASIC approved External Dispute Resolution (EDR) schemes.

Tax is often an integral component of financial planning advice and it is therefore likely that consumer complaints may arise based on this. However, how will a consumer determine what action they should take should they seek the advice of a financial planner who is registered to provide tax (financial product) advice?

Currently if a consumer wishes to make a complaint and has exhausted the internal dispute resolution process with the licensee of the financial planner, they would then take their complaint to an ASIC-approved EDR scheme such as the Financial Ombudsman Service (FOS). If the complaint is based on incorrect tax advice it is assumed the complaint should be taken to the Board, however it is unlikely that the consumer would be aware of this or may not be in a position to determine if the complaint relates to tax (financial product) advice or financial product advice.

This is an important issue that needs to be resolved to ensure consumers still can easily access dispute resolution services and is likely to require consultation between ASIC, the Board and EDR schemes.