9 April 2014

Tax Practitioners Board
PO Box 126
HURSTVILLE BC NSW 1481

Email: tpbsubmissions@tpb.gov.au

Dear Mr Taylor

Exposure draft TPB (EP) D6/2014 - Proposed professional indemnity insurance policy requirements for tax (financial) advisers

CPA Australia and the Institute of Chartered Accountants Australia ('the Institute') welcome the opportunity to comment on the Exposure draft TPB (EP) D6/2*014 Proposed professional indemnity insurance policy requirements for tax (financial) adviser*s.

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 and academia throughout Australia and internationally. Specifically members of the accounting profession are increasingly becoming involved more widely in financial services related advisory and service roles.

We support the proposed approach of the Tax Practitioners Board (TPB) to establish the professional indemnity insurance framework for tax (financial) advisers. This framework will be instrumental for the TPB to achieve its policy objective of ensuring all registered entities have adequate PI insurance cover for the tax (financial) advice services they provide.

We believe the proposed framework recognises, and where possible aligns, with the current compensation and insurance requirements for AFS licensees. This should ameliorate some additional compliance requirements and costs that registering entities may have otherwise faced during transition and registration.

If you have any questions regarding this submission, please do not hesitate to either 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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Implementation arrangements

The TPB's objective

Professional indemnity is an important element of the consumer protection framework and it is therefore appropriate a general requirement is implemented for PI insurance cover for all registered tax (financial) advisers.

The TPB's approach to implementation

CPA Australia and the Institute support the TPB's proposed staged approach to implementing and administering the PI insurance requirements for registered tax (financial) advisers.

Permitting a tax (financial) adviser to maintain their existing PI insurance cover during the implementation period provides a practical approach to implementing these obligations. It also balances consumer protection, while not imposing unnecessary cost and compliance burden on the financial services industry.

Given that insurance policies must generally be renewed on an annual basis, it is appropriate that by 1 January 2017 all tax (financial) advisers who are required to have PI insurance cover have cover in place that meets the TPB's requirements.

The legislative framework

What 'maintain' means

We believe the three proposed alternatives for determining whether a tax (financial) adviser maintains PI insurance cover are appropriate. They provide a practical approach, while ensuring the policy objective can be met at all times.

What 'will be able to maintain' means

CPA Australia and the Institute support the TPB's proposal to adopt a flexible approach to 'what maintain' means.

This approach will accommodate new applicants applying for registration, who would most likely seek appropriate PI insurance cover once it has been confirmed that their application for registration has been granted.

We believe that allowing 14 days from the date the tax (financial) adviser receives notification that their application for registration has been granted, provides adequate time to both secure the cover and provide the evidence to the how they meet the TPB's PI insurance requirements.

Where an employee or contractor registered tax (financial) adviser does not receive a fee in their own right for tax (financial) services provided, we agree they must be covered by another registered tax (financial) adviser's policy in order to meet the TPB's requirements.

The TPB’s PI insurance requirements

How the PI insurance requirements will apply

CPA Australia and the Institute support the TPB’s proposed implementation of the PI insurance requirements during the notification, transitional and standard periods.

In our view, it is appropriate to allow a licensed financial adviser to register during the notification period, provided they have in place a professional indemnity insurance policy that meets the requirements of ASIC’s Regulatory Guide 126 *Compensation and insurance arrangements for AFS licensees*. We consider permitting this policy to remain in place, as a means to satisfying the TPB’s requirement, until it either lapses or 1 January 2017 is consistent with the objective of minimising compliance costs where appropriate by recognising similar obligations required by ASIC.

We also believe it is appropriate when applying for registration, or renewal of registration, that a tax (financial) adviser must satisfy the TPB that they have, or will have in place upon registration, PI insurance cover that meets the TPB’s requirements.

Providing evidence of PI insurance cover to the TPB

Adequate PI insurance cover plays an important role in consumer protection. Therefore it is appropriate that a tax (financial) adviser should be required to annually provide evidence to the TPB as a means to ensure all registered tax (financial) advisers continue to meet their PI insurance obligations.

We also believe there may be opportunities where AFS licensees can work with the TPB to implement processes and administrative efficiencies. For example, the AFS licensees could on behalf of its registered tax (financial) advisers provide evidence of appropriate insurance to the TPB. We encourage the TPB to work with AFS licensees to explore any such opportunities.

What this means for consumers of tax (financial) advisers

We support the TPB’s view, and believe it is important to recognise, that while PI insurance is an important consumer protection mechanism, it is in fact intended to protect the tax (financial) adviser against the risk of financial losses in the provision of tax (financial) advice services. It is therefore limited in that it is not necessarily intended to cover what a client might perceive as a loss in every circumstance.

This is a risk that exists across many advice disciplines, not just tax advice, and consideration should be given as to how this misconception may be best addressed by regulators including the TPB.

If a tax (financial) adviser cannot or does not comply

If a tax (financial) adviser does not satisfy the TPB that they have PI insurance cover than meets the TPB’s requirements, or declare they will maintain PI insurance cover that meets the TPB’s requirements, we believe it is appropriate that the TPB does not grant the applicant registration.

We also support the view that if a tax (financial) adviser falls to maintain the required PI insurance cover during registration, that the TPB have the discretion to either sanction the tax (financial) adviser or terminate registration on the basis the individual fails to meet the requirements of registration.

However, we do note that as a result of recent amendments to the Tax Agent Services Act 2009 (TAS Act), the Board now has two separate powers to terminate a registration for failure to maintain the required PI insurance:

a) Subdivision 30-B - based on the grounds of a breach of the code of conduct obligation in s 30-10(13); and
b) Subdivision 40-A - based on the grounds that the individual ceases to meet one of the tax practitioner registration requirements in s 20-5

The concern with this is that it seems to give rise to two alternative procedures that the TPB could adopt depending upon which power is relied upon. The first power (a) is dependent upon the TPB being satisfied of a breach after having first conducted an investigation under Subdivision 60-E of the TAS Act, while the second power (b) does not appear to require any investigation. We would encourage the TPB to form and adopt a consistent approach for all PI insurance matters relating to ongoing registrations, and submit that the TPB should adopt the most robust and fair procedure, namely the one that first involves an investigation process. This will ensure the TPB must give notice that it has decided to commence an investigation into the matter, and allows the practitioner an opportunity to respond by obtaining the required PI insurance cover (or notifying the TPB) prior to the TPB making any decision to terminate the registration.

We note that ultimately, both powers to terminate are subject to Subdivision 40-B regarding notice and effect of termination. In either case, the TPB must notify the registered practitioner within 30 days of the decision, and such notice must state the decision and the reasons for the decision, as well as any determination of the period for which the practitioner cannot reapply for registration. Importantly, the date of effect of the termination must be at least 28 days after the date of the notice. However, we understand that this period would only allow the practitioner time to appeal the decision to the Administrative Appeals Tribunal before the termination takes effect. That is, we understand it would be too late for the TPB itself to reverse the termination decision once the TPB's decision is made and notified. For this reason, we consider that it is important for the TPB to allow practitioners a consistent process and adequate notice of the investigation into the alleged breach so they can obtain and/or notify their PI insurance cover, before the TPB's termination decision is made.

Recommendation:

We recommend that the TPB adopt a consistent process for enforcing the PI insurance requirement, which provides practitioners with notice that an investigation is being conducted into an alleged breach so they can obtain and/or notify their PI insurance cover, before the TPB's termination decision is made.

Key Principles

The three key principles of the TPB's PI insurance requirements are appropriate and will provide some flexibility in how a tax (financial) adviser can satisfy their PI insurance obligations.

While we believe it is important that a principles based approach is taken in order to provide flexibility to a diverse industry, supplementing this with specific requirements is also necessary in order to ensure the TPB's policy objective will be met.

This is consistent with the approach taken by ASIC for regulating compensation and insurance arrangements for AFS licensees. ASIC take a general approach and mandate specific elements, such as the minimum level of cover.

Importantly, we acknowledge and support the approach of the TPB to consider the practical availability of cover when setting out the PI insurance requirements.

Adequate PI insurance cover

Consistent with our previous comments, we support the TPB's proposal that in order for a tax (financial) adviser to determine what is adequate cover they must have regard to the nature of the tax (financial) advice and services they are providing within their business.

Notwithstanding this, we believe that it is appropriate that the TPB set a minimum level of cover and mandate other elements such as the scope of cover and that there are no exclusions which may undermine the policy objective.

We also support the TPB's approach of requiring tax (financial) advisers to assess, ensure and document they have sufficient financial resources available to cover any excess of the PI insurance policy. This is consistent with approach taken by ASIC for regulating compensation and insurance arrangements for AFS licensees.

Assessing adequacy

CPA Australia and the Institute support the guidance provided in Table 4 on the process a tax (financial) adviser should undertake to determine what is adequate PI insurance cover for their specific circumstances.

We also believe it is appropriate that this process is reviewed at least annually or if there is any material change in the business.

Authorised insurers

We support the requirement that the cover must be obtained from an insurer regulated by the Australian Prudential Regulation Authority, or operating under an exemption within the Insurance Act 1973 or the Insurance Regulations 2002.

This approach is again consistent with the approach taken by ASIC for regulating compensation and insurance arrangements for AFS licensees.

We also support the TPB's approach to assess on a case by case basis if an alternate source of cover is acceptable.

What the policy should cover and include

The guidance proposed in Table 5 is appropriate and will provide the financial services industry important guidance to ensure their PI insurance policy is 'adequate' for their business.