ASIC
Australian Securities &
Investments Commission

ASIC submission to the Review of the Tax Practitioners Board Discussion Paper

September 2019

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Overview

Purpose of ASIC's submission

1 On 5 March 2019 the Government announced an independent review into the effectiveness of the Tax Practitioners Board (TPB) and the *Tax Agent Services Act 2009* (TASA) to ensure that tax agent services are provided to the public in accordance with appropriate professional and ethical standards. The Discussion Paper released in July 2019 is part of this Review of the TPB.

2 This submission responds only to the following chapters in the Discussion Paper because they are the most relevant to the Australian Securities and Investments Commission (ASIC):

(a) *Chapter 2: Whole of Government interactions* (see Section A in this submission); and

(b) *Chapter 10: Tax (Financial) Advisers* (see Section B in this submission).

A Chapter 2: Whole of Government interactions

Information sharing

3 Chapter 2 of the Discussion Paper acknowledges that the current regulatory regime for entities that provide tax and financial services (collectively referred to as tax practitioners) is complex. The Discussion Paper also notes the breadth of the regulatory regime for tax practitioners.

4 This means that these entities, and their clients, need to interact with many administrative or regulatory bodies, in addition to the TPB. The Discussion Paper notes that this includes ASIC, the Australian Prudential Regulatory Authority (APRA), the Financial Advisers Standards and Ethics Authority (FASEA), code monitoring bodies, the Inspector-General of Taxation and Taxation Ombudsman (IGTO), the Australian Financial Complaints Authority (AFCA) and in the future, the proposed new financial adviser disciplinary body.

5 The breadth and complexity of the regulatory regime means that effective information sharing between government organisations, including ASIC and the TPB, is needed to:

(a) reduce the number of government interactions for tax practitioners and consumers; and

(b) allow government organisations to efficiently focus on compliance and monitoring activities.

6 Chapter 2 expresses the preliminary view that two-way information sharing between ASIC and the TPB and the use of this shared information could operate more effectively.

7 We are committed to using our best endeavours to respond to information requests from the TPB in a timely manner.

8 Further, we recognise there are situations where the TPB would be assisted by ASIC pre-emptively releasing information to it. We want to work with the TPB to find a way of releasing information to it pre-emptively that is effective and efficient for both organisations.

9 We are centralising management and oversight of the process to release information to the TPB. We are confident that centralised processes will improve the timeliness and consistency of our responses to requests for information from the TPB.

10 We have considered whether law reform would promote quicker decision-making by ASIC in relation to releasing information to the TPB. Specifically, we have considered whether naming the TPB in section

127(2A) of the *Australian Secruities and Investments Act 2001* (ASIC Act) would assist. The Discussion Paper also raises this issue.

11 Our view is that efficiency gains from an amendment to section 127 of the ASIC Act would be negligible. Our view is that the current authorisation relied on to disclose information to the TPB (section 127(4)(a) of the ASIC Act) does not hinder the timely and consistent disclosure of information by ASIC to the TPB.

B Chapter 10: Tax (Financial) Advisers

The regulation of Tax (Financial) Advisers

12 The Discussion Paper notes the complexity of the regulatory regime and the duplication in the system, in particular for tax (financial) advisers (TFAs). Further, the Discussion Paper notes that many stakeholders observed that the regulatory burden on TFAs is particularly onerous.

13 The Discussion Paper proposes seven options for the regulation of TFAs, mostly aimed at minimising regulatory duplication and regulatory burden for TFAs. We have been asked to comment on these options.

Option 1

14 Option 1 proposes that:

> 'The status quo remains. This means that ASIC is responsible for the regulation of financial advice and any financial advisers that provide tax advice as part of their financial services for a fee or reward must be registered with the TPB as a TFA and therefore are subject to the TPB regulatory regime.'

15 ASIC agrees with the Reviewers that there is overlap between our regulatory jurisdiction and that of the TPB and we see the merits of minimising this.

Option 2

16 Option 2 proposes that:

> 'ASIC operates as a 'one stop shop' for the regulation of financial advice and tax advice.[1] The TPB would have no direct role in the regulation of financial advisers.'

17 Option 2 would reduce the regulatory burden on TFAs and minimise the regulatory overlap to a large extent. For example, under Option 2, the Code of Professional Conduct in TASA would not apply to TFAs, just the Code of Ethics set by FASEA. Further, we would not set education requirements for TFAs (as the TPB currently does); setting education standards would be the role of FASEA alone.

[1] We understand that this option is intended to be restricted to 'tax (financial) advisers', and that other 'tax advice' would remain within the TPB's remit.

18 Importantly, Option 2 will ensure appropriate consumer protection continues for those clients receiving financial product advice from TFAs because their conduct in relation to financial advice would continue to be subject to the requirements in the *Corporations Act 2001* (Corporations Act). These protections include the obligation for a financial adviser to act in their client's best interests and to prioritise their client's interests over their own if there is a conflict. Further, Option 2 would make it easier for consumers to know which Government entity regulates TFAs.

19 It is for these reasons that Option 2 is our preferred option.

20 We note that if ASIC were to take on this role, we assume TFAs would be regulated under the Corporations Act in the same manner as other financial advisers. Some aspects of the regulation of financial advisers differ from the current regulation of TFAs by TPB under TASA (see paragraphs 24 – 26 below). In particular, under the Australian financial services (AFS) licensing regime in the Corporations Act, the AFS licensee would be primarily responsible for authorising the TFA. The AFS licensee would be responsible for ensuring that any TFAs they have authorised are adequately trained, competent and comply with the financial services laws.

21 If the Government adopted Option 2 we would need appropriate resources to attain and maintain the skills and expertise to perform the additional regulatory role of regulating tax (financial) advice.

Options 3, 4, 5, 6

22 The Option 3, 4, 5 and 6 are variations of a co-regulatory model under which ASIC and the TPB operate as co-regulators of financial advisers/TFAs, with only one of the entities responsible for the imposition of sanctions for tax (financial) advice related matters. Further, TPB registration as a TFA is proposed to automatically attach (or not attach) to all financial advisers, and then the financial adviser can 'opt out' of (or 'opt in' to) the TPB regime as appropriate.

23 We understand the Reviewers are considering a situation where, once the FASEA education requirements are fully implemented,[2] all financial advisers would be eligible to give tax (financial) advice (because the FASEA requirements will cover tax (financial) advice) and they should only be registered on the Financial Advisers Register (FAR). That is, they would not need to register with the TPB.

[2] We note that the Government has announced that they intend to delay the date for existing advisers to meet the degree requirement. Once legislated, this would mean existing financial advisers have until 1 January 2026 to meet the degree requirement (two additional years).

24 We would support these options as a method of reducing regulatory burden and overlap. However, we wish to draw the Reviewers' attention to the following aspects of the AFS licensing regime in the Corporations Act, which differ from the current regime under TASA and which limit the level of regulatory pre-vetting of individual advisers:

(a) The AFS licensee puts individual financial advisers on FAR and is responsible for keeping their details up to date – financial advisers cannot put themselves on FAR.

(b) ASIC does not check an individual financial adviser's qualifications before an AFS licensee puts the adviser on FAR. The law places the obligation to check the adviser's qualifications on the AFS licensee. This will remain the case once the FASEA requirements are fully implemented, particularly given the complexity that would be involved to check education requirements.

25 We note that whether an individual financial adviser can give tax (financial) advice, and in relation to what products, could be recorded and displayed on FAR in the same way that an adviser's product authorisations are currently recorded and displayed on FAR.[3]

26 We consider that AFS licensees should have the option of not authorising a financial adviser to give tax (financial) advice on their behalf, even though the adviser has completed the FASEA education requirements. This is because the AFS licensee is legally responsible and liable for the conduct of the advisers it authorises. In these circumstances, it should be able to limit the adviser's authority. Further, this would be consistent with the approach for product authorisations in the financial services licensing regime.

27 It is not clear to us what ongoing obligations would apply to TFAs under this regime. It appears that TFAs would continue to be required to comply with the Code of Professional Conduct in TASA. If so, and if enforcement and administration of this code is to be with ASIC (rather than the TPB), ASIC would require additional ongoing resources to attain and maintain the skills and expertise to perform this function.

Option 7

28 Option 7 proposes to:

> 'allow financial advisers that provide incidental tax advice to not have to be registered with the TPB. At the same time there are reciprocal arrangements that permit tax advisers/accountants to provide incidental financial advice which in effect restores the concession that was previously available to accountants that are registered tax practitioners.'

[3] We note this will require an IT build and ASIC would require funding to facilitate these changes.

29 It is not that clear how Option 7, as articulated in the Discussion Paper, would be implemented.

30 We would not support:

(a) the re-instatement of the old accountants' exemption allowing advice regarding self-managed superannuation funds (SMSFs) (see below for an overview of the previous exemption);

(b) an exemption that would mean that accountants can give financial product advice without having to comply with the AFS licensing regime, including an exemption from the AFS licensing regime for accountants on the basis of registration with the TPB; or

(c) an exemption for incidental financial product advice that goes beyond the existing conditional exemption for such advice in the Corporations Regulations 2001.

31 We do not support the options in subparagraphs 30(a) and (b) above as they are distortive and do not lead to a level-playing field for accountants and other advisers. Further, they would result in an inappropriate level of regulation, and corresponding consumer protections, for what is very important advice for consumers. These reasons are explained further below.

32 We would not support the option in subparagraph 30(c) above. The current exemption has several conditions that apply and we consider that these conditions provide appropriate consumer protection for consumers who receive incidental financial product advice under this exemption.

33 Further, we note that the Financial Services Royal Commission Final Report made the following observation, which would be counter to re-instating an accountants' exemption from the AFS licensing regime:

> '…the financial services industry is itself complicated…much of the complication comes from piling exception upon exception, from carving out special rules for special interests. And, in almost every case, these special rules qualify the application of a more general principle to entities or transactions that are not different in any material way from those to which the general rule is applied.
>
> …it is time to start reducing the number and the area of operation of special rules, exceptions and carve outs. Reducing their number and their area of operation is itself a large step towards simplification. Not only that, it leaves less room for 'gaming' the system by forcing events or transactions into exceptional boxes not intended to contain them.' (pages 16-17, Volume 1, PDF version)

34 While we do not consider that there is any justification for re-instating the old accountants' exemption (or a modified version of it), we do acknowledge that there are aspects of the accountants' limited AFS licence regime (which

was introduced when the exemption was removed) that are difficult to understand and comply with. We would support simplifying the regime through law reform. We would be happy to provide input to any such simplification process.

35 Finally, we note that through our work,[4] we have not seen evidence that TFAs or accountants provide more compliant or better financial advice for consumers than other financial advisers and so do not believe that concessions from the financial advice regime for accountants can be justified on this basis.

Overview of the requirements for accountants

Former accountants' exemption

36 The 'accountants' exemption' came into effect on 26 February 2004 as a result of the Corporations Amendment Regulations 2004 (No.2) 2004, Statutory Rules 2004 No. 25. The exemption allowed recognised accountants to give financial product advice about acquiring or disposing of an interest in an SMSF. The exemption did not extend to other superannuation products or other financial products.

37 The Explanatory Statement states the rationale for the exemption as:

> 'Self-managed superannuation funds are often used as a tool to implement FSRA-exempted advice given by accountants, such as business structuring advice and taxation advice. The exemption for self-managed superannuation would therefore be in keeping with the policy of exempting such advice from the FSRA.'

38 The former exemption did not apply universally. It was limited to 'recognised accountants', who were defined in the former Regulation 7.1.29A(2) as members of professional bodies (specifically, CPA Australia, Chartered Accountants Australia and New Zealand or the Institute of Public Accountants). Further, this exemption was restricted to those members entitled to use the specified post-nominals (for example, CA and CPA), who had completed the professional body's continuing professional education requirements. This carve-out was justified in the Explanatory Statement on the basis that the members of these professional bodies were subject to continuing educational and ethical requirements.

[4] In particular, in Report 575 *SMSFs: Improving the quality of advice and member experiences*.

Removal of the accountants' exemption

39 The view of the *Inquiry into Financial Products and Services in Australia* (known as the Ripoll report) conducted by the Parliamentary Joint Committee on Corporations and Financial Services in 2009 was that accountants wishing to provide financial product advice, as defined under the Corporations Act, should obtain an AFS licence to do so.[5]

40 We consider that the former exemption meant that there was not a level-playing field for accountants and other advisers. Further, it appeared to distort the conduct of accountants. That is, it appeared to lead to accountants recommending SMSFs because this was the only financial advice they could legally provide without an AFS licence, even when an APRA-regulated superannuation product would have been more likely to be in their client's interest.

41 The accountants' exemption was removed as part of the Future of Financial Advice (FOFA) reforms in 2013, with a three year transition period. The removal of the exemption extended the consumer protection provisions of the Corporations Act, such as the best interests duty, to financial product advice provided by accountants.

42 The removal of the accountants' exemption reflected the Government's policy decision that such advice should fall within the scope of the AFS licensing regime, regardless of who provides that advice. The Government's view was that the exemption did not provide an appropriate framework for advice in relation to SMSFs and superannuation more generally.

43 The removal of the accountants' exemption means that unlicensed accountants can no longer provide recommendations about whether to establish an SMSF, acquire an interest in an SMSF or wind up an SMSF.

44 This type of financial advice is fundamentally different to providing tax advice or to advising a client on the process of setting up an SMSF once they have already made the decision to establish one. (Both these types of advice are permitted to be given without an AFS licence.) The decision to set up an SMSF is one of the most significant steps a consumer can take in relation to their retirement savings. Our view is that it is appropriate that advice about whether to, or not to, set up an SMSF falls within the scope of the AFS licensing regime.

45 The services that were previously covered by the accountants' exemption cannot be characterised as merely 'incidental tax advice' or financial product advice that is incidental to the services that accountants normally provide.

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[5] Refer to paragraph 6.155 of the Ripoll Report.

46 There are a range of other exemptions which still allow accountants to provide financial product advice that is incidental to their services, without holding an AFS licence. These include exemptions for tax advice and for advice about establishing, operating, structuring or valuing an SMSF.

47 We have provided guidance about these exemptions and the conditions of relying on them in Information Sheet 216 *AFS licensing requirements for accountants who provide SMSF services* (INFO 216), in particular see Table 1 ('What you may do without being covered by an AFS licence') and the later section titled 'Exemptions for certain SMSF services'.

48 We consider that the conditions that must be complied with to rely on these exemptions provide appropriate consumer protection for consumers who receive incidental financial product advice under the exemptions.

Current framework

49 Typically, an accountant affected by the removal of the accountants' exemption is providing financial product advice about investing in an SMSF, or dealing in an SMSF, as part of their overall management of a client's tax affairs.

50 Provision of these financial services requires an AFS licence with an appropriate authorisation. This reflects the Government's policy decision that financial product advice about acquiring or disposing of an interest in an SMSF should be within the scope of the AFS licensing regime, regardless of who provides that advice.

51 As such, many services an accountant could previously have provided under the former accountant's exemption are now covered under the limited AFS licence regime. Typically, an accountant providing services of this nature would be authorised under a limited AFS licence (either by attaining their own licence or being authorised by a limited AFS licensee).

52 Finally, it is worth pointing out that an authorisation under a limited AFS licence, allows accountants to do more than they could previously do under the former accountants' exemption.