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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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TAX LAWS AMENDMENT (2013 MEASURES No. 3) BILL 2013

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EXPLANATORY MEMORANDUM

(Circulated by the authority of the  
Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP)



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## ***Glossary***

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
AAT	Administrative Appeals Tribunal
AFSL	Australian financial services licence
APS	Australian Public Service
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	<i>Corporations Regulations 2001</i>
CPE	continuing professional education
DGRs	deductible gift recipients
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
PI insurance	professional indemnity insurance
SMSF	self managed superannuation fund
TAA 1953	<i>Taxation Administration Act 1953</i>
TASA 2009	<i>Tax Agent Services Act 2009</i>
TASR 2009	<i>Tax Agent Services Regulations 2009</i>
TPB	Tax Practitioners Board



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## ***General outline and financial impact***

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### **Creating a regulatory framework for tax (financial) advice services and other amendments**

Schedule 1 amends the *Tax Agent Services Act 2009* to bring entities that give tax advice in the course of giving advice that is usually provided by financial services licensees within the regulatory regime administered by the Tax Practitioners Board. 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.

In addition, Schedule 2 to this Bill makes a number of other amendments to the *Tax Agent Services Act 2009* to correct a range of technical issues.

***Date of effect:*** The amendments in Schedule 1 mostly commence from 1 July 2014 with a three-year transitional period before the new regime commences in full on 1 July 2017. This transitional period ensures those in the financial services industry have time to adapt to the new regulatory requirements. The amendments in Schedule 2 apply from the day after this Bill receives Royal Assent

***Proposal announced:*** On 29 November 2010, the then Assistant Treasurer and Minister for Financial Services and Superannuation released an options paper ‘Regulation of tax agent services provided by financial planners’ for public consultation. Following an ongoing consultation process with industry stakeholders, these amendments were announced in the 2012-13 Mid-year Economic and Fiscal Outlook.

***Financial impact:*** Nil.

***Human rights implications:*** These Schedules do not raise any human rights issues. See Statement of Compatibility with Human Rights — Chapter 1, paragraphs 1.169 to 1.176.

***Compliance cost impact:*** Medium. Entities in the financial services industry that give tax advice in the course of giving advice that is usually provided by financial services licensees will need to register with the Tax Practitioners Board and meet standards of relevant qualifications and experience.

## **Summary of regulation impact statement**

### **Regulation impact on business**

**Impact:** These amendments will affect entities in the financial services industry that provide tax advice in the course of giving advice that is usually provided by financial services licensees.

**Main points:**

- Entities in the financial services industry may currently provide their clients with tax advice without being subject to the application of the *Tax Agent Services Act 2009*. This exemption expires on 30 June 2013.
- There are three courses of action available to address the situation arising from the expiry of this exemption.
  - Entities in the financial services industry would need to comply with all the requirements in the *Tax Agent Services Act 2009*.
  - The current exemption could be extended.
  - A co-regulatory model between the Tax Practitioners Board and the Australian Securities and Investments Commission could be implemented to streamline the regulation of entities in the financial services industry that provide tax advice.
- A co-regulatory framework best meets the objectives of ensuring the consistent regulation of all forms of tax advice and minimising the compliance costs on entities in the financial services industry.

### **Deductible gift recipients**

Schedule 3 amends the *Income Tax Assessment Act 1997* to update the list of specifically listed deductible gift recipients (DGRs).

**Date of effect:** The listings of the Australian Council of Social Service Incorporated and Make a Mark Australia Incorporated apply to gifts made after 30 June 2013.



**Proposal announced:** The listings of the Australian Council of Social Service Incorporated and Make a Mark Australia Incorporated have not been previously announced.

**Financial impact:** The revenue implications of this measure are as follows:

<b>Organisation</b>	<b>2013-14</b>	<b>2014-15</b>	<b>2015-16</b>	<b>2016-17</b>
The Australian Council of Social Service Incorporated	Nil	-\$0.015m	-\$0.015m	-\$0.015m
Make a Mark Australia Incorporated	Nil	-\$0.01m	-\$0.01m	-\$0.01m

**Human rights implications:** This Schedule does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 3, paragraphs 3.11 to 3.15.

**Compliance cost impact:** Nil.



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# **Chapter 1**

## **Creating a regulatory framework for tax (financial) advice services and other amendments**

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### **Outline of chapter**

1.1 Schedule 1 amends the *Tax Agent Services Act 2009* (TASA 2009) to bring entities that give tax advice in the course of giving advice that is usually provided by financial services licensees within the regulatory regime administered by the Tax Practitioners Board (TPB). 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.

1.2 In addition, Schedule 2 to this Bill makes a number of other amendments to the TASA 2009 to correct a range of technical issues.

1.3 Unless otherwise noted, all legislative references in this chapter are to the TASA 2009.

### **Context of amendments**

#### **The current regulatory regime for tax agents and BAS agents**

1.4 With effect from 1 March 2010, the TASA 2009 introduced a national regulatory regime for tax agents and BAS agents to ensure that providers of tax agent services to the public meet appropriate professional and ethical standards. A sound regulatory environment gives confidence to the public about the quality of the service they receive and strengthens the integrity of the tax system.

#### ***Tax agents and tax agent services***

1.5 There are three key elements that form the basis of the regulatory regime for tax agents. These are:

- the definition of what constitutes a tax agent service;

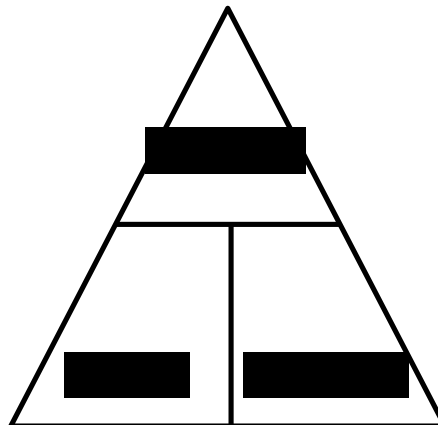
- the registration requirements and Code of Professional Conduct that applies to registered tax agents; and
- the civil penalties that may apply to unregistered tax agents.

1.6 The TASA 2009 broadly defines tax agent services by reference to a series of service-related elements. Essentially, a tax agent service is a service provided in circumstances in which an entity can reasonably expect to rely on it for tax purposes, and it relates to:

- ascertaining an entity's tax liabilities;
- advising an entity about their tax liabilities and potential tax liabilities; or
- representing an entity in their dealings with the Commissioner of Taxation (Commissioner).

The triangle in Diagram 1.1 illustrates each of these three elements.

**Diagram 1.1**



1.7 The TASA 2009 generally requires entities that provide tax agent services to register with the TPB. The registration requirements ensure that the individuals who provide or are accountable for these services meet standards of fitness and propriety and have relevant qualifications and experience. Registered entities are also subject to a Code of Professional Conduct which includes the requirement to provide services competently.

1.8 Different registration requirements apply to partnerships and companies that provide tax agent services. These requirements ensure that these entities have a sufficient number of registered individuals within the organisation to provide tax agent services to a competent standard and to carry out supervisory arrangements.

- This means that whilst a number of employees may need to be registered tax agents to meet this sufficient number requirement, there is no obligation for all employees, regardless of their remuneration, who may provide tax agent services to be registered with the TPB (unless they provide services in their own right).
- The entity may also use other individuals that are registered tax agents such as partners, directors, contractors and staff provided under service trust arrangements to meet this sufficient number requirement.

1.9 Generally, entities that provide tax agent services for fee or other reward whilst unregistered contravene the TASA 2009 and may be liable to civil penalties.

1.10 The TPB provides guidelines and other information about how this framework operates, as well as information about what services may or may not be tax agent services. For example, providing general tax information or tax advice to a client that does not involve the application or interpretation of the taxation laws to their personal circumstances are not tax agent services.

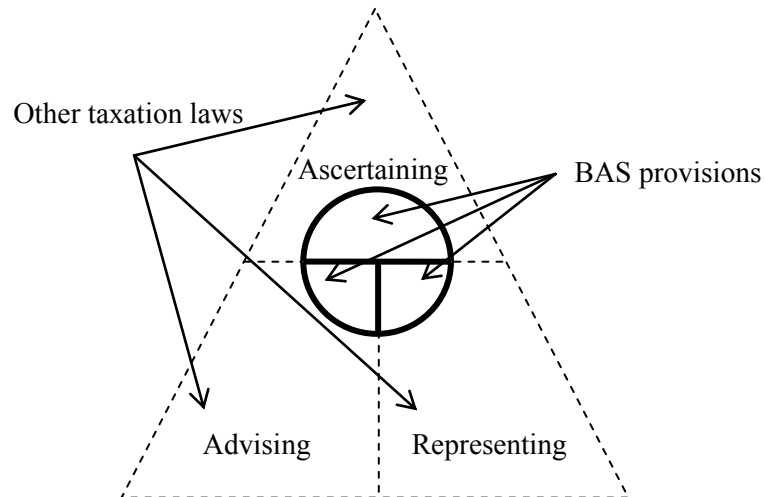
#### *BAS agents and BAS services*

1.11 The TASA 2009 also establishes a similar regulatory regime for BAS agents. It does this by defining a BAS service as a tax agent service that is limited in its application to BAS provisions in the taxation laws.

- Entities that wish to provide BAS services need to register with the TPB as a BAS agent (or a tax agent) and meet the same standards of fitness and propriety as well as have relevant qualifications and experience. Registered BAS agents are also subject to the same Code of Professional Conduct.
- Entities that provide BAS services for fee or other reward whilst unregistered contravene the TASA 2009 and may be liable to civil penalties.

1.12 The circle in Diagram 1.2 illustrates how BAS services interrelate with the broader concept of tax agent services.

**Diagram 1.2**



**Tax agent services provided in the course of advice that is usually provided by financial services licensees**

1.13 In practice, a core part of giving well-considered and comprehensive advice about an entity's financial affairs will often include information about the tax implications of certain strategies and investments. However, giving this information will not necessarily be a tax agent service.

1.14 As noted in paragraph 1.6, a service can only constitute a tax agent service if the entity receiving the service can reasonably expect to rely on it for tax-related purposes. This point was articulated in paragraph 2.36 of the explanatory memorandum to the Tax Agent Services Bill 2008:

‘Where it is reasonable to expect that advice is to be relied upon for purposes other than to satisfy tax obligations...such as making an informed financial or business decision, assessing risks or determining income tax provisions in an audited account, the advice is not a tax agent service. This applies to, for example, certain advice provided by a financial services licensee under the Corporations Act on the tax implications of financial products or financial transactions, or advice relating to ascertaining tax liabilities for the purpose of calculating a future income stream. It would also include advice provided by an actuary on a risk assessment of a particular product or entity that takes into account the tax implications.’

1.15 Nonetheless, it is often a fine line between whether an entity is merely providing information about the tax implications of particular financial products or giving tailored tax advice that could reasonably be expected to be relied on and therefore a tax agent service. This conceptual distinction was articulated in Examples 2.7, 2.8 and 2.10 of the explanatory memorandum to the Tax Agent Services Bill 2008.

1.16 As an interim measure, and to provide time to develop a suitable regulatory framework that takes into account the existing regulatory regime in the *Corporations Act 2001* (Corporations Act) applying to those in the financial services industry, the Government carved out tax agent services provided by financial services licensees and their authorised representatives from the TASA 2009 regulatory regime. This exemption, contained in subregulation 13(2) of the *Tax Agent Services Regulations 2009* (TASR 2009), applies when the entity providing financial product advice:

- accompanies it with a statement that they are not a registered tax agent; and
- advises the recipient that they should seek the services of a registered tax agent if they wish to rely on the advice.

1.17 This carve-out automatically ends on 30 June 2013.

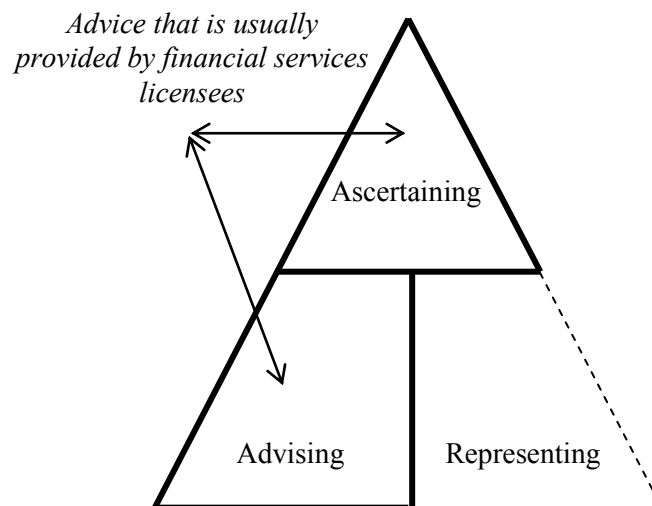
1.18 From after that date, and in the absence of any amendments, financial services licensees and their representatives will potentially be liable to civil penalties if:

- they provide tax advice that can reasonably be expected to be relied on by the recipient for tax purposes (and therefore would ordinarily meet the definition of a tax agent service) for a fee or other reward; and
- they are not registered with the TPB as a registered tax agent.

1.19 The purpose of these amendments is to bring entities in the financial services industry that are regulated by the Corporations Act and that provide tax agent services within the TASA 2009 regulatory regime. Entities in the financial services industry that do not provide tax agent services will not be affected by this regulatory regime.

1.20 Diagram 1.3 illustrates the link between the relevant elements of the definition of a tax agent service and the concept of advice that is usually provided by financial services licensees. Of note, there may be other forms of advice that do not constitute tax agent services and so fall outside the triangle.

**Diagram 1.3**



1.21 A key objective of this new regulatory regime is to minimise compliance costs by avoiding regulatory overlap between the TPB and ASIC. This is achieved, in part, by removing legislative impediments to



the TPB and ASIC sharing information about those entities regulated by both agencies.

### **Other enhancements to the TASA 2009 regulatory framework**

1.22 These amendments also provide a timely opportunity to improve the TPB's administration of the TASA 2009.

1.23 After being in operation for over three years, the TPB has identified a number of amendments to the TASA 2009 that would enhance the regulatory framework more generally (including in relation to registered tax agents and registered BAS agents) and streamline a range of administrative processes.

### **Summary of new law**

1.24 These amendments consist of two Schedules: Schedule 1 and Schedule 2.

1.25 Schedule 1 creates the new regulatory regime within the TASA 2009 for entities in the financial services industry that give tax advice. It does this by creating a new type of regulated service in the TASA 2009 — that of a 'tax (financial) advice service'. Schedule 1 consists of three Parts.

- Part 1 consists of the main amendments.
  - This Part defines a tax (financial) advice service and incorporates it, as appropriate, into the existing registration framework and Code of Professional Conduct that applies to registered tax agents and registered BAS agents.
  - Subject to the transitional arrangements in Part 3, this Part also establishes a civil penalty regime that applies to unregistered entities that provide tax (financial) advice services in much the same way as the existing civil penalty regime applies to unregistered entities that provide tax agent services or BAS services.
  - This Part also allows the TPB to disclose official information to ASIC for the purpose of ASIC performing any of its functions or exercising its powers.

- Part 2 makes several consequential amendments to the *Income Tax Assessment Act 1997* (ITAA 1997) arising from the creation of this new type of service. This Part also extends, for 12 months, the current carve-out in the TASA 2009 for financial services licensees or authorised representatives that provide financial product advice.
- Part 3 contains the transitional provisions for entities providing tax (financial) advice services from 1 July 2014 through to 30 June 2017. This consists of an initial 18 month notification period followed by an 18 month transitional period.
  - During the notification period, entities in the financial services industry need not immediately register with the TPB. Unregistered financial services licensees and their representatives may provide these services provided they accompany them by a disclaimer similar to that contained in subregulation 13(2) of the TASA 2009.
  - In addition, financial services licensees and authorised representatives that provide tax (financial) advice services may prospectively register with the TPB without having to meet any ongoing registration requirements (such as those relating to qualification and experience) during the notification period.
  - During the transitional period, any other unregistered financial services licensees or representatives may apply to the TPB to be registered. During this time, the ongoing registration requirements will be eased.

1.26 Schedule 2 addresses the various technical issues in the TASA 2009. These include:

- making it a registration requirement, rather than a separately imposed TPB requirement, for registered entities to maintain professional indemnity insurance (PI insurance) that meets the TPB's requirements and, for individuals renewing their registration, making it a registration requirement to meet the TPB's continuing professional education (CPE) requirements;
- allowing the TPB not to accept a registered entity's surrendered registration if that entity is subject to an investigation;

- allowing the TPB to broaden the scope of what services constitute a BAS service, by issuing legislative guidelines;
- allowing the TPB to provide information about a registered entity, if that entity is a member of an accredited professional association, to that professional association; and
- allowing the TPB to disclose information to the Commissioner for the purposes of administering a taxation law.

### **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
<p>Until 30 June 2014, financial services licensees and their authorised representatives need not register with the TPB if they provide tax advice in the course of providing financial product advice, unless they provide a broader range of tax agent services or BAS services.</p> <p>From 1 July 2014, entities that give tax advice in the course of giving advice that is usually provided by financial services licensees will need to start registering with the TPB and comply with various regulatory requirements.</p> <p>Subject to specific transitional rules, unregistered entities that give this advice whilst unregistered may be subject to civil penalties.</p>	<p>Until 30 June 2013, financial services licensees and their authorised representatives need not register with the TPB if they provide tax advice in the course of providing financial product advice, unless they provide a broader range of tax agent services or BAS services.</p>
<p>The TPB may also provide official information to ASIC where that information is for the purpose of ASIC performing any of its functions or exercising its powers.</p>	<p>The TPB may provide official information to the Commissioner and other law enforcement agencies for a range of law enforcement-related purposes.</p>

## **Detailed explanation of new law**

### **Creating a regulatory framework for tax (financial) advice services**

1.27 Under the existing legislative framework of the TASA 2009, only entities seeking to provide tax agent services, including BAS services, for fee or other reward must register with the TPB to avoid potential civil penalties. Entities that do not provide these services do not need to register.

1.28 These amendments adopt the same approach for entities seeking to provide ‘tax (financial) advice services’.

1.29 The amendments do this by defining a tax (financial) advice service and then extending, as appropriate, the current registration framework in the TASA 2009 to entities — individuals, partnerships and companies — seeking to be registered with the TPB to provide these services. The amendments define this new type of registered entity as a ‘registered tax (financial) adviser’.

1.30 Unregistered entities that provide tax (financial) advice services may be liable for civil penalties.

### **What is a tax (financial) advice service?**

1.31 A tax (financial) advice service consists of two elements — that of providing a tax agent service, and providing that service in the course of giving advice that is of a kind usually given by a financial services licensee or a representative.

#### ***Providing tax agent services***

1.32 The concept of a tax agent service is central to the TASA 2009. It is important to note that the provision of tax advice does not necessarily constitute a tax agent service. A regulated tax agent service is only tax advice provided in the circumstances where an entity can reasonably expect to rely on it to satisfy liabilities or claim entitlements under the taxation laws for a fee or other reward. For example, the provision of factual tax information or general taxation advice to clients which does not involve the application or interpretation of a taxation law to the client’s personal circumstances is not a tax agent service.

1.33 Consistent with the legislative approach in defining a BAS service as a tax agent service, a tax (financial) advice service is also defined as a tax agent service. This integrates tax (financial) advice services within the existing legislative framework of the TASA 2009

where the concept of a tax agent service defines and limits those services regulated by the TPB. [*Schedule 1, item 43, subsection 90-15(1)*]

1.34 Services that are not tax agent services will not be tax (financial) advice services — even if they are provided in the course of giving advice that is usually provided by financial services licensees.

1.35 Subregulation 13(1) of the TASR 2009 specifies particular services that are not tax agent services for the purpose of the TASA 2009. For example, paragraph 13(1)(b) of the TASR 2009 provides that services given by an entity to a related entity are not tax agent services, paragraph 13(1)(c) provides that services given by a related entity of an entity (the first entity) to another related entity of the first entity are not tax agent services and paragraph 13(1)(i) of the TASR 2009 provides that custodial services or depository services provided by a financial services licensee or an authorised representative are not tax agent services. As such, these services will not be tax (financial) advice services either.

1.36 To the extent that an entity in the financial services industry gives a client tax-related factual information (and therefore not providing a tax agent service) then that advice will not be a tax (financial) advice service. This could include, for example, tax-related factual information provided in product disclosure statements, payment summaries or other documents.

### **Example 1.1**

Financial and Investments Ltd holds an AFSL authorising it to provide financial product advice in relation to managed investment schemes.

Tim is a client of Financial and Investments Ltd. In the course of receiving financial product advice, Tim receives some information about the tax consequences that usually arise from holding interests in managed investment schemes.

To the extent that this information is not a tax agent service, Financial and Investments Ltd is not providing Tim with a tax (financial) advice service.

1.37 Entities that are unsure if particular forms of tax advice may be a tax agent service should seek guidance from the TPB. Of note, the TPB envisages updating its guidance material to clarify the types of tax agent services that an entity in the financial services industry may provide.

1.38 Consistent with the existing concept of a tax agent service, an entity that provides tax advice will provide a tax (financial) advice service only in circumstances where the entity receiving the advice can reasonably expect to rely on it to:

- satisfy obligations or liabilities that arise, or could arise, under the taxation laws;
- claim entitlements that arise, or could arise, under the taxation laws; or
- satisfy obligations or liabilities and claim entitlements that arise, or could arise, under the taxation laws.

*[Schedule 1, item 43, paragraph 90-15(1)(b)]*

1.39 To the extent that a service — such as an online calculator or a product disclosure statement — does not take into account all of an entity’s relevant circumstances so that it is not reasonable for the entity to expect to rely on it for tax purposes, such a service will not be a tax (financial) advice service.

### **Example 1.2**

Lachlan is considering buying an investment property and goes to see his financial adviser, seeking advice about the merits of such an investment.

Lachlan’s financial adviser confirms that various costs associated with rental properties, such as real estate agent management fees, are generally tax deductible but advises Lachlan to obtain tax advice specific to his needs.

Even though this advice relates to Lachlan managing his financial affairs and may usually be provided by financial services licensees, this advice is not a tax (financial) advice service.

1.40 Ultimately it will be a matter of fact as to whether an entity is providing a tax (financial) advice service. However, as the relevant test is whether the entity could reasonably expect to rely on the advice to satisfy obligations or claim entitlements under a taxation law, there is no need for the obligations or entitlements to immediately arise, or in some cases, to arise at all.

### **Example 1.3**

Further to Example 1.1.

Tim seeks more detailed advice from Financial and Investments Ltd about two specific managed investment schemes — Scheme A and Scheme B.

Accordingly, Financial and Investments Ltd provides Tim with financial product advice and specific advice about his tax

consequences of investing in either of these managed investment schemes. This advice is extensive and sufficiently detailed for Tim to reflect it in his income tax return should he choose to invest in either product.

In these circumstances, Financial and Investments Ltd provides Tim with a tax (financial) advice service in relation to both Scheme A and Scheme B, regardless of whether Tim subsequently chooses to invest in either, or both, schemes.

1.41 However, a tax (financial) advice service does not incorporate all three elements of a tax agent service. The key tax-related differences between a tax agent service and a tax (financial) advice service is that the latter service only relates to:

- ascertaining an entity's actual, or potential, tax liabilities, obligations or entitlements under a taxation law; or
- advising an entity about their actual, or potential, tax liabilities, obligations or entitlements under a taxation law.

*[Schedule 1, item 43, paragraph 90-15(1)(a)]*

1.42 Therefore an entity that represents a taxpayer in their dealings with the Commissioner, such as by lodging a tax return or a statement in the nature of a return, provides a tax agent service that is not a tax (financial) advice service.

1.43 Also, a tax (financial) advice service does not include preparing a return or a statement in the nature of a return. *[Schedule 1, item 43, paragraph 90-15(3)(b)]*

1.44 Accordingly, entities that wish to provide such services — even if they are provided in the course of giving advice that is usually provided by a financial services licensee or a representative — may need to register with the TPB as a registered tax agent or, if applicable, a registered BAS agent.

- A registered tax (financial) adviser, for example, that provides tax agent services may be liable to civil penalties under subsection 50-5(1) if they are not also a registered tax agent.
- Similarly, a registered tax (financial) adviser that provides BAS services may be liable to civil penalties under subsection 50-5(2) if they are not also a registered tax agent or a registered BAS agent.

***Giving advice of a kind usually given by a financial services licensee or a representative***

1.45 Entities in the financial services industry usually provide their clients with a range of advice and strategies for managing their financial affairs including in relation to wealth management, retirement planning, estate planning and risk management.

1.46 Under the Corporations Act, an entity that carries on a financial services business in Australia needs to hold an 'Australian financial services licence' (AFSL), unless an exemption applies. For example, an entity does not need to hold a licence to provide financial services as a representative of a financial services licensee (an entity that holds such a licence).

1.47 A representative (of a financial services licensee) is defined in paragraph 910A(a) of the Corporations Act and includes an authorised representative. An authorised representative is defined in section 761A of the Corporations Act to be a person authorised to provide financial services on behalf of a financial services licensee.

1.48 Section 5B of the Corporations Act provides ASIC with the general administration of that Act.

1.49 An entity provides a financial service if, amongst other things, it provides financial product advice as defined in section 766B of the Corporations Act. A recommendation, a statement of opinion or a report of either of these things, constitutes financial product advice if it:

- is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products, or could reasonably be regarded as being intended to have such an influence; and
- is not otherwise exempt from the definition of financial product advice.

1.50 There are a range of circumstances when such an exemption may apply. For example, paragraph 766A(2)(b) of the Corporations Act allows the Corporations Regulations to specify circumstances when a person is taken not to be providing a financial service and, therefore, potentially, not to be providing financial product advice.

1.51 In addition, section 926A of the Corporations Act allows ASIC to exempt a person or class of person from specific provisions in Part 7.6 of the Corporations Act, exempt financial products from specific



provisions in Part 7.6 or otherwise modify or vary the application of the relevant provisions. Section 926B of the Corporations Act provides for the Corporations Regulations to make similar exceptions and modifications.

1.52 In addition, dealing in a financial product is also a financial service. Section 766C of the Corporations Act sets out the circumstances when conduct constitutes dealing in a financial product. This includes:

- applying for, or acquiring, a financial product;
- issuing a financial product;
- varying a financial product; or
- disposing of a financial product.

1.53 For the purposes of these amendments, it does not matter whether this advice is financial product advice or dealing in a financial product (as defined in the Corporations Act). The relevant test is whether the tax agent service is given in the course of advice that is usually given by a financial services licensee or a representative. This broader advice is a necessary condition as it provides the context for the tax agent service and distinguishes tax (financial) advice services from other tax agent services. In effect, this means that the tax agent services will usually take the form of tax advice that can reasonably be expected to be relied on for tax purposes that is given for the purpose of helping to fully inform a client about their current and future financial affairs. As such, it could be given:

- as part of a strategic discussion about a client's long-term financial objectives;
- in the course of advising a client about the relative merits of particular financial products or other investments; or
- in the course of advising a client about non-financial products such as real property.

*[Schedule 1, item 43, subsection 90-15(1)]*

#### **Example 1.4**

Cate goes to her financial adviser to learn more about self managed superannuation funds (SMSFs). The financial adviser provides Cate with some factual information on what is generally understood to be an SMSF and how they operate. To the extent this constitutes purely

factual information does not influence her decision, it is not financial product advice.

Should Cate's financial adviser then provide her with advice on why an SMSF favourably compares to an Australian Prudential Regulation Authority regulated fund, given her financial objectives, then such advice may constitute financial product advice.

This advice is usually provided by financial services licensees and representatives.

### **Example 1.5**

Further to Example 1.2

Buying and selling a direct interest in real property is not a financial product. However, this advice is usually provided by financial services licensees and representatives.

### **Example 1.6**

Cecil owns a small business and goes to see his financial adviser to discuss his options for commencing a transition to retirement strategy. Part of the discussion relates to the capital gains tax discount and the small business tax concessions.

1.54 This advice is usually provided by financial services licensees and representatives. Registered tax agents and registered BAS agents, unless they provide tax agent services in the course of this broader advice service, will not provide tax (financial) advice services.

### **Example 1.7**

Katrina, a registered tax agent, provides her clients with a range of tax agent services, including the preparation and lodgement of tax returns. Katrina also advises her clients about the tax consequences of specific transactions and recommends various tax-effective strategies. Katrina is not licensed by ASIC to provide financial services.

To the extent that Katrina's advice does not take into account her client's financial affairs and objectives more generally (and therefore is not advice that is usually provided by financial services licensees or representatives), any tax agent services that Katrina provides will not be tax (financial) advice services.

1.55 However, even if a registered tax agent does provide a tax agent service in the course of giving advice that is usually provided by a financial services licensee or a representative, they do not need to separately register with the TPB as a registered tax (financial) adviser. This is because registered tax agents can also provide tax (financial)

advice services for fee or other reward without contravening the TASA 2009. Paragraph 1.101 provides further information about this.

***Providing flexibility as to what may constitute a tax (financial) advice service in the future***

1.56 Paragraph 60-15(d) allows the TPB to issue guidelines (in the form of legislative instruments) to assist in administering the system for the registration of tax agents, BAS agents and tax (financial) advisers. *[Schedule 1, item 33]*

1.57 To provide ongoing flexibility as to what constitutes a tax (financial) advice service and ensure that the regulatory framework continues to reflect industry practice, the TPB will be able to specify any other services that are to also be tax (financial) advice services by issuing a legislative instrument. *[Schedule 1, item 43, subsection 90-15(2)]*

1.58 In addition, and consistent with the current approach in relation to BAS services, the regulations may prescribe services that are not tax (financial) services. *[Schedule 1, item 43, paragraph 90-15(3)(b)]*

1.59 The reason for specifying services that are not tax (financial) advice services in the regulations, rather than allowing the TPB to issue legislative instruments, is that the consequence of just specifying a service to not be a tax (financial) advice service is that it will remain a tax agent service. Allowing the TPB to specify additional tax (financial) advice services will not have a detrimental effect on already registered tax agents but amending the regulations to specify services that are to not be tax (financial) advice services may have such an effect on registered tax (financial) advisers. This is because all registered tax agents may provide tax (financial) advice services but registered tax (financial) advisers may not provide all tax agent services.

***Registering with the TPB to provide tax (financial) advice services***

1.60 An entity that applies to become a registered tax (financial) adviser will need to do so in the form approved by the TPB. This allows the TPB to minimise the compliance costs on entities seeking to become registered tax (financial) advisers. *[Schedule 1, item 10]*

1.61 Applications will need to be accompanied by an application fee, the amount of which will be prescribed by the regulations.

1.62 An entity may apply to the Administrative Appeals Tribunal (AAT) under section 70-10, for the review of a decision by the TPB to reject an application for registration (including rejecting a renewal of registration) or to specify a condition to which the registration is subject.

*The eligibility framework for individuals seeking registration*

1.63 The eligibility framework for an individual seeking to become a registered tax (financial) adviser will be the same as an individual seeking to become a registered tax agent or a registered BAS agent — regardless of whether, for example, the individual is registering in their own right or as a representative of a financial services licensee. This includes being at least 18 years of age and satisfying the fit and proper person test. Specific eligibility requirements, such as those relating to qualifications and experience, will be prescribed by the regulations. This could also include other eligibility requirements, such as the requirement to be a financial services licensee or a representative such a licensee to ensure a regulatory connection with the Corporations Act. *[Schedule 1, item 4]*

1.64 Of note, the Government is currently publicly consulting on potential registration requirements for registered tax (financial) advisers. A copy of this consultation paper is available on the Department of the Treasury's website ([www.treasury.gov.au](http://www.treasury.gov.au)). For example, one of the requirements could be the individual having relevant work experience — and this could include experience obtained before the commencement of this regime and the creation of the concept of a tax (financial) advice service.

1.65 The TPB may also impose conditions on an individual's registration as a registered tax (financial) adviser and, on application from the registered entity, vary these conditions. *[Schedule 1, items 11 and 13]*

*The eligibility framework for partnerships and companies seeking registration*

1.66 Similarly, the eligibility framework for a partnership or a company seeking to become a registered tax (financial) adviser will be the same as for a partnership or company seeking to become a registered tax agent or a registered BAS agent. This means each partner who is an individual has to be at least 18 years of age and each partner, or company director (including situations where a company is a partner), must satisfy the fit and proper person test. In addition, any companies must not be under external administration or have been convicted of a serious taxation offence, or an offence involving fraud or dishonesty, in the previous five years. *[Schedule 1, items 5 and 7]*

### Example 1.8

Further to Example 1.1.

Financial and Investments Ltd applies to the TPB to become a registered tax (financial) adviser. Financial and Investments Ltd has three directors — Erin, Jamie and Diana — and twenty employees in four offices throughout New South Wales.

In deciding whether to register Financial and Investments Ltd, the TPB must be satisfied that:

- Erin, Jamie and Diana are all fit and proper persons;
- Financial and Investments Ltd is not under external administration; and
- Financial and Investments Ltd has not been convicted of a serious taxation offence or an offence involving fraud or dishonesty in the past five years.

1.67 In addition, the partnership or company will need to satisfy the TPB that it has a sufficient number of individuals, either registered tax (financial) advisers or registered tax agents, to provide tax (financial) advice services to a competent standard and carry out supervisory arrangements. [*Schedule 1, items 6 and 8*]

1.68 Allowing partnerships and companies to use registered tax agents to satisfy the TPB of this sufficient number requirement is consistent with a tax (financial) advice service being a type of tax agent service.

1.69 Paragraphs 2.55 and 2.56 of the explanatory memorandum to the Tax Agent Services Bill 2008 explain that the sufficient number requirement ensures that the partnership or company has sufficient organisational qualifications and experience to provide tax agent services competently. In addition, paragraph 2.57 explains that whilst there is no set formula for determining the number of registered individuals, the following general factors may be taken into account by the TPB:

- the size of the business;
- the services being offered;
- any conditions imposed on the entity's registration; and
- the supervisory arrangements in place.

### **Example 1.9**

Further to Example 1.8.

The TPB may take into account that Financial and Investments Ltd has twenty employees spread over four offices in determining if Financial and Investments Ltd has a sufficient number of registered individuals.

1.70 Complementing these general factors will be the requirement that the TPB must take into account paragraphs 912A(1)(d), 912A(1)(e) and 912A(1)(f) of the Corporations Act. *[Schedule 1, items 6 and 8]* Section 912A of the Corporations Act imposes a range of general obligations on financial services licensees, including:

- having available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements — per paragraph 912A(1)(d);
- maintaining the competence to provide those financial services — per paragraph 912A(1)(e); and
- ensuring that its representatives are adequately trained, and are competent, to provide those financial services — per paragraph 912A(1)(f).

1.71 Requiring the TPB to take into account these provisions when determining a sufficient number of registered individuals ensures that the entity is not subject to undue additional regulation under the TASA 2009. This is because, in effect, the TPB will need to determine a sufficient number that takes into account the arrangements that the entity already has in place for meeting its obligations under the Corporations Act.

1.72 In practice, this means that where the entity is a financial services licensee, the TPB will need to have an understanding of its existing arrangements for ensuring both its organisational competence and technical competence.

### **Example 1.10**

Further to Example 1.9.

Taking into account the nature, scale and complexity of its business as well as the financial services it provides and the roles that individuals play in its business, Financial and Investments Ltd has nominated two responsible managers to comply with its obligation under paragraph 912A(1)(e) of the Corporations Act. These managers are directly responsible for the significant day-to-day decisions about the

ongoing provision of financial product advice and together have appropriate knowledge and skills.

In determining whether Financial and Investments Ltd has a sufficient number of individuals who are either registered tax agents or registered tax (financial) advisers to provide tax (financial) advice services to a competent standard the TPB *must* take into account these arrangements that Financial and Investments Ltd has in place for meeting this obligation, as well as any factors listed in Example 1.8 that it *may* take into account.

Similarly, the TPB *must* take into account the arrangements Financial and Investments Ltd has in place for meeting its obligations under paragraphs 912A(1)(d) and 912A(1)(f) of the Corporations Act.

1.73 Where the entity is a representative of a financial services licensee, the TPB will need to have a comprehensive understanding of how the relevant licensee meets these obligations to the extent this affects how the representative provides services on behalf of the licensee.

1.74 This may require the TPB to consult, as appropriate, with ASIC or the entity concerned.

### ***Ongoing registration requirements and the Code of Professional Conduct***

1.75 The TASA 2009 imposes a range of obligations, including a Code of Professional Conduct on registered tax agents and registered BAS agents. Registered tax (financial) advisers will be subject to the same obligations. *[Schedule 1, items 15 and 16]*

#### *The Code of Professional Conduct*

1.76 The Code of Professional Conduct is set out in Division 30 and includes, in part, the obligations to:

- act honestly and with integrity;
- comply with the taxation laws in conducting your personal affairs;
- act lawfully and in the best interests of your clients;
- have in place adequate arrangements for managing conflicts of interests;
- maintain client confidentiality except where otherwise required by law or permitted by the client;

- not knowingly obstructing the proper administration of the taxation laws; and
- respond to requests and directions from the TPB in a timely, responsible and reasonable manner.

1.77 The Code of Professional Conduct also imposes specific obligations in relation to tax agent services provided by registered tax agents and registered BAS agents. These obligations will similarly apply in relation to tax agent services provided by registered tax (financial) advisers. For example, subsection 30-10(7) requires registered entities to provide tax agent services competently and subsection 30-10(8) requires registered entities to maintain knowledge and skills relevant to the tax agent services they provide.

1.78 Like registered tax agents and registered BAS agents, registered tax (financial) advisers that do not comply with these statutory obligations may be subject to administrative sanctions from the TPB. These sanctions can range from a written caution through to suspension or termination of registration. *[Schedule 1, items 17 to 19]*

1.79 Currently, financial services licensees have many similar obligations under the Corporations Act. For example, section 912A of the Corporations Act requires, in part, financial services licensees to:

- do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly;
- have adequate arrangements for the management of conflicts of interest that may arise; and
- maintain the competence to provide those financial services.

1.80 A registered tax (financial) adviser that complies with these similar obligations under the Corporations Act will generally find they also comply with the relevant obligations under the TASA 2009. However, registered tax (financial) advisers should, in particular, be mindful of the additional tax-related obligations imposed by the Code of Professional Conduct.

1.81 In determining its compliance processes, the TPB should ensure these processes are as efficient as possible to avoid any unnecessary duplication with ASIC's processes.



*Other events that may affect an entity's registration*

1.82 In the same way that various events may affect an entity's continued registration as a registered tax agent or a registered BAS agent, these events may also affect an entity's continued registration as a registered tax (financial) adviser. These events include:

- being convicted of a serious taxation offence or an offence involving fraud or dishonesty;
- being penalised for being a promoter of a tax exploitation scheme or for implementing a scheme, that has been promoted as conforming with a product ruling, in a way that is materially different from the ruling;
- becoming an undischarged bankrupt or going into external administration; or
- being sentenced to a term of imprisonment.

*[Schedule 1, item 14]*

*Civil penalties that may apply to registered tax (financial) advisers*

1.83 Consistent with the existing civil penalties that may apply to registered tax agents and registered BAS agents, a registered tax (financial) adviser may be liable to a civil penalty if they:

- employ or use the services of a previously registered tax (financial) adviser or a previously registered tax agent; and
- know, or ought to reasonably know, that the previously registered entity's registration had been terminated within the previous year.

*[Schedule 1, items 29 and 30]*

1.84 The maximum penalty for each contravention is 250 penalty units for individuals and 1,250 penalty units for body corporates. Subsection 4AA(1) of the *Crimes Act 1914* stipulates the value of Commonwealth penalty units. The current penalty unit value is \$170. Based on this penalty unit value, this equates to a maximum penalty of \$42,500 for individuals and \$212,500 for body corporates.

1.85 Paragraphs 4.48 and 4.49 of the Explanatory Memorandum to the Tax Agent Services Bill 2008 explains the rationale for such a provision as being an extension of the principle that a previously registered tax agent or a previously registered BAS agent must not

provide tax agent services for a fee or other reward where their registration has been terminated by the TPB.

1.86 Of note, the TPB will be required to publish details about deregistered tax (financial) advisers in addition to deregistered tax agents and BAS agents. This will assist registered tax (financial) advisers in being able to undertake due diligence when considering what entities to employ or engage to provide services. Paragraph 1.92 provides further information about this.

1.87 Registered tax agents and registered BAS agents may also be subject to civil penalties under sections 50-20 and 50-30 if they make false or misleading statements to the Commissioner or sign declarations that are required or permitted by the taxation laws respectively. However, these additional civil penalties are not relevant for tax (financial) advice services as registered tax (financial) advisers cannot represent a taxpayer in their dealings with the Commissioner.

#### ***Giving effect to a co-regulatory regime between the TPB and ASIC***

1.88 As noted in paragraphs 1.19 to 1.21, the administrative effectiveness of this new regulatory regime requires the TPB and ASIC to have a close and collaborative working relationship, particularly in relation to matters that may have regulatory consequences for entities under both the TASA 2009 and the Corporations Act. This requires both agencies to be able to share relevant information with the other.

1.89 The TPB and ASIC have advised that they are currently developing a memorandum of understanding (MOU) to underpin their future relationship, with a commitment to work closely together through an open and consultative approach and to provide each other with positive assistance wherever possible.

#### ***The role of the TPB***

1.90 The TPB will have the function of administering the system for the registration and regulation of registered tax (financial) advisers and regulation of unregistered entities. *[Schedule 1, item 33]*

1.91 This includes investigating any conduct that may contravene the TASA 2009.

1.92 As part of its administration of this system, and consistent with its obligations for administering the system for the registration of registered tax agents and registered BAS agents, the TPB will need to:

- maintain a register of registered tax (financial) advisers and those that have been deregistered in specific circumstances *[Schedule 1, items 37-39]*;
- publish in the Gazette its decisions to terminate or suspend an entity's registration as a registered tax (financial) adviser *[Schedule 1, item 40]*; and
- notify the Commissioner about its decision to register an entity as a registered tax (financial) adviser or terminate an entity's registration *[Schedule 1, item 12, paragraph 20-30(2)(a) and item 20, paragraph 40-20(3)(a)]*.

### ***Sharing information with ASIC***

1.93 Subject to a limited number of exceptions, section 70-35 makes it an offence for current and former TPB members, as well as Australian Public Service (APS) employees whose services have been made available to the TPB by the Commissioner, or any other individual employed by the TPB or who provides services to the TPB, to disclose, or make a record of, official information that they acquired in the course of their duties.

1.94 These amendments provide an additional exception to this general prohibition for these entities to disclose, or make records of, official information they acquired in the course of their duties to ASIC for the purposes of ASIC performing any of its functions or exercising its powers. *[Schedule 1, item 41]*

### **Example 1.11**

Further to Example 1.8.

The TPB grants Financial and Investments Ltd's registration as a registered tax (financial) adviser. Three months later, Financial and Investments Ltd consolidates two of its offices to a larger office at a new premises and advises the TPB of its new contact details.

It is not an offence for Gregory, an employee whose services have been made available to the TPB by the Commissioner, to disclose Financial and Investments Ltd's new contact details to ASIC to allow ASIC to update its contact details for Financial and Investments Ltd.

- 1.95 In addition, the TPB will be obliged to notify ASIC:
- about its decision to register an entity as a registered tax (financial) adviser [*Schedule 1, item 12, paragraph 20-30(2)(b)*];
  - about its decision to terminate an entity's registration as a registered tax (financial) adviser [*Schedule 1, item 20, paragraph 40-20(3)(b)*]; and
  - following an investigation into a registered tax (financial) adviser or a registered tax agent that has provided tax (financial) advice services — about its decisions or findings and the relevant reasons [*Schedule 1, items 34-36*].

***The role of ASIC and obligations under the Corporations Act***

1.96 These amendments do not amend the obligations imposed by the Corporations Act on financial services licensees and their representatives.

1.97 For example, financial services licensees are required by the Corporations Act to have dispute resolution systems for handling retail client complaints that consist of:

- internal dispute resolution processes that meet ASIC's approved standards and requirements and cover complaints made by retail clients in relation to the financial services provided; and
- membership of an ASIC-approved external dispute resolution scheme that covers complaints made by retail clients in relation to the financial services provided.

1.98 Under the Corporations Act, financial services licensees and representatives will remain subject to these dispute resolution obligations. This is because the dispute resolution system must cover complaints made by retail clients in connection with the provision of all financial services covered by the licence as per paragraphs 912A(2)(a) and 912A(2)(b) of the Corporations Act. Consumer complaints about any financial product advice provided by a financial services licensee or a representative may also include some aspects of any tax (financial) advice services provided by, or on behalf of, the licensee. These complaints will continue to be dealt with by the financial services licensee's internal dispute resolution and external dispute resolution systems because they are in connection with the provision of financial services.

1.99 There are no dispute resolution-related obligations under the TASA 2009.

1.100 Subsection 127(4) of the *Australian Securities and Investments Commission Act 2001* allows ASIC to disclose information to the TPB to enable or assist the TPB to perform its functions and exercise its powers. In most cases, ASIC will be aware that information in its possession falls within the functions or powers of the TPB and will be able to determine whether this requirement has been met. However, in some cases, ASIC may require the TPB to confirm that the disclosure of the information would enable it to perform, or exercise, one or more of its functions or powers.

### **Civil penalties that may apply to unregistered entities providing tax (financial) advice services**

1.101 Consistent with the existing civil penalties that may apply to an unregistered entity that provides a tax agent service or a BAS service, an entity may be liable to a civil penalty if:

- they knowingly provide a tax (financial) advice service that is not a BAS service, or ought to know they are providing such a service, for a fee or other reward; and
- they are not a registered tax (financial) adviser or a registered tax agent.

*[Schedule 1, item 23]*

#### **Example 1.12**

Further to Example 1.11.

Lena is an employee and representative of Financial and Investments Ltd. Even though Lena provides Financial and Investments Ltd's clients with financial product advice and tax advice because she is an employee of Financial and Investments Ltd she does not provide tax (financial) advice services in her own right.

Lena, who is not a registered tax (financial) adviser, does not contravene the TASA 2009 by providing this advice.

#### **Example 1.13**

Dominique is a registered tax agent and a financial services licensee and, in return for set fees, provides her clients with both financial product advice and tax agent services. One of Dominique's clients is Leo.

In providing Leo with financial product advice, Dominique makes a recommendation that takes into account the specific tax consequences that would result from Leo making these investments.

Even though Dominique is providing Leo with a tax (financial) advice service for a fee, Dominique is not contravening the TASA 2009 as she is a registered tax agent.

#### **Example 1.14**

Further to Example 1.7.

Even if Katrina provides her clients with tax (financial) advice services, she is not contravening the TASA 2009 as she is a registered tax agent.

1.102 Paragraph 4.29 of the explanatory memorandum to the Tax Agent Services Bill 2008 notes that entities, such as legal practitioners, may provide or advertise tax agent services in certain circumstances without being a registered tax agent or a registered BAS agent. Accordingly, if the entity provides the tax (financial) advice service as a legal service, then they may only be liable to a civil penalty if they are prohibited from providing such a service under a State or Territory law that regulates legal practice and legal services. *[Schedule 1, item 23, paragraph 50-5(2A)(d)]*

1.103 The maximum penalty for each contravention of improperly providing a tax (financial) advice service under the TASA 2009 is 250 penalty units for individuals and 1,250 penalty units for body corporates. Based on the current penalty unit value, this equates to a maximum penalty of \$42,500 for individuals and \$212,500 for body corporates.

#### **Example 1.15**

In return for a set fee, Amelia provides her clients with advice about investing in particular financial products and, in making her recommendations, takes into account the specific tax consequences that would result from such investments. Amelia assures her clients that they may rely on her tax advice should they choose to invest in these products.

Amelia is not a registered tax (financial) adviser, a registered tax agent or a legal practitioner.

By providing tax (financial) advice services whilst unregistered, Amelia is contravening the TASA 2009 and may be liable to civil penalties.

Amelia may also be committing an offence under the Corporations Act if she is providing financial product advice and is not licensed by ASIC to provide that advice.

1.104 Consistent with the existing civil penalties that may apply to an unregistered entity that advertises the provision of tax agent services or BAS services, an entity may be liable to a civil penalty if:

- they advertise that they will provide a tax (financial) advice service that is not a BAS service; and
- they are not a registered tax (financial) adviser or registered tax agent.

If an entity advertises they will provide the tax (financial) advice service as a legal service, then they may only be liable to a civil penalty under the TASA 2009 if they are prohibited from providing such a service under a State or Territory law that regulates legal practice and legal services.  
*[Schedule 1, item 25]*

1.105 The maximum penalty for each contravention of improperly advertising a tax (financial) advice service under the TASA 2009 is 50 penalty units for individuals and 250 penalty units for body corporates. Based on the current penalty unit value, this equates to a maximum penalty of \$8,500 for individuals and \$42,500 for body corporates.

1.106 Consistent with the existing civil penalty provisions that may apply to an unregistered entity that represents they are a registered tax agent or a registered BAS agent, an entity may be liable to a civil penalty if:

- they represent that they are a registered tax (financial) adviser; and
- that representation is untrue.

1.107 The maximum penalty for each contravention of improperly representing as a registered tax (financial) adviser under the TASA 2009 is 50 penalty units for individuals and 250 penalty units for body corporates. Based on the current penalty unit value, this equates to a maximum penalty of \$8,500 for individuals and \$42,500 for body corporates. *[Schedule 1, item 27]*

***Other amendments to incorporate tax (financial) advice services with the existing TASA 2009 regulatory regime***

1.108 These amendments carve out entities that provide tax (financial) advice services from the civil penalty provisions that would otherwise

apply to unregistered tax agents for providing tax agent services for fee or other reward or advertising to provide tax agent services. This ensures that a registered tax (financial) adviser does not contravene the TASA 2009 for providing, or advertising to provide, tax agent services when they are not a registered tax agent and the service is a tax (financial) advice service. *[Schedule 1, items 22 and 24]*

1.109 A registered tax agent that employs, or uses, the services of a deregistered tax (financial) adviser may be subject to civil penalties. The maximum penalty for each contravention of the TASA 2009 is 250 penalty units for individuals and 1,250 penalty units for body corporates. Based on the current penalty unit value, this equates to a maximum penalty of \$42,500 for individuals and \$212,500 for body corporates. *[Schedule 1, item 28]*

1.110 These amendments allow the regulations to provide for a system for the TPB to accredit professional associations for the purposes of recognising relevant professional qualifications and experience for the registration of registered tax (financial) advisers. The regulations currently provide a system for the TPB to accredit professional associations for the purposes of recognising relevant qualifications and experience for the registration of registered tax agents and registered BAS agents. *[Schedule 1, item 9]*

1.111 These amendments insert a range of tax (financial) advice service and registered tax (financial) adviser related definitions in the dictionary in subsection 90-1(1). *[Schedule 1, item 42]*

1.112 These amendments update the objects clause, headings and guide material in the TASA 2009 so that references to tax agents and BAS agents also include a reference to tax (financial) advisers. *[Schedule 1, items 1 to 3, 21, 26, 31 and 32]*

## **Other amendments to the *Tax Agent Services Act 2009***

### *New registration requirements*

#### *Maintaining professional indemnity insurance*

1.113 Subsection 20-30(3) allows the TPB to give written notice to registered tax agents and registered BAS agents requiring them to maintain PI insurance that meets the TPB's requirements. Subsection 30-10(13) requires these entities to maintain this PI insurance as an ongoing Code of Professional Conduct requirement.

1.114 In effect, these amendments replace subsection 20-30(3) with a new ongoing registration requirement for individuals, partnerships and



companies that the relevant entity maintains PI insurance that meets the TPB's requirements. Maintaining PI insurance that meets the TPB's requirements will become the ongoing Code of Professional Conduct requirement rather than the current requirement of maintaining PI insurance as required by the TPB under subsection 30-10(13). *[Schedule 2, item 1, paragraph 20-5(1)(c) and items 2 to 4]*

### **Example 1.16**

Liza applies to the TPB for registration as a registered tax agent.

In addition to having to satisfy the TPB that she is a fit and proper person and that she can meet the registration requirements (prescribed by the regulations), Liza will need to satisfy the TPB that she will be able to maintain PI insurance that meets its requirement as soon as she is registered.

Assuming that the TPB grants Liza's application and she becomes a registered tax agent, three years later Liza applies to the TPB to renew her registration.

As Liza already has PI insurance, she need only satisfy the TPB that this insurance meets its requirements.

1.115 In substance, these new registration requirements do not affect the obligations on registered entities to hold PI insurance — as, under subsection 20-30(3), the TPB can write to registered entities requiring them to maintain PI insurance as specified in the notice. Instead, the amendments streamline the current administrative procedures relating to maintaining PI insurance by incorporating it into the registration process. As such, there is no need to retain a separate review right of a decision by the TPB to require PI insurance. *[Schedule 2, item 22]*

1.116 The TPB's explanatory paper 'TPB(EP)03/2010: Professional indemnity (PI) insurance' provides further information about the TPB's current requirements for PI insurance for registered tax agents and registered BAS agents.

1.117 The TPB has advised that it intends to consult with key stakeholders in developing its PI insurance requirements for registered tax (financial) advisers and that it intends to adopt a set of transitional arrangements to provide industry with time to adapt, where necessary, to these requirements. The TPB has also advised that it does not intend to require registered tax (financial) advisers to necessarily obtain separate PI insurance or modify their existing policies, if those policies already adequately cover tax advice. The TPB has also advised that, consistent with its current requirements in relation to registered tax agents and registered BAS agents, it does not intend to require registered employees

to maintain separate PI insurance if they are adequately covered by their employer's policy.

*Satisfying continuing professional education requirements*

1.118 In addition, these amendments make it a registration requirement for individuals seeking to renew their registration to have met the TPB's CPE requirements. This ensures that registered individuals maintain their skills and knowledge for the benefit of their clients. *[Schedule 2, item 1, paragraph 20-5(1)(d)]*

***Allowing the TPB to not accept an entity's surrendered registration***

1.119 Under paragraph 40-5(2)(a) the TPB must terminate an individual registered tax agent or registered BAS agent's registration if that individual surrenders their registration to the TPB in writing. Subsection 40-10(2) and paragraph 40-15(2)(a) similarly apply to registered partnerships and registered companies.

1.120 As a result, registered entities that are subject to an investigation by the TPB may avoid any consequences of that investigation by surrendering their registration before the investigation is complete.

1.121 These amendments provide the TPB with the opportunity not to accept a registered entity's surrendered registration in circumstances when:

- the entity is subject to a current investigation by the TPB or was subject to a previous investigation by the TPB; and
- the TPB considers it would be inappropriate to accept the entity's surrendered registration and therefore terminate the entity's registration.

*[Schedule 2, items 8-10]*

**Example 1.17**

Paris, a registered BAS agent, completes business activity statements for her clients and, on their behalf, lodges them with the Commissioner.

However, Paris fails to provide her clients with a competent service and a number of them complain to the TPB. As a result, the TPB decides to investigate Paris.

Paris subsequently seeks to terminate her registration by surrendering it in writing to the TPB. However, due to its current investigation, the

TPB considers it would be inappropriate to terminate Paris's registration and so decides not to terminate it.

As such, Paris remains a registered BAS agent.

1.122 The TPB will need to exercise its judgement in deciding whether to not accept an entity's surrendered registration. This decision will need to be informed by the available information at that point in time. Relevant information could include:

- any reasons the registered entity provides for wanting to surrender their registration;
- the nature of any complaints against the registered entity;
- the availability of evidence and other information relevant to the investigation;
- the priority of the investigation relative to the TPB's other work; and
- the need to protect consumers.

1.123 An application to review a decision by the TPB not to terminate an entity's registration may be made to the AAT. *[Schedule 2, item 23]*

***Allowing the TPB to notify accredited professional associations***

1.124 After conducting an investigation into a registered entity, subsection 60-125(8) requires the TPB to notify the following entities about its decision or findings:

- the entity affected by the decision or finding;
- the complainant (if any); and
- if the decision or finding is relevant to the administration of the taxation laws — the Commissioner.

1.125 If the investigated registered entity is a member of a professional association accredited by the TPB under the regulations, then these amendments will require the TPB to notify the professional association about its decision or finding and relevant reasons. This will improve the interactions between the TPB and professional associations in dealing with inappropriate behaviour. *[Schedule 2, items 20 and 21]*

1.126 It will be a matter for the professional association to determine what, if anything, it does with the information. However, professional

associations will not be obliged to take any specific action (such as internal disciplinary action) on receipt of this information.

**Example 1.18**

Further to Example 1.17.

The TPB completes its investigation into Paris and finds that her conduct has breached the Code of Professional Conduct. As a result, the TPB decides to terminate Paris's registration as a BAS agent and decides, per section 40-25, that she may not to apply to be registered as a BAS agent for the following two years. The details of her termination are published on the public register under section 60-135.

Assume Paris is a voting member of the BAS Agents Alliance and that the BAS Agents Alliance is an accredited professional association. Consequently, the TPB needs to notify the BAS Agents Alliance about its finding in relation to Paris's conduct and the reasons for this finding.

However, the BAS Agents Alliance is not obliged to take any specific action on receipt of this information.

***Allowing the TPB to provide a wider range of information to the ATO***

1.127 Further to paragraph 1.93, section 70-40 provides a limited range of exceptions to the general prohibition against members of the TPB and other relevant individuals from disclosing official information that they acquire in the course of their duties in administering the TASA 2009. These exceptions facilitate efficient and effective government administration and law enforcement. Specifically, subsection 70-40(3) allows disclosures of official information to the Commissioner for a range of law-enforcement purposes including investigating taxation offences and investigating contraventions of civil penalty provisions.

1.128 These amendments replace the existing specific purposes with a general purpose — that of administering a taxation law. As a result, records made, or disclosures of, official information to the Commissioner will not be an offence where the record or disclosure is for the purpose of the Commissioner administering a taxation law. As it is not generally practical to provide the information to the Commissioner personally, it may be provided to an Australian Taxation Office (ATO) officer on behalf of the Commissioner. *[Schedule 2, item 25]*

**Example 1.19**

Philippe applies to the TPB to become a registered tax agent and provides his contact details to the TPB. Six months later he moves to

new premises with a new address and phone number and provides these new contact details to the TPB.

The disclosure of Philippe's contact details to an ATO officer to allow the ATO to update its contact details for Philippe is not an offence.

### **Example 1.20**

Rita, a registered tax agent is the subject of a TPB investigation in response to allegations that she has been lodging a number of false income tax returns.

During its investigation, the TPB becomes aware of information that would be relevant for the Commissioner's administration of the taxation laws.

As this information relates to the administration of the taxation laws, the disclosure of the official information to an ATO officer is not an offence.

1.129 This general purpose, 'for the purpose of administering a taxation law' is a broad concept that includes both direct and indirect methods of ensuring or encouraging compliance with the taxation laws. Disclosure of information to assist the ATO initiate enforcement action, including a prosecution under other Acts, such as the *Criminal Code Act 1995*, in relation to an underlying breach of a taxation law is for the purposes of administering a taxation law.

### **Example 1.21**

Paula, an ATO officer, is investigating a tax agent who she suspects has been lodging deliberately false income tax returns. Paula considers that a prosecution under the *Criminal Code Act 1995* may be an appropriate means of addressing the alleged breaches of the taxation law. In compiling a brief of evidence to the Commonwealth Director of Public Prosecutions, Paula requests official information from the TPB.

As Paula's investigation is for the purposes of administering a taxation law, the TPB's disclosure of this official information to Paula is not an offence.

### **Example 1.22**

Alex, an ATO officer in the ATO's superannuation area, is examining if a registered tax agent should be disqualified under section 131 of the *Superannuation Industry (Supervision) Act 1993* from being an approved superannuation auditor in relation to the auditing of SMSFs. As part of this examination, Alex requests official information from the TPB.

As the Commissioner has the general administration of section 131 of the *Superannuation Industry (Supervision) Act 1993* in relation to SMSFs, and Alex's determination is for the purpose of administering a taxation law, the TPB's disclosure of this official information to Alex is not an offence.

### **Example 1.23**

Scott, an ATO officer is investigating an alleged tax avoidance scheme promoted by a registered tax agent. Scott requests official information from the TPB that he believes could assist his investigation. Scott intends to use this information to pursue an order under the *Proceeds of Crime Act 2002* as one of the means to address any breaches of the taxation laws.

As this information relates to the administration of a taxation law, the TPB's disclosure of this official information to Scott is not an offence.

1.130 Allowing the TPB to provide this additional information to the Commissioner improves the ATO's administration of the taxation laws and is consistent with the object of the tax agent services regime. However, as the TPB is independent of the ATO, it will need to exercise its own judgement as to what information it would provide to the ATO under this exception.

### ***Allowing the TPB to specify additional types of BAS services***

1.131 Further to the discussion in paragraphs 1.56 to 1.59, and to provide ongoing flexibility as to what constitutes a BAS service, these amendments allow the TPB to issue legislative instruments that specify any other services that are to also be BAS services. *[Schedule 2, item 27]*

1.132 As a consequence, it may be possible for BAS agents to provide BAS services that are not limited to just BAS provisions in the taxation laws and so this limitation in section 50-30 needs to be removed. *[Schedule 2, items 13-16]*

### ***Other amendments***

#### ***Registered entities to provide the TPB with various contact details***

1.133 Under subsection 30-35 registered tax agents and registered BAS agents that cease to meet specific registration requirements or other events happen to them that affect their continued registration need to notify the TPB in writing of this within 30 days.

1.134 These amendments will require registered entities to also advise the TPB in writing about any changes to their business address, email address and other contact details. *[Schedule 2, items 5-7]*

1.135 Registered entities that fail to comply with these obligations may be in breach of the Code of Professional Conduct.

*Evidential burdens in civil penalty provisions*

1.136 An entity contravenes section 50-5 if they provide a tax agent service whilst unregistered by the TPB. An entity contravenes section 50-10 if they advertise they will provide a tax agent service and they are unregistered.

1.137 Subsection 50-5(5) imposes an evidential burden on entities to show in a civil penalty proceeding, that — per subsections 50-5(3) and 50-5(4) — the reason they did not contravene section 50-5 is that they were providing a legal service in the course of acting for a trust or deceased estate as trustee or legal personal representative.

1.138 Even though subsections 50-10(3) and 50-10(4) provide an equivalent exception in relation to a potential contravention of section 50-10, there is no equivalent evidential burden on the entity to show that the reason they did not contravene section 50-10 is that they were providing a legal service in the course of acting for a trust or deceased estate as trustee or legal personal representative.

1.139 These amendments impose an equivalent evidential burden to that contained in subsection 50-5(5) in relation to subsections 50-10(3) and 50-10(4). *[Schedule 2, items 11, 12, 17 and 26]*

*Allowing the TPB to delegate its functions*

1.140 Subject to some limitations, section 70-30 allows the TPB to delegate its functions or powers to a single Board member or committee. The limitations relate to the TPB's function to issue guidelines, establish Committees or make decisions that may be reviewed by the AAT.

1.141 These amendments will also allow the TPB to also delegate its functions and powers to:

- APS employees whose services are made available to the TPB by the Commissioner; and
- other individuals engaged by the TPB.

*[Schedule 2, item 24]*

1.142 Allowing the TPB to make these delegations will improve its administrative effectiveness.

*Allowing the Chair of the TPB to hold other part-time appointments*

1.143 Subsection 60-25(2) requires the Minister to appoint one of the TPB members to the Chair subject to that individual not holding any other office or appointment under a law of the Commonwealth.

1.144 In practice, a part-time Board member who also holds another part-time office or appointment may still be able to satisfactorily discharge both appointments. However, subsection 60-25(2) does not allow this and, as a result, limits the potential pool of suitable candidates.

1.145 As such, this amendment limits this restriction so that it applies to only holding a full-time office or appointment under a law of the Commonwealth. *[Schedule 2, item 18]*

*Allowing the Minister to appoint an acting Chair and acting TPB members*

1.146 These amendments allow the Minister to appoint a TPB member to act as the Chair during any vacancies or situations when the Chair is absent from duty, absent from Australia or is otherwise unable to perform the duties of office. *[Schedule 2, item 19, subsections 60-67(1) and (2)]*

1.147 Similarly, these amendments allow the Minister to appoint an individual to act as a TPB member during any vacancies or situations when the TPB member is absent from duty, absent from Australia or is otherwise unable to perform the duties of office. *[Schedule 2, item 19, subsection 60-67(3)]*

## **Application and transitional provisions**

### **Creating a regulatory framework for tax (financial) advice services**

1.148 These amendments commence on Royal Assent.

1.149 These amendments start to apply from 1 July 2013.

1.150 An entity that provides tax (financial) advice services for a fee or other reward from 1 July 2014 may be liable for civil penalties under the TASA 2009 unless they are:

- a registered tax agent;
- in some cases — a legal practitioner;
- a registered tax (financial) adviser; or



- an unregistered financial services licensee or representative that accompanies such a service with a disclaimer advising that:
  - they are not a registered tax (financial) adviser under the TASA 2009; and
  - if the recipient intends to rely on the advice, then they should request advice from a registered tax (financial) adviser or a registered tax agent.

*[Schedule 1, item 48 and item 49, subitem (4)]*

### **Example 1.24**

Better Fin-Plan Ltd, a financial services licensee, provides its clients with a range of financial advisory services, including financial product advice and tax advice. Better Fin-Plan Ltd is not a registered tax agent.

Assuming the provision of this advice constitutes a tax (financial) advice service, Better Fin-Plan Ltd can continue to provide such services from 1 July 2014 as long as it advises its clients that it is not registered with the TPB and that if the client intends to rely on that advice then they should request advice from a registered tax (financial) adviser or a registered tax agent.

1.151 Unregistered financial services licensees and representatives may only provide these services accompanied by a disclaimer until 31 December 2015. From after that date, unregistered entities that continue to provide tax (financial) advice services may be liable for civil penalties. *[Schedule 1, item 48 and item 49, subitem (4)]*

1.152 Entities that wish to rely on the fact that they provided such a disclaimer bear an evidential burden in relation to that matter in any proceeding for contravening the TASA 2009. *[Schedule 1, item 48 and item 49, subitem (5)]*

1.153 Entities that wish to advertise the provision of tax (financial) advice services or represent they are registered tax (financial) advisers after 1 July 2014 should first register with the TPB. These arrangements provide a balance between giving sufficient time for entities to adapt to the new regulatory regime and to encourage these entities to register before 31 December 2015.

1.154 Entities that do not provide tax (financial) advice services do not need to register with the TPB.

**Example 1.25**

Further to Example 1.24.

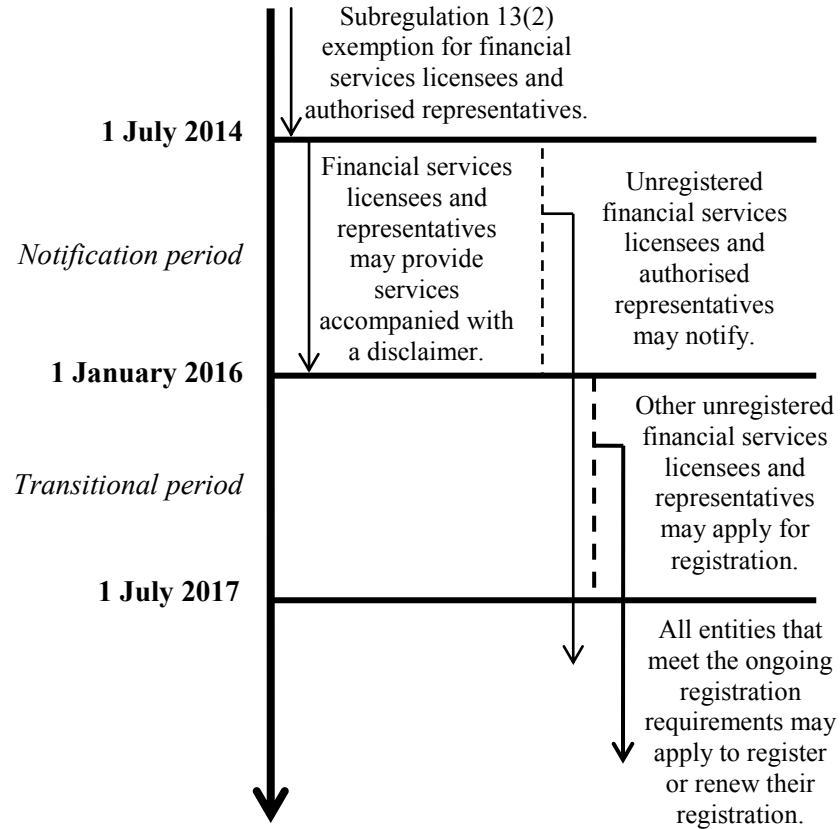
Dan, a recent university graduate, is employed by Better Fin-Plan Ltd in August 2014 and so does not provide tax (financial) advice services in his own right.

Dan does not need to register with the TPB as a registered tax (financial) adviser.

However, Better Fin-Plan Ltd needs to ensure that any tax (financial) advice services it provides, including by Dan and its other employees, is accompanied with the disclaimer that Better Fin-Plan Ltd is not registered with the TPB and that if the client intends to rely on that advice then they should request advice from a registered tax (financial) adviser or a registered tax agent.

1.155 Diagram 1.4 provides a brief overview of the different arrangements for entities seeking to become registered tax (financial) advisers.

**Diagram 1.4**



***The notification period — 1 July 2014 to 31 December 2015***

1.156 During the notification period, financial services licenses and authorised representatives that provide tax (financial) advice services may register with the TPB as registered tax (financial) advisers. To register, the entity need only notify the TPB that they are providing such services and that they are either a financial services licensee or an authorised representative. These entities will not be required to pay an application fee. [Schedule 1, item 48 and item 49, subitem (1)]

**Example 1.26**

Further to Examples 1.24 and 1.25.

On 17 September 2014, Better Fin-Plan Ltd notifies the TPB that it is a financial services licensee that provides tax (financial) advice services. Better Fin-Plan Ltd is taken to be a registered tax (financial) adviser

from 17 September 2014 and, from that date, can provide tax (financial) advice services — including through its employees — without having to accompany those services with a disclaimer.

1.157 Limiting the entities that may register with the TPB during the notification period to financial services licensees and authorised representatives ensures that only entities that provide tax (financial) advice services in their own right need initially register with the TPB. As noted in Diagram 1.4, there is a further opportunity for unregistered financial services licensees and other unregistered representatives to register with the TPB during the transitional period before the regime commences in full from 1 July 2017.

1.158 The TPB will determine the form of the notification, including what information or documents, if any, are required. *[Schedule 1, item 47 and item 48, subitem (2)]* This means the TPB could source some of the necessary information directly from ASIC, thereby minimising the information required from financial services licensees or authorised representatives. It also means that the TPB could allow financial services licensees to notify on behalf of their authorised representatives.

1.159 The entity's registration will take effect from the day they notify the TPB and the entity's registration will expire at a specific date. This expiry date will depend on when the entity notified the TPB.

- Entities that notify the TPB during the period of 1 July 2014 to 31 December 2014 will have their registration expire on 31 January 2018.
- Entities that notify the TPB during the period of 1 January 2015 to 30 June 2015 will have their registration expire on 31 October 2017.
- Entities that notify the TPB during the period of 1 July 2015 to 31 December 2015 will have their registration expire on 31 July 2017.

*[Schedule 1, item 48 and item 49, subitem (1)]*

### **Example 1.27**

Further to Example 1.26.

As Better Fin-Plan Ltd notified the TPB on 17 September 2014, its registration expires on 31 January 2018.

1.160 Once registered, the entity will be subject to the Code of Professional Conduct and other ongoing requirements imposed by the

TASA 2009 on registered tax (financial) advisers. This also includes any registration conditions imposed by the TPB. *[Schedule 1, item 48 and item 49, subitem (3)]*

1.161 Entities that first register with the TPB during the notification period will not be able to use the relaxed registration requirements available during the transitional period should they apply to renew their registration prior to 30 June 2017.

***The transitional period — 1 January 2016 to 30 June 2017***

1.162 Starting from 1 January 2016, financial services licensees and their representatives may apply to the TPB to be registered as tax (financial) advisers. However, in contrast to the notification period, an entity will only become registered once the TPB has made a decision to register the entity and notifies them of this. Once the TPB makes a decision to register the entity, the entity will be registered for at least three years. *[Schedule 1, item 48 and paragraphs 50(a) and (b)]*

1.163 During this time, these entities may apply to the TPB to be registered without having to satisfy all of the ongoing registration requirements that would otherwise apply.

- Individuals need only satisfy the TPB that they have sufficient experience to be able to provide tax (financial) advice services to a competent standard rather than satisfy any specific registration requirements prescribed by the regulations.
- Partnerships and companies need only satisfy the TPB that they have sufficient experience to be able to provide tax (financial) advice services to a competent standard rather than satisfy the requirement to have a sufficient number of registered tax (financial) advisers or registered tax agents to provide tax (financial) advice services to a competent standard and carry out supervisory arrangements.

*[Schedule 1, item 48 and paragraphs 50(c) and (d)]*

**Example 1.28**

Further to Example 1.24.

Misha, a representative of Better Fin-Plan Ltd, applies to the TPB to become a registered tax (financial) adviser on 23 February 2016. The TPB considers Misha's application and grants her registration on 31 March 2016.

Misha is a registered tax (financial) adviser from 31 March 2016 for at least three years.

***Transitional regulations***

1.164 To provide flexibility during the period of 1 July 2014 to 30 June 2017, the amendments provide for the Governor-General to make regulations prescribing matters required or permitted to be prescribed and that are necessary or convenient to be prescribed. *[Schedule 1, item 51]*

***Transitioning to the full regime — 1 July 2017***

**Example 1.29**

Further to Examples 1.24, 1.26, 1.27 and 1.28.

Better Fin-Plan Ltd's registration expires on 31 January 2018.

On 1 December 2017, Better Fin-Plan Ltd applies to the TPB to be a registered tax (financial) adviser.

Better Fin-Plan Ltd needs to satisfy the TPB that:

- each of its directors is a fit and proper person;
- it is not under external administration;
- it has not been convicted of a serious taxation offence or an offence involving fraud or dishonesty during the previous five years;
- it has a sufficient number of individuals being registered tax agents or registered tax (financial) advisers to provide tax (financial) advice services to a competent standard and carry out supervisory arrangements — in this regard it has one individual, Misha, who is a registered tax (financial) adviser; and
- it has PI insurance that meets the TPB requirements

**Other amendments to the *Tax Agent Services Act 2009***

1.165 These amendments will commence on Royal Assent and will apply from the following day. *[Schedule 2, items 28 and 29]*

## **Consequential amendments**

### **Creating a regulatory framework for tax (financial) advice services**

1.166 These amendments amend the definitions in section 995-1 of the ITAA 1997 to incorporate, where relevant, the term tax (financial) adviser. *[Schedule 1, items 44-46]*

1.167 Subsection 90-5(2) provides that a service specified in the regulations is not a tax agent service. Regulation 13 of the TASR 2009 specifies specific services that are not tax agent services. This includes subregulation 13(2) that provides financial product advice is not a tax agent service if it is provided by a financial services licensee or an authorised representative of the licensee and is accompanied by a disclaimer:

- stating that they are not a registered tax agent; and
- advising the recipient that they should seek the services of a registered tax agent if they wish to rely on the advice to satisfy liabilities or obligations or claim entitlements under a taxation law.

1.168 These amendments replace the current end date for subregulation 13(2) of ‘30 June 2013’ with ‘30 June 2014’ so that this carve-out will apply for a further 12 months. *[Schedule 1, item 47]*

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

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

#### ***Creating a regulatory framework for tax (financial) advice services and other amendments to the Tax Agent Services Act 2009***

1.169 Schedules 1 and 2 are 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**

1.170 Schedules 1 and 2 amend the TASA 2009 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.

## **Human rights implications**

1.171 Schedules 1 and 2 engage the following human rights:

### ***Freedom of opinion and expression***

1.172 Schedule 1 regulates the content of speech and commercial expression where these relate to specialised areas of tax advice. The proposed legislation applies to situations where a person has sought advice in relation to their financial affairs and tax advice, and ensures that only persons appropriately qualified and registered are able to provide that advice.

1.173 These limitations operate to protect consumers from inadequate or inappropriate advice and reasonably require professionals seeking to provide that advice to be appropriately trained and registered to provide consumers with confidence in the advice they receive.

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

1.174 Schedule 1, consistent with the existing legislative framework, provides that entities that are regulated to provide tax 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.

1.175 The information that is made available on this 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 TPB.



**Conclusion**

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

**Assistant Treasurer, the Hon David Bradbury**



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## **Chapter 2**

# **Regulation impact statement — Creating a regulatory framework for tax (financial) advice services and other amendments**

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### **Introduction**

2.1 This Regulation Impact Statement was prepared by the Department of the Treasury at the original decision making stage and was assessed as adequate by the Office of Best Practice Regulation. It was publicly released on 8 November 2012.

2.2 A Regulation Impact Statement is a document prepared by departments and, as such, this Regulation Impact Statement reflects the Department of the Treasury's assessment of the costs and benefits of each option at the decision making stage. Accordingly, this Regulation Impact Statement does not reflect changes arising from further consultation during the legislative development of these amendments.

### **Regulation Impact Statement: A new regulatory framework for financial advisers<sup>1</sup> providing tax advice**

### **Background**

#### **Regulation of tax advice by the Tax Agent Services Act 2009**

2.3 The *Tax Agent Services Act 2009* (TASA 2009) introduced a national regulatory framework for tax agents and BAS agents. The TASA 2009 regime commenced on 1 March 2010. It consolidated previous state-based arrangements into a streamlined national regime and

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<sup>1</sup> This document uses the term 'financial adviser' to refer to Australian Financial Services License (AFSL) holders and their representatives providing financial advice services. On 20 June 2012, Minister Shorten, announced that among other things the Government is consulting on whether the term 'financial planner' or 'financial adviser' should be defined in the Corporations law.

strengthened consumer protection available to recipients of tax agent services, including tax advice.

2.4 The policy objectives of the TASA 2009 framework were to strengthen the integrity of the tax system; enhance the protection of consumers of tax agent services, thereby reducing the level of uncertainty for taxpayers and the risks associated with the self-assessment system; and to improve consistency in registration and to regulate the provision of tax agent services in an appropriate, but flexible, way.

2.5 The introduction of the TASA 2009 was accompanied by a regulation impact statement. That regulation impact statement was published in Chapter 6 of the Explanatory Memorandum accompanying the Tax Agent Services Bill 2008 (which on passage through Parliament became the TASA 2009).

2.6 Providers of tax advice are ordinarily regulated by the TASA 2009. Section 90-5 of the TASA 2009 defines a 'tax agent service' to include 'advising... about liabilities, obligations or entitlements... that arise, or could arise, under a taxation law'.

#### ***Position of financial advisers under the TASA 2009***

2.7 Financial advisers may provide their clients with tax advice without being subject to the application of the TASA 2009. This is because financial advisers are legislatively exempt from the application of the TASA 2009. Anecdotal evidence suggests that there may be anywhere between 8,000 and 17,000 financial advisers who could be providing tax advice for a fee or other reward.

2.8 Because financial advisers are exempt from the TASA 2009, they are also exempt from having to comply with the professional requirements it imposes upon tax agents in order to guarantee the standard of tax advice. This creates a number of issues, which are discussed in more detail below under the 'Problem' section.

#### ***Development of a new framework for financial advisers providing tax advice***

2.9 Because of the problems generated by the present exemption of financial advisers from the TASA 2009, the Government has been developing a new policy framework for regulating financial advisers who give tax advice. This is discussed in more detail in the 'Consultation' section of this regulation impact statement.

2.10 Financial advisers have been exempted from the application of the TASA 2009 to allow the Government sufficient time to settle the

details of the regulatory model to be settled, resolve implementation issues associated with the new framework, and enable necessary legislation to be enacted with effect from 1 July 2013.

## **Problem**

2.11 Financial advisers are able to provide tax advice to their clients without being subject to the ethical and professional standards imposed by the TASA 2009. This situation is undesirable. A new regulatory framework for financial advisers providing tax advice is proposed to ensure they are appropriately regulated.

2.12 The current situation is undesirable for three reasons, which are that:

- the provision of tax advice by tax agents is regulated but the provision of tax advice by financial advisers is not — this is a regulatory anomaly;
- as a result of this anomaly, the current situation poses risks to consumer protection, professional accountability, and the integrity of the tax system; and
- there is a lack of legislative clarity regarding the legal position of financial advisers who provide tax advice.

2.13 In relation to the first issue — the TASA 2009 currently applies to tax agents providing tax advice, but not to financial advisers who provide tax advice. This means that financial advisers are not subject to the professional and ethical standards that the TASA 2009 imposes on providers of tax agent services through its mandatory Code of Professional Conduct. The TASA 2009 also provides disciplinary sanctions which the Tax Practitioners Board (TPB) may apply against tax agents for breaches of the Code of Professional Conduct. Because financial advisers are not subject to the Code of Professional Conduct, they are also not subject to sanctions. This creates an inequality between financial advisers and tax agents, as tax agents are subject to more onerous professional standards.

2.14 In relation to the second issue – this situation creates several underlying risks in the absence of regulation of those financial advisers who provide tax advice. Firstly, consumer protection may be compromised as the TASA 2009 regime only affords key protections to clients of tax agents who provide tax advice (and not the clients of financial planners who provide tax advice). Secondly, there are different

standards of accountability between tax agents and financial advisers providing tax advice as only tax agents can be held accountable for misconduct under the TASA 2009. Thirdly, the integrity of the tax system could be compromised by tax advice being provided by non-registered and non-regulated providers of tax agent services.

2.15 Finally, there remains a lack of legal clarity about which aspects of tax advice services will fall within the definition of a ‘tax agent service’ in section 90-5. When the TASA 2009 was first introduced, there were concerns regarding the nature of tax related services that may be provided by a financial adviser and how they relate to the definition of tax agent services. It remains ambiguous as to precisely what financial advice services fall within the ambit of the TASA 2009, and consequently whether financial advisers will need to register with the TPB to provide services to clients.

2.16 The current regulatory regime therefore has undesirable consequences, which the Government may wish to take policy action to remedy.

## **Objective of the Government**

2.17 The objective of Government action is to ensure that all tax advice provided for a fee or other reward is consistently regulated, irrespective of whether that tax advice is provided by a financial adviser.

2.18 Specifically, the policy objectives of the new framework for regulating financial advisers who provide tax advice are:

- for financial advisers providing tax advice — to ensure they are regulated as providers of tax agent services in an appropriate, but flexible manner to ensure that an unfair burden is not placed on the industry;
- for taxpayers — to enhance their consumer protections and to promote the provision of quality financial advice services; and
- for the tax system — to ensure the integrity of the tax system and the tax industry are strengthened, so that providers of tax advice are treated in a similar manner.

2.19 In April 2011, the then Assistant Treasurer outlined a possible model to achieve these objectives after consultation with industry. This is the model discussed in Option 1 below.

## Options that may achieve objectives

2.20 Three courses of action that could be taken in response to the present situation are:

- implementing a co-regulatory model — to streamline regulation of financial advisers to ensure that the provision of tax advice is consistently regulated;
- extending the TASA 2009 exemption for financial advisers indefinitely — so that financial advisers would be able to provide tax advice without needing to comply with the TASA 2009 requirements; or
- maintaining the status quo — when the TASA 2009 exemption expires on 30 June 2013, financial advisers will need to comply with all the requirements of the TASA 2009 regime from 1 July 2013.

### Option 1: A co-regulatory framework

2.21 The regulation of financial advisers providing tax advice could be addressed using a co-regulatory framework, as discussed with industry stakeholders. Financial advisers who provide tax advice for a fee or other reward, and are not otherwise registered with the TPB as tax agents, will be required to register in order to continue providing tax advice.

2.22 The essence of this proposal is to introduce a regulatory system in which Australian Securities and Investments Commission (ASIC) and the TPB jointly regulate those financial advisers who provide tax advice as part of their financial advice services. To allow the financial services industry to adjust to the new system, the co-regulatory framework could be introduced in three separate phases. Such a co-regulatory framework would only apply to the financial advisers referred to below in paragraph 2.23 in this document (and not to the ones in paragraph 2.24).

2.23 Financial advisers who *will* be subject to the co-regulatory framework are those who can:

- provide tax advice in the context of providing personal financial advice for a fee or other reward, but not to the extent they lodge tax returns or make representations to the Commissioner of Taxation;
- provide personal financial product advice which includes tax advice that can be relied on by consumers; or

- advise clients as part of their job, profession or business in exchange for a fee (directly or indirectly) or any other reward or remuneration.

2.24 Financial advisers who *will not* be subject to the co-regulatory framework are those who:

- provide only general tax information and not tax advice tailored to a client's circumstances; or
- provide tax agent services, such as lodging tax returns and making representations to the Commissioner of Taxation, as they are currently required to be regulated by the existing the TASA 2009 framework and therefore they are (or should be) registered tax agents.

***Possible features of the co-regulatory framework***

2.25 Under the co-regulatory framework, financial advisers may need to be registered with the TPB and ASIC in order to provide tax advice in the context of their financial advice services.<sup>2</sup> These registered financial advisers may then be subject to ongoing regulation under the TASA 2009.

2.26 Under the co-regulatory framework, financial advisers providing tax advice may need to meet obligations imposed on them by both the TASA 2009 and the *Corporations Act 2001* (Corporations Act),<sup>3</sup> as applicable. The TASA 2009 requirements would need to be extended to cover financial advisers providing tax advice and these would need to be introduced as part of the legislative amendments.

2.27 ASIC could act as a 'shop front' facilitating the co-regulatory framework and be the initial point of contact for financial advisers and consumers in relation to the regulation or receipt of financial advice.

2.28 ASIC could on-share information with the TPB about financial advisers who are licensed or authorised under the Corporations Act. ASIC and the TPB would communicate with each other as appropriate to facilitate the success of this co-regulatory approach. Legislative changes

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<sup>2</sup> Where there are 'sufficient numbers' of registered financial advisers or tax agents in an organisation, a financial adviser may be able to provide tax advice without needing to register with the TPB. The TPB will make decisions about the existence of sufficient numbers on a case-by-case basis, taking into account the supervisory arrangements that are in place within the organisation.

<sup>3</sup> As well as regulations associated with the Corporations Act and the TASA 2009.



will need to be introduced to enable the TPB to share information with ASIC and for ASIC to share information with the TPB for no fee.

2.29 The TPB could administer the registration of financial advisers who provide tax advice, however ASIC could provide a link on its website to assist financial advisers to obtain the information about the new requirements. The TPB could also be responsible for enforcement activities and relevant professional standards for tax advice.

### ***Possible implementation phases***

2.30 Should the co-regulatory framework be implemented, it would be preferable to institute it in distinct phases, such as: a notification phase (1 July 2013 to 31 December 2014); a transitional phase (1 January 2015 to 30 June 2016); and a long-term phase (1 July 2016 onwards when the co-regulatory framework is fully implemented).

2.31 During a notification phase, no registration fee would be payable by financial advisers, but during transitional and long-term phases registration fees would be payable by financial advisers.

2.32 During notification and transitional phases, a financial adviser would not be required to meet education and experience requirements. However, during both notification and transitional phases financial advisers would need to apply for registration, meet fitness and propriety requirements, and adhere to the Code of Professional Conduct.

2.33 Once the co-regulatory framework enters into the long-term phase, applicants would also need to meet education and experience requirements in order to be able to renew their registration.

2.34 A high level overview of the different features of each implementation phase is contained in the table below.

**Table 2.1: An overview of the possible requirements for financial advisers providing tax advice as part of their financial advice across three phases.**

	Notification Phase 1 July 2013 — 31 December 2014	Transitional Phase 1 January 2015 — 30 June 2016	Long Term 1 July 2016 onwards
Applying for registration	✓	✓	✓
Registration fee	✗	✓	✓
Registration requirement — experience	✗	✗	✓
Registration requirement — education	✗	✗	✓
Registration requirement — fitness and proprietary	✓	✓	✓
Code of Professional Conduct	✓	✓	✓

***Possible registration requirements — education and experience***

2.35 Relevant financial advisers should need to demonstrate that they also have appropriate professional experience. Experience could be demonstrated by having worked with a registered tax agent or could perhaps be obtained through working with an already registered adviser. The TPB has recently launched new CPE requirements, discussed in Attachment A.

2.36 If financial advisers who provide tax advice become voting members of recognised associations, and demonstrate that they meet certain experience requirements, then they could be exempted from undertaking the additional education requirements. However, if they are not exempted, then under the co-regulatory framework they may need to complete appropriate courses from the start of a long-term period (from 1 July 2016).

2.37 Financial advisers who provide tax advice will also be expected to maintain and update their skills through a continuing professional education (CPE) regime which will complement the continuing professional development regime as outlined by ASIC. The TPB is in the process of developing a framework of CPE expectations for financial planners who provide tax advice.

#### ***Development of a co-regulatory framework option***

2.38 On 23 April 2010, the Government announced that it would seek the public's view on the most suitable regulatory oversight arrangements for tax agent services and advice provided by financial planners. In November 2010, the Treasury issued an options paper, 'Regulation of tax agent services provided by financial planners', which canvassed possible options and how those options could be implemented.

2.39 The options paper presented two options for consideration:

- *Option 1* — To bring tax agent services provided by financial advisers permanently within the tax agent services regime, including regulation by the TPB, but done so as to minimise additional compliance burdens;
- *Option 2* — To investigate and implement changes to the Australian Financial Services Licence (AFSL) regime or its enforcement powers, to ensure financial advisers offering tax agent services are regulated to the same standards as those expected of tax agents. The AFSL regime does not cover the provision of tax advice. Legislative changes would need to be made to extend the ambit of the AFSL regime to cover tax advice.

2.40 On 15 December 2010 the then Assistant Treasurer met with representatives of finance and accounting bodies. The outcome of that meeting was a decision that Treasury, ASIC and the TPB would work through options using ASIC as the 'one-stop shop' to regulate financial advisers. Subsequently, the co-regulatory framework, a hybrid model application of options 1 and 2 that were presented in the November 2010 Options paper, was developed when Treasury consulted with ASIC and the TPB.

2.41 The proposed hybrid model accommodates the stakeholder views that were expressed when the two options were initially considered. In particular, it aligns the regulation of financial advisers (as ASIC regulates them) with modifications to the TASA 2009 to ensure that tax advice provided by financial advisers is consistently regulated by the TPB. This model seeks to avoid any unnecessary duplication of

administrative efforts associated with registration and enforcement activities without compromising the regulation of tax advice provided by financial advisers.

2.42 On 10 February 2011, the then Assistant Treasurer announced a number of principles that should underpin the development of the regulatory arrangements for the potential co-regulatory regime. These principles included: consumer protection, ASIC being the key agency for interacting with financial advisers and consumers in relation to tax services provided as part of their financial planning services; and ASIC being supported by a strong and collaborative arrangement with the TPB.

## **Option 2: Extending the financial advisers exemption from the TASA 2009**

2.43 Option 2 is to indefinitely extend the exemption of financial advisers from the application of the TASA 2009, and subject them only to regulation by ASIC insofar as they provide financial product advice.

2.44 While financial advisers would continue to be subject to the AFSL regime to the extent they provide financial product advice, tax advice which financial advisers provide would not be subject to the TASA 2009 regime. As such, the quality assurance provided by the TASA 2009 would not be available for tax advice provided by financial advisers.

2.45 It is difficult to identify a sound reason why financial advisers who provide tax advice should be indefinitely exempt from the operation of the TASA 2009 regime, especially since financial advisers may provide tax advice as part of the ordinary advice they already provide to their clients. For instance, financial advisers may already provide advice in relation to the deductibility of superannuation contributions, the extent to which superannuation benefits would be subject to tax in the hands of the recipient, the implications of receiving franked dividends and income splitting. Providing such advice would constitute the delivery of 'tax agent services' as defined in the TASA 2009.

2.46 Currently there is an anomalous situation with financial advisers being able to provide tax advice without needing to comply with the TASA 2009 requirements, which others (who provide tax agent services) need to comply with when providing similar advice.

2.47 This is the preferred option, as financial advisers would face no compliance requirements and benefit from not being subject to the TASA 2009 when they provide tax advice. This is contrary to the Government's objective to improve consumer protection.

2.48 The *Tax Agent Services Regulations 2009* (TASR 2009) subregulation 13(2), which provides the current temporary exemption, would need to be amended to put into effect an indefinite exemption.

### **Option 3: Status quo**

2.49 The current exemption for financial advisers will lapse on 30 June 2013. If the Government decides to take no action and maintain the status quo, then the TASA 2009 will apply to financial advisers in full from 1 July 2013. This will mean that financial advisers will need to comply with all the requirements of the TASA 2009, including the Code of Professional Conduct, education, experience and other requirements from 1 July 2013 (as opposed to the three phases outlined above with the co-regulatory framework option).

2.50 This option has the benefit of bringing all providers of tax agent services into the TASA 2009 regime, thereby regulating tax advice provided by financial advisers, plus ‘levelling the playing field’ between financial advisers and tax agents. However, allowing the exemption to end without any transitional safety-net arrangements may be detrimental to the regulators (ASIC and the TPB) and to affected financial advisers.

### **Impact analysis**

2.51 There are approximately 18,000 financial advisers in Australia, however, not all financial advisers will be providing tax advice for a fee or other reward in addition to the financial advice that they would be providing. Anecdotal evidence suggests that there may be anywhere between 8,000 and 17,000 financial advisers who could be providing tax advice for a fee or other reward. Some may already be registered with the TPB as tax agents.

2.52 The Government is likely to incur implementation costs under both Options 1 and 3. There may also be costs in the setting up of additional registration mechanisms or adding financial advisers who provide tax advice to the TASA 2009 register, however, these are likely to be minimised with requirements to use existing systems.

2.53 Over the long-term, the requirements of Options 1 and 3 will not be different, as the level of regulatory oversight will be the same.

2.54 A quantitative estimate of these possible costs was not available at the time of writing.

## **Impact of option 1**

2.55 The consumer protection provided by the TASA 2009 would be in place and implemented under this option. The protections that would come into effect from the commencement of the co-regulatory framework (1 July 2013) include: registration, compliance with the fitness and propriety requirements, and with the Code of Professional Conduct. Financial advisers will need to comply with these key protections from the start of their registration. Subsequently, those financial advisers may need to meet further education and experience requirements.

2.56 Streamlining the regulation of tax advice through a co-regulatory framework, jointly administered by ASIC and the TPB, will mean that financial advisers will not generally have to provide the same details to two separate regulators in order to secure licencing, registration or renewal.

2.57 Certainty and consumer protection would be enhanced under this model, as there is a proposed requirement that financial advisers ensure that their professional indemnity insurance (PI insurance) will cover them not only for the financial advice that they provide, but also for their tax advice.

2.58 A co-regulatory framework should raise the standard of advice provided by financial advisers who provide tax advice, as professional standards would be increased because financial advisers will be subject, for the first time, to explicit tax-related obligations and education standards, Code of Professional Conduct requirements, and disciplinary standards.

### ***Impacts on financial advisers and financial advice businesses***

2.59 Financial advisers will continue to face the costs associated with obtaining or maintaining an appropriate AFSL licences (that is, the proposed co-regulatory framework will not impact on those). However, financial advisers who provide tax advice would also need to ensure that their licences, registrations or renewals cover them for the provision of tax advice services. The co-regulatory model should minimise the time financial advisers spend applying to regulators for licencing, registration or renewal. In addition, for the first time financial advisers could be subject to explicit requirements that tax agents are currently subject to under the TASA 2009, such as the specific tax-related conduct obligations and education standards.

2.60 Financial advisers may face costs such as registration and renewal fees, as well as education costs (additional taxation training and CPE developed by the TPB, and PI insurance costs if the financial

adviser's existing PI insurance does not cover them for the tax advice). However, financial advice businesses may choose to bear the costs associated with obtaining and maintain registration on behalf of financial advisers that they employ. Financial advice businesses may therefore incur costs such as registration and renewal fees, as well as education costs and PI insurance costs.

2.61 Financial advisers who wish to provide tax advice will need to ensure that their PI insurance extends to covering them for the tax advice that they may provide. This may or may not require them to pay an addition premium on their existing PI insurance.

2.62 Registration fees collected by the TPB could initially be waived for financial advisers who are being regulated for the first time. To assist with this transition, fees could be delayed until the commencement of a transitional phase on 1 July 2015. After this point though, a proposed fee structure could be:

- \$400 — for three-year registration as a financial adviser who carries on a business as a financial adviser; and
- \$200 — for three-year registration as a financial adviser who does not carry on a business as a financial adviser.

2.63 During the initial notification phase, financial advisers could benefit from a delay in the requirement to pay registration fees from 1 July 2013 to 1 July 2015. As such, they will be able to register and be able to provide advice without needing to immediately pay the registration fee.

2.64 Financial advisers intending to provide tax advice would become subject to the qualification and experience requirements which apply to registration and renewal of tax agents (in line with items 201 to 206 in Schedule 2, Part 2 of the TASR 2009). If they do not qualify for an exemption or do not meet the education requirements, under the co-regulatory framework the financial advisers who wish to provide tax advice may need to complete the education requirements from 1 July 2016 (the start of the long term period).

2.65 Apart from needing to invest time to complete the required courses, financial advisers or their employers are likely to incur educational expenses such as course fees and course material costs to assist them meet the educational requirements.

2.66 This is the preferred Option, as it meets the objectives of the Government.

***Possible costs of meeting the education requirement***

2.67 The TPB is proposing that an Australian taxation law course that some financial advisers may need to undertake should be at the Diploma level, and their preliminary view is such a course would be of 100 to 130 hours duration and could cost between \$680 and \$1,060. This would equate to one quarter of a semester's full-time workload.

2.68 Some financial advisers may have already undertaken a course of study that covers the course content. Further, some financial advisers should be entitled to sit an exam that tests their prior knowledge and experience. In those cases, there may not be an additional cost impost (in the course of prior study) or a reduced cost impost (by undertaking a test).

2.69 Financial advisers who provide tax advice will also be expected to maintain and update their skills through CPE. This would also require an investment of time, possible additional costs to attend short courses, and the need to maintain a record as evidence of the CPE. Membership with accredited associations which impose CPE requirements upon members may also count toward meeting the TASA 2009 CPE requirements.

***Impacts on recipients of tax advice from financial advisers***

2.70 Recipients of tax advice from financial advisers would benefit from the enhanced certainty that comes with these advisers being registered in a similar manner to tax agents under the TASA 2009. Consumer protection will be strengthened as a result of a requirement that relevant financial advisers will have PI insurance policies that cover them for the tax advice that they may provide. This will provide consumers with a further safety-net.

2.71 The competency of financial advisers who provide tax advice will be enhanced, and recipients of tax advice can be assured that the standard of advice that is received would be of a similar professional standard to that provided by tax agents that are currently regulated under the TASA 2009.

2.72 Some benefits to consumers could be deferred for three years, as under Option 1, CPE and education requirements will apply from 1 July 2016, rather than 1 July 2013 (the date after the exemption expires).

2.73 As financial advisers would face new costs and outlays for registration and education, they may pass some of the additional costs to the recipients of the tax advice that they provide.



## **Impact of option 2**

2.74 Financial advisers will not face financial costs or additional compliance burdens under this option. However, the underlying risks associated with the absence of regulating financial advisers who provide tax advice, and the concerns associated with those, would remain unresolved.

2.75 Financial advisers who provide tax advice would remain unaccountable for the tax advice that they provide, and would not face disciplinary action or be subject to penalties under the TASA 2009. Consumer protection afforded by the TASA 2009 would not be available to the recipients of tax advice from such financial advisers.

2.76 Recipients of tax advice from financial advisers could potentially face uncertainty as they would not be able to rely on sanctions under the TASA 2009 or the Code of Professional Conduct that they could rely on if similar advice was obtained from a registered tax agent.

2.77 This is not a preferred option, as it does not meet the objectives of the Government.

## **Impact of option 3**

2.78 Under this option, financial advisers would be subject to all obligations under the TASA 2009 regime from 1 July 2013.

2.79 Consumers of tax advice could benefit from the protection that the TASA 2009 provides, and would be assured that the same scrutiny would be applied to a financial adviser who provides tax advice, as would be applied against a tax agent. Financial advisers, who wish to provide tax advice as part of their services would need to register under the TASA 2009, meet the propriety test, agree to be bound by the Code of Professional Conduct, as well as show that they meet the education and experience requirements upon registration.

2.80 Financial advisers who provide (or advertise that they can provide) tax advice for a fee or other reward, and who do not register under the TASA 2009, would face civil penalties for not complying with the TASA 2009 regime. Offending individual advisers could face civil penalties of up to 250 penalty units (or currently \$27,500) while body corporates committing similar offences could face civil penalties of up to 1,250 penalty units (or currently \$137,500).

2.81 In addition, financial advisers who wish to provide tax advice will be required to meet the education and experience criteria, and they may or may not have met those criteria at the time that the TASA 2009

exemption expires. Those who have not met the criteria will not be permitted to register and provide tax advice, and will be subject to civil penalties if they do provide such advice.

2.82 This is not the preferred option, as it does not meet the objectives of the Government.

## **Consultation**

2.83 Consultation on this matter commenced in November 2010 with the release of the options paper, 'Regulation of tax agent services provided by financial planners'.

2.84 The options paper presented two options: to either regulate financial advisers within the tax agent services regime or through regulatory supervision by ASIC. Twenty-two submissions were received with two suggesting that financial advisers providing tax advice be given a permanent exemption from additional regulation, while a handful supported the option for the regulation to be within the tax agent services regime. However, the majority supported the option for the regulation to be undertaken by ASIC under the existing AFSL regime to avoid unnecessary complexity and confusion for the public and financial advisers, but also accepted that significant background support from the TPB would be appropriate to avoid unnecessary duplication and costs.

2.85 Between December 2010 and April 2011, the then Assistant Treasurer met several times with representatives of the financial planning, tax and accounting bodies, the Treasury, the TPB and ASIC to discuss how financial planners who provide tax agent services should be regulated.

2.86 The outcome of the then Assistant Treasurer's meeting with representatives on 15 December 2010 was that Treasury, ASIC and the TPB would work through options using ASIC as the 'one-stop shop' to regulate financial advisers.

2.87 Subsequent meetings developed a broad set of principles, which the then Assistant Treasurer announced on 10 February 2011. Also, key aspects of a possible model to regulate financial planners who provide tax advice within the context of providing financial advice were announced by the then Assistant Treasurer on 7 April 2011.

2.88 Broadly the agreement centred on a model of regulation, where collaborative approaches streamline arrangements to be implemented as far as practicable. The aim of the new arrangement is to avoid duplication

of regulation and red tape, reduce unnecessary burden and costs for financial planners, as well as raise competencies and strengthen consumer protection.

2.89 On 27 February 2012 Treasury conducted a further confidential consultation meeting with stakeholders, including representatives of the financial planning, tax and accounting bodies, the TPB and ASIC to further develop the regulatory framework for financial advisers providing tax advice. Following this meeting, Treasury held further discussions with the various stakeholders to develop a paper to focus on matters to implement a proposed new regulatory framework for financial advisers providing tax advice.

2.90 Stakeholders' comments showed support and agreement with the proposed regulation of relevant financial planners (who are not otherwise registered tax agents or legal practitioners) by the TPB. The Self Managed Superannuation Funds Professionals' Association of Australia advised that it supports the co-regulatory framework for financial planners providing tax advice in conjunction with the provision of financial advice as outlined in the draft discussion paper. The Association of Financial Advisers confirmed that it does not have any major issues with information sharing between the TPB and ASIC which is one of the key matters to enable the proposed option to work effectively.

2.91 Following further consultation with representatives from the financial planning, tax and accounting bodies, the TPB and ASIC, the Assistant Treasurer announced on 30 April 2012 the decision to grant an extension to the exemption for financial advisers providing tax advice. This extension has been granted in order to allow for the details of the regulatory model to be settled and ensure resolution of implementation issues associated with bringing financial advice under the scope of the tax agent services regime.

2.92 The Government will undertake further consultation on proposed legislation and regulatory amendments and seek to ensure that the legislation and regulations are introduced before the changes will take effect on 1 July 2013.

### **Further consultations on exposure draft legislation and regulations**

2.93 Subject to agreement with this framework, a further broad consultative process based on exposure draft legislation, regulation and supporting material will be held. Draft legislation and explanatory materials will be released for public comment to enable not only representatives of affected professionals, the TPB, and ASIC, to further

comment but to provide the wider community with an opportunity to comment.

## **Conclusion and recommended option**

2.94 The proposed co-regulatory framework (Option 1) most fully meets the Government's objectives, as it addresses not only the anomaly in relation to the current regulation of tax advisers, but also effectively addresses the underlying risks for consumers as it seeks to clarify the legal implications on financial advisers who provide tax advice. In addition, it reflects the discussions held with industry.

2.95 Under the co-regulatory framework, from 1 July 2013 the financial advisers who wish to provide tax advice in addition to the financial advice that they are providing would need to apply for registration under the TASA 2009, meet the fitness and propriety test and comply with the Code of Professional Conduct under the TASA 2009 and ensure that their PI insurance cover extends to the tax advice that they could be providing. This will maintain the integrity of the tax system and ensure that financial advisers who wish to provide tax advice as part of their service to their clients are accountable for the service that they provide their clients in similar manner that tax agents are under the TASA 2009. This option also provides financial advisers with transitional arrangements that do not compromise consumer protection.

2.96 The proposed phased introduction of the new co-regulatory arrangements should minimise the impact on financial advisers, as they would not need to pay registration fees until the commencement of the transitional period on 1 January 2015, and not need to show that they meet the education and experience requirements until 1 July 2016 when the long term phase commences, and if additional education requirements need to be proven these would not become mandatory until 1 July 2016 when the long term phase commences.

2.97 While the framework does not introduce the entire the TASA 2009 regime at once, the key requirements need to be met at the nomination and registration phase and this ensures consumer protection and the integrity of the TASA 2009 are upheld. The other requirements are met in the longer-term and these strengthen and fully apply the TASA 2009 requirements.

## **Option 1 is the preferred option**

2.98 Option 1 is the preferred option. The co-regulatory framework would bring financial advisers who provide tax advice into the

TASA 2009 regulatory framework, thereby maintaining the integrity of tax advice and protecting consumer interests. Ultimately, it will ensure that financial advisers providing tax advice are regulated in a similar manner to tax agents providing advice under the TASA 2009. Option 1 provides a phased-in approach to bringing financial advisers within the ambit of the TASA 2009, thereby allowing the financial advice industry to adapt to the new regulatory environment and meet industry needs.

2.99 Option 2 would not meet the Government's objectives, as financial advisers would continue to be exempt from the TASA 2009 requirements under this option and it would not ensure consistent regulation of tax advice being provided.

2.100 Option 3 (maintaining the status quo) would meet some of the Government's objectives, but does not address financial advisers' concerns, as they would need to continue to register and comply with AFSL requirements for the financial advice that they provide, and in addition register and comply with all the TASA 2009 requirements as soon as the current exemption expires (from 1 July 2013). Financial advisers who wish to provide tax advice as part of their service to their clients would be required to become registered under the TASA 2009, meet all the TASA 2009 requirements, pay registration fees as soon as the exemption lapses (that is, from 1 July 2013).

## **Implementation and review**

2.101 Option 1 would be implemented by amending legislation and regulations. These amendments would commence when the current exemption from the TASA 2009 expires on 1 July 2013. Given the number of advisers who may apply for registration, it is envisaged that transitional arrangements will be necessary to assist both industry, ASIC and the TPB in adapting to the new regime.

2.102 It is expected that further consultation will take place on the draft legislation and regulations that will give effect to the new arrangements. This would occur in the second half of 2012.

2.103 Also, the TPB and ASIC will need a period of time to introduce and fine-tune their administration mechanisms to ensure that the co-regulatory framework (including required information sharing mechanisms) is implemented so as to avoid providing the same information to different regulators.

2.104 A review could then be undertaken as directed by the Government.

### **Attachment A — Board launch of a new continuing professional education<sup>4</sup>**

2.105 On 4 June 2012, the Board launched a new CPE policy for tax and BAS agents.

2.106 From 1 July 2012 all tax practitioners should begin their continuing professional education in accordance with the Board's policy to maintain their professional knowledge and skills. Agents should maintain a record as evidence of their CPE from 1 July 2012.

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<sup>4</sup> The CPE policy is an important step in assuring the community that tax and BAS agents meet appropriate standards of ethical and professional conduct. The policy will assist tax practitioners to maintain up-to-date and relevant knowledge and skills to comply with their obligations under the Code of Professional Conduct.

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## **Chapter 3**

### **Deductible gift recipients**

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#### **Outline of chapter**

3.1 Schedule 3 amends the *Income Tax Assessment Act 1997* (ITAA 1997) to update the list of specifically listed deductible gift recipients (DGRs).

#### **Context of amendments**

3.2 The income tax law allows income tax deductions for taxpayers who make gifts of \$2 or more to DGRs. To be a DGR, an entity must fall within one of the general categories set out in Division 30 of the ITAA 1997 or be specifically listed by name in that Division.

3.3 DGR status helps eligible funds and entities attract public financial support for their activities.

#### **Summary of new law**

3.4 The amendment adds the Australian Council of Social Service Incorporated and Make a Mark Australia Incorporated as specifically listed DGRs.

#### **Detailed explanation of new law**

##### **The Australian Council of Social Service Incorporated (ABN 72 757 927 533)**

3.5 The Bill adds the Australian Council of Social Service Incorporated as a specifically listed DGR. Taxpayers may claim a deduction for gifts made to the Australian Council of Social Service Incorporated after 30 June 2013. [*Schedule 3, item 1, item 4.2.15 in the table in subsection 30-45(2) of the ITAA 1997*]

3.6 The purposes of the Australian Council of Social Service Incorporated are to develop and promote socially, economically and

environmentally responsible public policy and action by government, community and private sectors, support the role of non-government organisations in providing assistance to vulnerable people and groups in Australia, and contribute to national policy making.

### **Make a Mark Australia Incorporated (ABN 24 546 286 505)**

3.7 The Bill adds Make a Mark Australia Incorporated as a specifically listed DGR. Taxpayers may claim a deduction for gifts made to Make a Mark Australia Incorporated after 30 June 2013. *[Schedule 3, item 2, item 9.2.14 in the table in subsection 30-80(2) of the ITAA 1997]*

3.8 Make a Mark Australia Incorporated provides books and computers to primary school aged children in developing countries

### **Application and transitional provisions**

3.9 The listings of the Australian Council of Social Service Incorporated and Make a Mark Australia Incorporated apply to gifts made after 30 June 2013.

### **Consequential amendments**

3.10 A change has been made to update the index in Division 30 to add the new listings. *[Schedule 3, items 3 and 4]*

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

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

#### ***Deductible gift recipients***

3.11 This Schedule 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**

3.12 This Schedule amends the list of deductible gift recipients (DGRs) in Division 30 of the *Income Tax Assessment Act 1997*. The income tax law allows income tax deductions for taxpayers who make gifts of \$2 or more to DGRs.

3.13 The amendments add the Australian Council of Social Service Incorporated and Make a Mark Australia Incorporated as specifically listed DGRs on an ongoing basis.

## **Human rights implications**

3.14 This Schedule does not engage any of the applicable rights or freedoms.

## **Conclusion**

3.15 This Schedule is compatible with human rights as it does not raise any human rights issues.

**Assistant Treasurer, the Hon David Bradbury**



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