



THE TAX INSTITUTE

11 July 2013

Mr Gerry Antioch
General Manager
Tax System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: taxagentservices@treasury.gov.au

Dear Mr Antioch,

Proposed registration requirements for registered tax (financial) advisers – Discussion Paper

The Tax Institute is pleased to have the opportunity to make a submission to the Treasury in relation to the Discussion Paper entitled *Proposed registration requirements for registered tax (financial) advisers (Discussion Paper)*.

Summary

In the interests of ensuring a professional and ethical framework is laid out for those financial advisers who wish to register as tax (financial) advisers, The Tax Institute is of the view that extensive educational qualifications and sufficient relevant experience should be required to be met. Our views in relation to specific aspects of what Treasury proposes in the Discussion Paper are set out below.

Discussion

Overview

In previous submissions to Treasury and the Tax Practitioners Board (**Board**), The Tax Institute has expressed its views in relation to the education and experience elements of the registration requirements for financial advisers who are required to register with the Board under the Tax Agent Services regime¹ (**TASR**). We are broadly of the view that the more education and experience that will be required of someone who wishes to register under TASR, the better for both the protection of consumers of tax advice

¹ This is comprised of the *Tax Agent Services Act 2009* (Cth) (**TASA**), associated Regulations and amendments to TASA contained in the *Tax Laws Amendment (2013 Measures No.3) Bill 2013*.

(whether provided by a tax agent, BAS agent or financial adviser) and the integrity of the profession.

We are pleased the design stage for the regulations that will govern the registration options for financial advisers who are required to register under TASA has now been reached. The Discussion Paper outlines four registration options.

Options proposed

Though we are of the view that the more education and experience a registrant under TASA is required to obtain, the better, it does seem that Treasury has reached a form of an acceptable compromise between the competing views of stakeholders regarding the education and experience requirements to apply to a tax (financial) adviser.

Similar to the flexibility provided for tax agent registration, the Tertiary Qualifications Option (Option 1) and the Diploma or Higher Award Option (Option 2) provide the Board with the ability to recognise courses previously completed by an applicant that may satisfy the tax law course and commercial law course requirements. Subject to our comments below, this is fair and reasonable.

We consider certain aspects of the four options below.

a) Option 1 – degree in a “relevant discipline”

Treasury has outlined the types of disciplines that are to be regarded as relevant disciplines. We suggest that proper guidance be included in the Explanatory Memorandum to accompany the regulations that will incorporate these options into the *Tax Agent Services Regulations 2009* (Cth) as to what will be regarded as a relevant discipline. We agree that the disciplines outlined are relevant for this purpose and do not suggest any additional ones.

We anticipate that the Board will also issue an information product containing what it regards to be a relevant discipline for this purpose similar to the product that has been issued for Item 202 of the tax agent registration options².

b) Option 2 - diploma from a registered training organisation or equivalent institution in a relevant discipline

Treasury have only suggested one option as to what should be regarded as a relevant discipline for the purpose of Option 2. We anticipate that the Board will also issue an information product containing what it regards to be a relevant discipline for this purpose.

² See *TPB Information Sheet TPB (i) 14/2012 Tertiary qualifications in a discipline other than accountancy for tax agents*

If there are no other appropriate alternatives, we suggest Option 2 could be renamed to refer only to obtaining a diploma or higher award from a registered training organisation (RTO) or equivalent institution in financial planning.

Traditional forms of assessment provided by an RTO are based on competency-based assessment (eg assignments, online tests or observations by a student's manager). We acknowledge that diplomas obtained by financial advisers to date would have been awarded incorporating this form of assessment.

There is a move by ASIC³ to require assessment administered by an RTO for a diploma qualification in financial planning via independently supervised examination or public exams from an independent registration examination body administered by ASIC or the Board as would be provided by a university or other registered higher education institution. Once this formal examination requirement is in place, following the start of the application of TASR to financial advisers on 1 July 2014, we suggest that only diplomas or higher awards which are awarded incorporating formal examination for assessment be recognised under this option. This will ensure those who wish to register as a tax (financial) adviser have satisfied this level of integrity of assessment in their prior education. We have already made similar comments to the Board regarding how the tax law subject should be delivered by an RTO and should meet similar assessment standards⁴.

c) Tax law course

We have previously put forward our views on what should be in the contents of a Board-approved course in Australian taxation law to the Board⁵. In short, our view is that a person wishing to register as a tax (financial) adviser⁶ should be required to have the same level of tax law knowledge ordinarily expected for a person registering as a tax agent. This is based on the breadth and nature of the financial advice a person registering as a tax (financial) adviser is likely to give and that it is not possible to carve out certain parts of the tax law and state that a tax (financial) adviser would not be required to know or know of them.

However, in our submission to the Board, we acknowledged the Board's view that it would be unreasonable to expect tax (financial) advisers to have tax expertise that equals that of a tax agent. Though the Board assumes that tax (financial) advisers will refer clients with unusual circumstances and high risks to obtain specialised independent tax advice, tax (financial) advisers will need to be able to recognise when specialist tax advice is required. Sufficient tax law knowledge and understanding will

³ Refer to ASIC Consultation paper 153 "Licensing: Assessment and professional development framework for financial advisers" proposing a "National certification exam for new and existing advisers. See [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp153.pdf/\\$file/cp153.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp153.pdf/$file/cp153.pdf)

⁴ Refer to The Tax Institute's submission in relation to *Exposure Draft: Proposed TPB Guideline TPB(PG) D04/2013 — Course in Australian taxation law that is approved by the Board for tax (financial product) advisers* dated 24 May 2013.

⁵ Refer to Note 3 above.

⁶ Referred to as "tax (financial product) advisers" in the draft Guideline

allow for this. We sought in our submission to find the best compromise between the two views.

As Treasury has set out in the Discussion Paper, a tax law course should be required in each of the options for registration of a tax (financial) adviser and that course should cover, at a minimum, the topics listed at paragraph 10 of the Board's Proposed Guideline for an Australian tax law course for tax (financial) advisers. Particular emphasis should be placed on the topic of the ethical and professional responsibilities of tax (financial) advisers including their obligations under TASR. This includes an understanding of the Code of Professional Conduct. In addition to having sufficient tax law knowledge and understanding, a tax (financial) adviser should also be aware of their obligations under the Code which includes ensuring they meet certain competency requirements, with particular regard to the provision of tax-related services under TASR.

d) Commercial law course

We are pleased to see that Treasury has included the requirement for the completion of a commercial law course in all four options proposed. We put this to Treasury in our submission in relation to the *Creating a regulatory framework for tax advice (financial product) services: Exposure Draft* dated 15 March 2013.

A detailed understanding of various aspects of commercial law, including entity structures and contract law, is crucial for a financial adviser. This is because some of the most complex contracts an individual will enter into relate to superannuation, managed funds, managed investment schemes, share products and interest rate products, all financial products on which a financial adviser will commonly advise an individual. The legal structure of an entity also often completely determines the tax treatment of a product or investment. A consumer would expect their adviser to be able to assist them in understanding their legal/contractual obligations, as often the tax implications arise directly out of a full understanding of the contractual terms. Tax (financial) advisers will also need to be able to recognise when specialist commercial law advice is required. Sufficient commercial law knowledge and understanding will allow for this.

Inclusion of a commercial law requirement for each registration option ensures that a high standard of competency can be achieved and maintained by a tax (financial) adviser when delivering tax advice.

We note for completeness that since the release of the Financial Services Training Package (FNS10), commercial law competencies have been included in a diploma qualification and therefore may already be chosen by applicants to form part of their initial financial adviser education. Consequently, obtaining commercial law knowledge is not an unfamiliar requirement to financial advisers⁷.

⁷ FNS10 Financial Services Training Package. The Diploma of Financial Services (FNS51811) contains these competencies related to commercial law. Accessed 28 June 2013 at www.training.gov.au

It is therefore not unreasonable that commercial law knowledge be a specific requirement of registration with the Board given it might be included in the packaging rules for relevant initial education via the Diploma of Financial Services (Financial Planning) training package.

e) Accounting course

We suggest that Treasury reconsider their position on not requiring a tax (financial) adviser to have undertaken a Board approved course in accounting. Accounting skills are not just relevant for the preparation of tax returns (which we acknowledge a tax (financial) adviser will not be able to do). They also provide an adviser with the skills to properly analyse financial statements with a view to determining relevant tax outcomes. Therefore they are also a relevant skill to have in providing tax advice in the course of providing financial advice. It is likely financial advisers will already have gained the requisite accounting skills in their initial studies such that imposing this requirement should not present an additional education burden on financial advisers.

f) Relevant experience

It is not yet clear what the “relevant experience” requirement in each of the four options entails. We have gleaned from the discussion at p5 of the Discussion Paper in relation to Option 3, the Work Experience option, that “relevant experience” would include work experience as a tax (financial) adviser and as a tax agent. We assume that experience as either or both would meet the requirements.

However, it would be useful if Treasury could provide further guidance around what is considered “relevant experience”. In the absence of a definition of relevant experience for the purpose of these requirements, guidance may be taken from the “relevant experience” guidelines for a tax agent published on the Board’s website⁸. For a tax agent, “relevant experience” is gained from the provision of tax agent services. This can include work either as a registered tax agent or under the supervision and control of a registered tax agent, from work as a legal practitioner or from another kind of work approved by the Board. It is also made clear that experience in general accounting work is unlikely to be sufficient experience to count as relevant experience for a tax agent. We would expect similar requirements to apply to a tax (financial) adviser as they relate to work done in providing financial services.

In the case of a financial adviser who would only spend part of their time giving tax advice in the context of providing financial advice, it would be useful to know if there was some kind of measure or standard by which a financial adviser could determine whether they had obtained sufficient exposure to tax issues for the purpose of determining whether they have gained relevant experience, other than based on a measure of time.

⁸http://www.tpb.gov.au/TPB/Qualifications_and_experience/0367_Relevant_experience_for_tax_agents.aspx

We appreciate that it may fall to the Board to provide further details regarding what is relevant experience for these purposes. Accordingly, we are keen to see how the Board intends to define “relevant experience” for tax (financial) advisers.

We appreciate that it will be a very difficult task for the Board to define what should be regarded as “relevant experience”, given that there are currently no registered tax (financial) advisers whose experience could be drawn upon. The Board will have to draw upon the range of experience obtained by the numerous financial advisers who give tax advice in the ordinary course of their practice. The range of experience in giving tax advice will most likely vary significantly from in depth to very little. It is also difficult to see how the Board will assess what supervised work will qualify as relevant experience (and under whose supervision it has been obtained) while maintaining the integrity of the registration process. The Tax Institute would welcome the opportunity to assist the Board with this task.

We note that for Option 4, the Membership of a Professional Organisation Option, the experience requirement does not refer to “relevant experience”. We assume this is an accidental omission as we would expect that, consistent with the other options, “relevant experience” should be required.

Other matters - Consumer Protection

While we appreciate the Board’s view (noted above) that tax (financial) advisers will refer complex tax issues to an appropriately experienced practitioner⁹, we draw Treasury’s attention back to the primary requirements for registration. These are that in the first place, a registrant should have the appropriate skills and experience to perform the function for which they are registered. In this case, it is the giving of tax (financial) advice.

As pointed out above, this can involve giving tax advice covering any tax matter (provided in the course of providing financial advice) and only excludes the lodgement of tax returns and making other representations to the Commissioner.

We are concerned that the education standards and experience requirements are set quite low. This may put at risk consumer protection. It is preferable if the entry requirements to registration are shored up to ensure that the bulk of registrants will have the requisite qualifications to provide tax advice to a competent standard. This will provide consumers with comfort that registered tax (financial) advisers have the required skill set to provide them with the advice they need in the majority of cases. Relying on registrants to refer matters to more skilled professionals should be the exception rather than the norm. Consumers having to turn to legal options for recovery of losses and reliance on professional indemnity insurance policies should be a last resort. Losses arising from the receipt of poor advice from inadequately qualified

⁹ And we recommend the same be required of complex commercial law issues

advisers should be prevented in the first place where proper registration requirements are put in place.

Accordingly, we recommend the Government consider conducting a post-implementation review of these requirements 12 months after their commencement with a particular focus on the quality of advice being provided to ensure the appropriate level of consumer protection is being met.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0011.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Westaway', with a long horizontal stroke above it and a vertical line extending downwards from the end.

Steve Westaway
President