

8 April 2014

Tax Practitioners Board
PO Box 126
HURSTVILLE BC NSW 1481

Email: tpbsubmissions@tpb.gov.au

Dear Mr Taylor

Exposure draft TPB (I) D20/2014 - What is a tax (financial) advice service?

CPA Australia and the Institute of Chartered Accountants Australia ('the Institute') welcome the opportunity to comment on the Exposure draft TPB (1) D20/2014 - What is a tax (financial) advice service?

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.

CPA Australia and the Institute believe that clarifying what will constitute a tax (financial) advice service is the most fundamental component of the new regime to regulate tax (financial) advisers. It will also form a core component of the consumer protection framework, ensuring that tax (financial) advisers provide advice and services to consumers within the confines of the new regime.

We broadly support the Tax Practitioners Board's (TPB) proposed views in the draft information sheet and the examples provided to demonstrate what is and what is not a tax (financial) advice service. However, we believe that the provision of additional and more complex examples would provide clarity and further assist the financial services sector to transition to this new regulatory regime. We would be happy to work with the TPB to developing these examples.

Once finalised, this guidance will play a central role in providing clarity and a consistent approach for the industry.

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



Keddie Waller
Policy Adviser – Financial Planning
CPA Australia
Accountants



Hugh Elvy
Head of Financial Planning
Institute of Chartered

Representatives of the Australian Accounting Profession



cpaaustralia.com.au



**Institute of
Chartered Accountants
Australia**

charteredaccountants.com.au

What is a tax (financial) advice service?

CPA Australia and the Institute believe that clarifying what will constitute a tax (financial) advice service is the most fundamental component of the new regime to regulate tax (financial) advisers.

We support the TPB's proposed approach to issue guidance by way of an information sheet containing examples that explain what is and what is not a tax (financial) advice service.

This guidance will be vital in providing clarity and a consistent approach for the industry.

It is clear from the proposed guidance that all five key elements must be satisfied for the service to be regarded as a tax (financial) advice service. However, in our view it is easier to identify whether some elements have been satisfied than others.

We also support that in addition to Appendix A 'Examples of tax (financial) advice services' the TPB may, by legislative instrument, specify that another service is a tax (financial) advice service. The financial services and advice sectors are continually going through stages of regulatory change and as a consequence, the TPB needs the flexibility to address these changes as they arise.

Element 1 – tax agent service (excluding representations to the Commissioner)

The guidance in this section provides a clear indication of what is considered to be a tax agent service for the purposes of this regime.

This includes the basis on which 'general advice', as defined in section 766B of the *Corporations Act 2001*, has been excluded from being a tax (financial) advice service, that is based on the fact that a client's specific circumstances have not been considered.

While we agree in principle with this conclusion, we would caution that this creates the potential for tax related advice and services to be provided without requiring the licensed financial adviser providing the general financial product advice to be registered or having undertaken any specialist training.

While a client's circumstances may not be taken into account, there remains a risk that the client may still rely and act on the general advice without having adequate warning. Of relevance, the issue of whether a consumer is able to differentiate between 'general' and 'personal' advice is also currently being debated in regards to the proposed amendments to the Future of Financial Advice reforms.

In our view it would be beneficial if the TPB issued guidance stating the specific requirements that a licensed financial adviser must meet to rely on the general advice exclusion, for example the provision and content of a disclaimer. This should be accompanied by examples of general advice to provide context when the disclaimer should be provided.

This disclaimer should be separate and distinct from the 'Disclosure' statement that an unregistered licensed financial adviser is required to provide a client if they provide tax (financial) advice services within the notification period.

Recommendation:

The TPB should issue guidance stating the specific requirements that a licensed financial adviser must meet to rely on the general advice exclusion, for example the provision and content of a disclaimer.

Element 2 – provided by a financial services licensee or a representative

This element provides clear guidance, and as such, we do not believe any further comments or examples are necessary.

Element 3 – provided in the course of advice usually given by a licensee or representative

The definition of a tax (financial) advice service in section 90-15 of the *Tax Agent Services Act 2009* was broadly drafted to reflect the range of advice and strategies in relation to wealth management, retirement planning, estate planning and risk management a licensed financial adviser may provide.

However, clarity is required to ensure that this broad definition does not inadvertently enable a licensed financial adviser to provide a broader range of advice and services than traditionally provided. This clarity will be beneficial for both financial advisers and consumers.

For example, the definition explicitly excludes the preparation or lodging of tax returns and representing an entity in their dealings with the Commissioner. However, we are aware of a view that was put forward at the last TPB consultative forum that the definition may permit a financial adviser to assist a client with the preparation of a private binding ruling application.

In our view, such a service is clearly beyond the intended scope of the definition and is not a service 'provided in the course of giving advice of a kind usually given by a financial services licensee or representative'.

The preparation of a private binding ruling application requires an in-depth knowledge of the taxation administration laws and relevant ATO practice statements (in addition to the relevant substantive taxation provisions). As such, we believe this would fall well outside of what would constitute a service that is provided in the course of giving advice of a kind usually provided by a licensed financial adviser and therefore a registered tax (financial) adviser. Further, we also believe applying for a private binding ruling on behalf of a client is also strictly a registered tax agent service.

We recommend that the TPB include a specific item in Appendix A 'Examples' table to make it clear that assisting a client in preparing or applying for a private binding ruling is a tax agent service, not a tax (financial) advice service.

Recommendation:

The TPB include a specific item in Appendix A 'Examples' table that states assisting a client in preparing or applying for a private binding ruling is a tax agent service, not a tax (financial) advice service.

In paragraph 14 we believe 'permits' would be a more appropriate term in preference to 'authorises' in order to describe the scope, the effect of the licence and remove potential confusion. The AFS licence permits specific advice and services to be provided, while the licensee or representatives of the licensee provide the advice and service.

Note: Element 3 Paragraph 16 has a typographical error in the following statement -

General advice

- All other financial *produce* advice.

This should be:

- All other financial *product* advice.

Element 4 – relates to ascertaining about obligations under a taxation law

We believe that Element 4 provides clear guidance, and as such, does not require further guidance.

Note: Element 4 Paragraph 19 has a typographical error in the following statement -

Key Acts include, but *is* not limited to..

This should be:

Key Acts include, but *are* not limited to..

Element 5 – reliance for tax purposes

The guidance in this section and Appendix A provides useful information to assist individuals in making this determination.

For clarity and consistency, we believe 'independent' should be removed from point 9 in Paragraph 22. Section 923A restricts the use of certain words, such as 'independent', 'impartial' and 'unbiased'. The use of a restricted word includes using the word in any publication or advertisement produced or released by a person that gives financial product advice, including AFS licensees, authorised representatives and other representatives of an AFS licensee.

The final item of Paragraph 22 states that whether the entity providing the service has provided an effective disclaimer against responsibility for the service is one of the circumstances to consider as to whether the client can reasonably expect to rely on a service being provided. Although it explains that the provision of a disclaimer does not automatically absolve the entity providing the service from registration, we are concerned that this may undermine the policy intent of the new framework. As such, we believe it is important that the TPB provide additional guidance in regards to this factor, including examples of when providing a disclaimer may or may not be appropriate.

Recommendation:

The TPB provide additional guidance in regards to when a disclaimer can or cannot be provided to a client for reliance on the service for tax purposes following the notification period, including examples of when providing a disclaimer may or may not be appropriate.

In addition to items listed in this table, and consistent with our previous comments, we recommend the addition of a new item that specifically states that assisting a client in preparing or applying for a private binding ruling is a registered tax agent service, not a tax (financial) advice service.