



THE TAX INSTITUTE

7 June 2013

Ms Deborah O'Neill MP
Chair
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

By email: corporations.joint@aph.gov.au

Dear Ms O'Neill,

Former Schedules 3 and 4 of Tax Laws Amendment (2013 Measures No. 2) Bill 2013 - Creating a regulatory framework for tax (financial) advice services

The Tax Institute is pleased to have the opportunity to make a submission to the Parliamentary Joint Committee on Corporations and Financial Services (**Committee**) in relation to former Schedules 3 and 4 of the Tax Laws Amendment (2013 Measures No. 2) Bill 2013 (**Schedules**).

Summary

It is extremely important that the consumer protection measures (contained in the Schedules) for people who receive tax advice in the course of receiving financial advice are passed into law before 1 July 2013. Therefore, we strongly recommend to the Committee that the Schedules be reintroduced into the House of Representatives at the next available opportunity in the current Parliamentary session and ultimately are passed by the Senate before the 43rd Parliament rises for the last time.

Discussion

Background

The Schedules introduce amendments to the *Tax Agent Services Act 2009* (Cth) (**TASA**). Schedule 3 introduces substantive changes to incorporate rules to allow the Tax Practitioners Board (**Board**) to regulate the provision of tax agent services given in the course of the provision of financial services advice. Broadly, this relates to tax advice provided by financial advisers and planners in the course of providing financial advice.

Schedule 4 contains other amendments to the TASA.

The Board is responsible for regulating persons (registered tax and BAS agents) who provide tax agent services and Business Activity Statement (**BAS**) services by ensuring appropriate professional and ethical standards are met. The Board is also responsible for requiring a sufficient level of educational qualifications and experience. The amendments in Schedule 3 will allow the Board to also regulate financial advisers who provide tax advice and ensure they meet appropriate professional and ethical standards as well as educational qualifications and experience. .

When the regime under TASA began on 1 March 2010, an exemption¹ was put in place to exclude from the regime tax advice services provided by financial advisers until such time that appropriate rules surrounding the regulation of these services could be formulated. The exemption is now due to expire on 30 June 2013². Hence, there is an urgent need to ensure these extremely important measures become law prior to 1 July 2013.

Schedule 3: Protection of Consumers - Start of the regime should not be delayed

As consumer protection is central to the design of the TASA³, The Tax Institute has consistently maintained that the protection of consumers who are provided tax advice in the context of receiving financial services advice is of paramount concern. People receiving this type of advice must be afforded the same level of protection offered in respect of tax advice received from a tax agent. This is achieved by ensuring that financial advisers meet appropriate professional and ethical standards as well as having appropriate educational qualifications and experience to be able to advise people about their tax. Schedule 3 of the Bill is integral to achieving this level of consumer protection.

There has been substantial consultation on the design of the policy and content of these amendments on a number of occasions between stakeholders concerned including Treasury, the Board and industry stakeholders, such as the Financial Planning Association of Australia, since 2010. In particular, the definition of “tax (financial) advice service” contained in draft section 90-15 (Part 1, Item 43) has been consulted on substantially, resulting in an expansion of the definition from its original form in the Exposure Draft.

In addition, there is a generous three year transition period before the full regulatory framework applies from 1 July 2016.

¹ Regulation 13 *Tax Agent Services Regulations 2009* (Cth) (“**Regulations**”) which excluded a tax service provided by a financial services licensee (who holds an Australian Financial Services Licence) from being a tax agent service.

² Initially, the exemption was to expire on 30 June 2011; this was deferred on two occasions to 30 June 2013.

³ Paragraph 3.4 of the Explanatory Memorandum to the Bill

On the basis that the regime is to apply from 1 July 2013, to ensure a timely transition, this legislation must not be delayed any further. Therefore, we strongly recommend to the Committee that the Schedules are passed in the current Parliamentary sittings.

Without wanting in any way to contribute to a delay in the reintroduction and passage of the Schedules, we raise the following issues.

Integrity concern with Item 49 of Part 3 of Schedule 3

An integrity concern arises from the operation of the Item 49 in Part 3 of Schedule 3 concerning when a person registers during the transitional period (1 January 2015 to 30 June 2016). In effect, a person registering during the transitional period may register late in the period (say in June 2016) and obtain three years prospective registration (to June 2019, some six years after the regulatory regime starts). Their registration will be based on being able to satisfy the Board they have sufficient experience to be able to provide tax (financial) advice services to a competent standard rather than having to meet the higher registration requirements⁴.

Therefore, the full registration requirements, including education and experience requirements, will not apply to this person until they come to reregister at a time in the future well after the regime begins.

A possible remedy for this would be to have a series of staggered end dates⁵ applying to persons who register in the transitional period which end relatively soon after the full regime starts on 1 July 2016 (for example, the last end date being no later than 30 June 2017). We previously suggested to Treasury⁶ that the amendments provide for registration to be granted retroactively for the 18 month period 1 January 2015 to 30 June 2016 to applications made during the transitional period rather than granting a three year registration prospectively. The suggestion was not taken up.

Ensuring all persons registered under these rules are required to meet the education and experience requirements from the start of the full regime on 1 July 2016 is important.

However, we reiterate that this concern should not in any way be allowed to contribute to a delay in the reintroduction and passage of the Schedules before the 43rd Parliament rises for the last time.

⁴ These requirements, to be contained in the Regulations, are yet to be fully determined.

⁵ A similar process is to be used for persons registering during the notification period –refer to Item 48 of Schedule 3 of the Bill. This would ensure less of an administrative burden on the Board when it comes to these registrants reregistering.

⁶ In our submission dated 15 March 2013 in relation to the Exposure Draft released on 8 February 2013 that contained these amendments.

Suggested amendments to the Explanatory Memorandum

a) Power of the Board to amend the definition of tax (financial) advice services by legislative instrument

As noted above, the definition of tax (financial) advice services was modified and expanded from its original more narrow form contained in the Exposure Draft as a result of extensive consultation undertaken with stakeholders. In addition to this, the Board has been given the power to further expand the definition by way of legislative instrument (draft subsection 90-15(2)). This was not originally contemplated in the Exposure Draft. This will allow changes to be made to the definition without the need to amend the TASA.

Provided the Board consults widely on proposed changes to the definition where this power is exercised, proposed changes may receive the necessary public scrutiny similar to the level of public scrutiny an amendment to the legislation would likely receive. Paragraph 3.57 in the Explanatory Memorandum could be expanded to include a statement reflecting the value of consultation with industry where the power is exercised while still retaining the flexibility to amend the definition.

Where changes to the definition are made, in our view, the Board should also require persons who are registered to provide the services to have sufficient education to be able to provide the newly defined services⁷. This requirement should also be captured in the Explanatory Memorandum.

b) Obligation to meet education and experience requirements upon renewal of registration

It is implied by operation of section 20-20(1) of TASA read together with section 20-5 that a person registering or renewing their registration with the Board will have to meet the eligibility requirements for registration. Items 3-8 and 10 of Schedule 3 amend these provisions to take into account persons who may register with the Board under these new provisions which amend TASA to regulate financial advisers who provide tax advice in the course of providing financial advice .

Given the full registration requirements do not apply to someone who registers during the notification and transitional periods⁸, it would be useful if a note could be included in the Explanatory Memorandum making it clear that these requirements⁹ will apply if these advisers choose to renew their registration with the Board after 1 July 2016.

⁷ A similar principle should also apply where the same power is exercised to expand the definition of BAS Service – refer to draft section 90-10(1A) in Item 27 of Schedule 4.

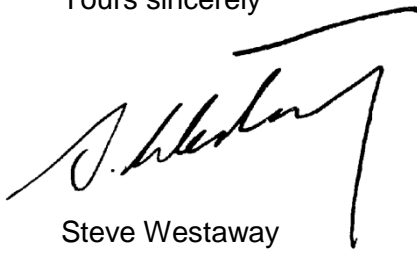
⁸ The eligibility requirements do not apply to someone who applies to register during the notification period because they do not start to apply until 1 January 2015. They also do not apply to someone who applies to register during the transitional period by operation of Item 49(c).

⁹ That is, the education and experience requirements to be contained in the Regulations.

Once again, we stress that these suggested amendments to the explanatory memoranda should not in any way be allowed to contribute to a delay in the reintroduction and passage of the Schedules before the 43rd Parliament rises for the last time. This will lay the foundation for financial advisers to meet appropriate professional and ethical standards as well as having appropriate educational qualifications and experience to be able to advise people about their tax

If you would like to discuss this matter, please contact me or Senior Tax Counsel, Robert Jeremenko on 02 8223 0011.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Westaway', with a long horizontal stroke extending to the right.

Steve Westaway
President