

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 115, 2014**

#### **Issued by authority of 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 Regulation) gives effect to the changes to the Act contained in 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 Regulation does this by prescribing registration requirements for tax (financial) advisers, and also sets out a number of other changes, which are designed to bring tax (financial) advisers in line with other entities regulated by the Board. These, for example, include changes to recognise tax (financial) adviser associations, and list tax (financial) advisers on the register of registered and deregistered entities.

The Regulation allows 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 provided by tax agents. For example, tax (financial) advisers may not make representations to the Commissioner of Taxation. 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.

The Regulation also makes a number of other amendments to bring tax (financial) advisers within the regime administered by the Board. 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 Regulation clarifies that some services which are provided by an actuary are not a tax agent service. Similarly, the Regulation specifies that services provided by a trustee to members of a trust or a managed investment scheme are not tax agent services.

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

Details of the Regulation are set out 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 Regulation between 8 February 2013 and 8 March 2013. Thirty-three submissions were received, including three confidential submissions. The non-confidential submissions are available on the Department of the Treasury (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 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 proposed regulations.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences the day after its registration.

**Details of the *Tax Agent Services Amendment (Tax (Financial) Advisers) Regulation 2014***

**Section 1 – Name of Regulation**

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

**Section 2 – Commencement**

This section provides that the entirety of the Regulation commences on the day after the instrument is registered.

**Section 3 – Authority**

This section provides that the Regulation is made under the *Tax Agent Services Act 2009* (the Act).

**Section 4 – Schedule(s)**

This section provides that the items contained in the schedule to the Regulation amend the *Tax Agent Service Regulations 2009*, in the way set out in the schedule.

**Schedule 1 – Amendments**

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

Item [32] 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 the four qualification and experience combinations set out in that Division. These requirements recognise the types of services provided by financial planners, and ensure they meet minimum standards of education and experience to provide tax (financial) advice services.

The various combinations ensure that individuals seeking registration have sufficient breadth of knowledge in both Australian taxation law and commercial law. It is important that advisers have this breadth of knowledge because the Act does not carve out certain parts of tax or commercial law knowledge that a tax (financial) adviser is not required to know. However, this does not mean that every tax (financial) adviser necessarily has the depth of knowledge required to give advice on any matter. As is currently the case with tax agents, where affairs are complicated or require specialist knowledge, it may be more appropriate for that to be referred to someone with the requisite knowledge. Requiring tax (financial) advisers to have a wide breadth of knowledge ensures that they can properly assess whether the service a client requires is within their relevant knowledge and skills to provide.

**Requirements under the Corporations Act 2001**

For all qualification and experience combinations under this Division, it is a requirement 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 paragraph 910A(a) of that Act. This includes an authorised representative of the licensee, an employee or director of the licensee, an employee or director of a related body corporate of the licensee, or any other person acting on behalf of the licensee. This nexus is necessary to ensure that only individuals subject to the regulatory regime in the *Corporations Act 2001* qualify for the tailored education and experience requirements under the Act. As noted in paragraph 1.16 of the Explanatory Memorandum to the Tax Laws Amendment (Measures No. 3) Bill 2013, the regulatory regime for tax (financial) advisers takes in account the existing regulatory regime in the *Corporations Act 2001* applying to those in the financial services industry.

Additionally, this requirement ensures that individuals seeking to register under these combinations are currently, or have very recently been, engaged as financial planners. Where an individual has not ceased to be a licensee or a representative of a licensee, the 90 day transitional period does not apply. This is because an individual who remains employed but has taken leave will ordinarily remain a licensee or a representative.

As this is an ongoing registration requirement, a 90 day transitional period ensures individuals do not cease to be registered if, for example, they merely change jobs. Providing a fixed period ensures administrative efficiency and that short transitions need not require re-registration with the Tax Practitioners Board (the Board). The length of this period balances maintaining the integrity of the regime and ensuring that there is sufficient flexibility to account for reasonable transitional arrangements.

However, it is important to note that a registered individual who does not meet an ongoing registration requirement is not automatically deregistered. Section 40-5 of the Act provides that the Board has discretion whether to terminate the registration of an individual or not. The Board's processes are to first notify an individual that they no longer meet an ongoing registration requirement and then seek further information about this before making any decision. Such a decision is reviewable by the Administrative Appeals Tribunal.

#### Relevant discipline

The Regulation sets out that a discipline which is relevant to financial planning includes, but is not limited to, ones such as finance, financial planning, commerce, economics, business, tax, accountancy or law. Other disciplines may also be relevant.

#### Relevant experience

A key concept for all four 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 rather than 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. This allows the Board to recognise relevant experience that individuals may have gained prior to 1 July 2014. 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 is able to consider and aggregate smaller periods, in assessing if an applicant has met the requirement.

#### Tertiary qualifications

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

A relevant tertiary qualification is a degree or post-graduate award from an Australian tertiary institution in a relevant discipline, or a degree or award from an equivalent institution that is approved by the Board, in a relevant discipline.

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 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 necessarily 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 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 will be on the basis of work experience that an individual has completed. This allows 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 fourth 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 Regulation (as outlined below). A recognised professional association that accepts members who do not meet these requirements may have its recognition terminated.

As noted in the Explanatory Statement to the *Tax Agent Services Regulations 2009*, 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 will not be required to complete a Board approved course in Australian taxation law or commercial law. This is consistent with item 206 of Part 2, Division 1 of Schedule 2 to the *Tax Agent Services Regulations 2009*, which allows individuals seeking registration as tax agents 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 under this option, an applicant will need to complete significantly more relevant experience. This totals 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.

### Application fees

Item [14] 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. From 1 July 2014 to 31 December 2015, tax (financial) advisers are not required to pay a fee for lodgement of an application.

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 [15]-[22] provide that tax (financial) advisers are registered entities under the *Tax Agent Services Act 2009*. The Regulation prescribes that, as registered entities, they would need to be listed on the register of registered and deregistered agents, in the same way that BAS agents and tax agents are.

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

- 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 will need to 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 ensure that such organisations 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.

Items [9], [27] and [28] provide that to qualify as a recognised tax (financial) adviser association, an organisation needs to satisfy the Board that it meets the following eligibility criteria:

- 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 will need to be subject to rules controlling their conduct in the practice of that profession and will need to 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 will be required to have professional indemnity insurance.

The organisation will be required to have satisfactory arrangements in place for notifying clients of its members (or 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 will be required to 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 each of the organisation's voting members are required to comply with at least one of the following requirements:

- they have been awarded a degree or a post-graduate award from an Australian tertiary institution or an equivalent institution in a relevant discipline;
- they have been awarded a diploma or higher award from a registered training organisation or equivalent institution in a relevant discipline; or
- they 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 the regulations. In determining what falls within the definition, the Board has issued specific guidance material on what it considers to be a tax agent service and a tax (financial) advice service.



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. Services that fall short of meeting the threshold definition of a tax agent service cannot be prescribed as not being a tax agent service using this regulation making power.

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 determination or 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's 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 amendments to Regulation 13 contained in Items [25] and [26] provide 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. It is also not a tax agent service if an actuary provides a service to a 'defined benefit superannuation scheme' within the meaning of section 6 of the *Superannuation Guarantee (Administration) Act 1992*, or if an actuary provides a service about an allocation from a reserve in an accumulation fund, within the meaning of section 291-25(3) of the *Income Tax Assessment Act 1997*. Though these services are not explicitly required by legislation to be performed by an actuary, where an actuary is asked to provide a service to a 'defined benefit superannuation scheme' or an accumulation fund, they are asked to do so on the basis of their specialist and technical training as an actuary.

Items [23] and [24] 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 Regulation 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 may disproportionately affect those women who take maternity leave.

Accordingly, Item [31] 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 [30] 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], [16]-[23], and [30] amend various sections in the *Tax Agent Services Regulations 2009* with references to tax (financial) advisers and recognised tax (financial) adviser associations.

Items [5]-[8] and [12] clarify the operation of existing provisions. Two of the amendments, Items [5] and [7] better align the provisions with existing definitions, and Items [6], [8], and [12] clarify how existing concepts are to apply in specific circumstances.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Tax Agent Services Amendment (Tax (Financial) Advisers) Regulation 2014***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

This instrument gives effect to the amendments in the *Tax Laws Amendment (2013 Measures No. 3) Act 2013*, in order to regulate entities that give tax advice in the course of giving advice that is usually provided by a financial services licensee or a representative. This ensures the consistent regulation of all forms of tax advice, irrespective of whether it is provided by a tax agent, a BAS agent or an entity in the financial services industry. The issues identified in the Statement of Compatibility with Human Rights to the *Tax Laws Amendment (2013 Measures No. 3) Act 2013*, are also relevant to this instrument.

#### **Human rights implications**

##### ***Equality and non-discrimination***

The *Tax Agent Services Regulations 2009* provide that an ongoing registration requirement is that BAS agents have completed a number of hours of professional experience over a three year period. Though not discriminatory in its terms, in effect the length of this period has disproportionately affected women taking maternity leave, because women constitute 80 per cent of registered BAS agents.

The amendment addresses this concern by extending the period over which experience may be earned for all applicants. This better accounts for the circumstances of individuals engaged as BAS agents.

The ongoing registration requirements for tax (financial) advisers introduced by the Regulation implicitly distinguish between entities that meet the requirements, and those that do not. These requirements operate to protect consumers from inadequate or inappropriate advice, and reasonably require entities providing tax (financial) advice to be appropriately trained and registered to provide consumers with confidence in the advice they receive.

##### ***Privacy and reputation***

Consistent with the existing legislative framework, the instrument provides that entities that are regulated to provide tax (financial) advice are listed on a public register to provide transparency to the public regarding the registration status of these entities. This is an important consumer protection mechanism.

The information that is made available on the register does not include intrinsically personal information about any individual. The information includes the name of the entity, registered address, registration status and membership status and allows consumers to properly identify and verify those entities regulated by the Board.

#### **Conclusion**

This instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are necessary, reasonable and proportionate.