

23 December 2010

General Manager
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Dear Sir/Madam

REGULATION OF TAX AGENT SERVICES PROVIDED BY FINANCIAL PLANNERS

Thank you for the opportunity to respond to the November 2010 options paper.

The Financial Services Council (FSC) is the peak body representing the retail and wholesale funds management, superannuation and life insurance industries and financial advisory networks (FANs). The FSC has over 135 members who are responsible for investing over \$1.4 trillion on behalf of more than ten million Australians.

The FSC has previously submitted its views on aspects of the tax agent services regime (TAS regime). In particular, we welcomed the Government's announcement on 1 November 2010 to defer the application of the TAS regime to financial planners until 1 July 2011.

The FSC supports the Government's objectives in ensuring there is appropriate protection for consumers receiving advice from financial planners.

The FSC has also broadly welcomed the recommendations made in the Future of Financial Advice (FoFA) reform package and we support the intent of FoFA to improve the quality of financial advice and strengthen investor protection, thereby underpinning trust and confidence in the financial advice industry.

Importantly, the FSC has consistently advocated for all issues relating to the provision of financial advice to be addressed in the context of these FoFA reforms. We believe that the regulation of tax-related advice provided by financial planners must also be considered within the context of the FOFA objectives.

The FSC supports comparable regulatory supervision by ASIC (Option 2)

A clear, efficient and effective regulatory regime is essential for appropriate consumer protection. Therefore, following consideration of the options paper and to ensure that any new regime achieves the objectives of the FoFA reforms, the FSC advocates the adoption of option 2 – comparable regulatory supervision by the Australian Securities and Investments Commission (ASIC) under the existing AFSL regime, with appropriate resources provided to ASIC to ensure they are able to regulate tax-related financial advice.

Within the current regulatory framework, ASIC is responsible for the regulation of all aspects of financial advice and we strongly recommend that it is in the best interests of consumers that all financial advice, including tax-related advice, continues to be regulated through a single

overarching regime. We believe that this option is also the simplest, most efficient and cost effective way to meet the Government's policy objectives.

A single regulatory regime that applies to all financial advice will increase consumer protection and reduce confusion from a consumer perspective. It will provide Licensees, planners and consumers with regulatory certainty around the framework within which financial advice is delivered.

In a majority of cases where tax-related advice is provided by a financial planner, the tax-related component is not easily distinguished from the financial advice. From a consumer protection perspective, having multiple regulatory bodies responsible for financial advice will result in confusion for consumers. This would also increase the risk of issues 'falling through the cracks'.

In addition, the tax services provided by a financial planner will typically be quite different from the services a consumer would typically expect to receive from a 'traditional' tax agent. Therefore, distinguishing the two services by having different regulators is appropriate and will assist in ensuring that consumers' expectations with regard to the services they will receive under the two different models continue to be distinct and obvious.

Ensuring appropriate professional and ethical standards for tax agent services provided by financial planners

The TAS regime has a broad objective of ensuring that tax agent services are provided to the public in accordance with appropriate professional and ethical standards. The FSC supports this objective.

Through existing legislation, financial product advisers are required to meet minimum standards of knowledge and skill sets to provide advice on particular products. Regulatory Guide 146, *Licensing: training of financial product advisers* (RG146) sets out these standards, which currently require competency including with respect to a range of taxation issues.

We acknowledge that the current RG146 standards relating to taxation issues are not comparable to the professional standards set out in the TAS regime and we support the enhancement of these standards. Therefore, we recommend that further enhancements be made to RG146 to incorporate minimum training standards for financial product advisers in respect of the provision of tax-related advice.

A precedent exists within the current legislative framework to expand the AFSL regime giving ASIC broader supervisory powers. The incorporation of minimum training standards for margin lending facilities within RG146 (announced in January 2010) provides a case study for an approach that could be applied to the incorporation of tax-related advice services guidance within this existing regulatory framework.

We note that ASIC is currently undertaking informal consultation with industry in relation to the functioning of RG146. We recommend that consultation should also take place between the financial advice industry, ASIC, the Tax Practitioners Board (TPB) and accounting bodies to develop appropriate regulatory guidance for tax-related advice provided by financial planners and incorporated into RG146. This should include consideration of appropriate competency, educational and experience requirements for financial planners.

The FSC recommends that any consideration of these appropriate qualifications, experience and ongoing education with respect to tax-related services provided by financial planners should also be referred to the FoFA expert advisory panel currently examining professional standards in the financial advice industry. Such an approach will achieve the policy objective of FoFA to establish a financial advice profession and will enable the development of a scalable advice model. The FSC's proposals with respect to a tiered advice model are predicated on the view that levels of education and competency should be aligned with the level of complexity of the advice service being provided. The same principles should apply to tax-related advice.

To ensure that ASIC has the appropriate resources and expertise, the Government should consider providing TPB staff on secondment to ASIC. This would ensure that ASIC is adequately resourced. This would provide consumers with a single regulatory authority for all financial advice and avoids a situation where ASIC and the TPB are responsible for oversight of the provision of financial advice.

In addition to the above recommendation we have also highlighted a number of potential unintended consequences of the application of the TAS regime, which are outlined in an attachment that follows.

If you have any questions on any aspect of the FSC's submission please contact myself or Pravin Madhanagopal on 02 9299 3022.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Martin Codina', with a long horizontal line extending to the right from the end of the signature.

Martin Codina
Director of Policy

Attachment: Potential unintended consequences of the TAS regime

The introduction of the tax agent services regime via the Tax Agent Services Act (TASA) and the subsequent exemption provided (via Tax Agent Services Amendment Regulations 2010 (No. 1)) to financial planners operating under an AFSL has revealed a number of unintended consequences that must be addressed as part of this reform process.

Support services in the provision of financial advice should be exempted from the scope of the Tax Agent Services Act 2009

There are a number of support services that exist within the financial advice industry that may fall within the definition of tax agent services, but should not be caught within the scope of the TASA. The two notable examples of this are in relation to 'paraplanning' and 'technical services'.

Paraplanning involves the production of the written Statement of Advice. These services are provided to a financial planner, rather than directly to an end client, and will often involve the charging of a fee. Under the TASA, the services of a paraplanner may be regarded as a tax agent service. This is because the document prepared by the paraplanner, which is checked and presented by the financial planner to the end client, may contain advice on which the end client could reasonably be expected to rely.

Paraplanners are specifically exempted from the AFSL regime on the basis that it is the financial planner that is ultimately responsible for the advice delivered to the client. On this basis, paraplanners will generally not hold an AFSL in their own right (or be an authorised representative of an AFSL holder). As a result, the current exemption provided under Tax Agent Services Amendment Regulations 2010 (No. 1) provides no relief to paraplanners as the exemption only applies to those operating under an AFSL. Therefore, any regulatory reform in relation to the provision of tax agent services should exclude paraplanners from the scope of the TASA.

Technical services are a function provided by many AFSL holders, platforms and some product manufacturers to financial planners. The role of technical services is to provide technical support to planners to assist in interpreting legislation and ensuring the right advice is provided to a client. Technical services functions may be provided for a direct, discernible fee or may be included as part of an overall fee paid to an AFSL holder, or part of an administration fee payable to a platform or product provider. If it is determined that part of a fee relates to the provision of this service, and such services would generally cover tax agent services (as defined), then similar to paraplanners, those who work in such functions are caught by the TAS regime and will need to meet its requirements.

In contrast to paraplanners, those working in a technical services function are not specifically exempted from the AFSL regime, but as they do not provide personal advice direct to retail clients they will generally not be covered by an AFSL so do not enjoy the benefit of the exemption provided under the Tax Agent Services Amendment Regulations 2010 (No. 1).

We recommend that the current exemption in the Tax Agent Services Amendment Regulations 2010 (No. 1) be extended to these support functions and to any other intermediary support service of a similar nature.

We also recommend that a relevant exemption is provided for paraplanning and technical services in the TASA on a permanent basis, irrespective of which Option is ultimately implemented. This change is justified on the basis that it is the financial planner who is ultimately responsible for the advice they provide to their client and such an exemption will not reduce the level of protection offered to customers.

Tax reporting information provided by platforms and product providers should be excluded from the scope of the Tax Agent Services Act 2009

It is common practice that platform providers (and some product providers) will issue clients with a Tax Report at the end of each financial year. These reports are used to:

- consolidate the transactions that have occurred for the client during the year, and
- total the level of income, capital gains and losses and expenses that have arisen for the client during the financial year from their investments in those products or via that platform.

Often these reports will be accompanied by a generic guide indicating which sections of their Tax Return corresponds to these items/numbers

Currently, the provision of this information could constitute a tax agent service as defined (with the fee for this service potentially combined in the on-going administration fees charged by the platform or product provider) and therefore the providers of this information subject to the TAS regime, even though the information is accompanied by a comment that the client should consult with their tax agent about the completion of their tax return.

Similar to the recommendations for paraplanners and technical services staff, we recommend that this tax reporting function from product providers and platforms be exempted from the operation of the TASA on a permanent basis.

Tax agent services provided through intra-fund advice should be subject to the same regulatory oversight as financial planners generally

Trustees of superannuation funds currently enjoy the benefit of an exemption from the AFSL regime in relation to the provision of certain advice (commonly referred to as intra-fund advice) under Regulatory Guide 200.

This intra-fund advice may include the consideration of taxation aspects, such as the deductibility of insurance premiums for insurance held through superannuation, and would therefore fall within the scope of the TASA.

Consumers receiving intra-fund advice deserve the same level of protection as they would receive through advice received directly from a financial planner. We therefore recommend that whichever Option is implemented, that customers receive the same level of protection for financial advice received, irrespective of the source of that advice.