



## THE TAX INSTITUTE

THE MARK OF EXPERTISE

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9 May 2014

Mr Ian Taylor  
Chair  
Tax Practitioners Board  
PO Box 126  
HURSTVILLE NSW BC 1481

By email: [tpbsubmissions@tpb.gov.au](mailto:tpbsubmissions@tpb.gov.au)

Dear Ian,

**TPB Information Sheet TPB(I) D20/2014: What is a tax (financial) advice service?  
– Exposure Draft**

The Tax Institute welcomes the opportunity to make a submission to the Tax Practitioners Board (**Board**) in relation to the *TPB Information Sheet TPB(I) D20/2014: What is a tax (financial) advice service?* Exposure Draft (**Exposure Draft**).

An earlier draft of the Exposure Draft was subject to discussion at a consultation with members of the Board's Consultative Forum and various stakeholders and representatives from the financial planning/advisory industry held on 11 February 2014. We understand from these discussions that the Board is keen to keep this document as a 'high level' document.

With this in mind, we raise the following issues with the Board in respect of the Exposure Draft.

1. Element 3 - Provided in the course of advice usually given by a licensee or representative

For the purpose of defining this element, the Board extensively defines the type of advice that is concerned here. In particular, reference is made to how the concepts of "personal advice" and "general advice", both of which comprise "financial product advice", are defined in section 766B of the *Corporations Act 2001* (Cth) (**Corporations Act**).

At paragraph 17 of the Exposure Draft, the Board goes on to explain when a tax (financial) advice service arises. We note that personal advice is referred to in Item 2 of the table in Appendix A as being a tax (financial) advice service and that general advice is referred to in Item 6 of the table as not being a tax (financial) advice service.

It would be useful if the Board could go one step further and confirm that tax advice given in the context of the provision of personal advice would amount to the provision of a tax (financial) advice service in the body of the Exposure Draft at paragraph 17.

It would also be useful if the Board could provide an explanation as to why general advice is not regarded as a tax (financial) advice service. General advice is excluded from the definition of personal advice so it seems there is an assumption that any tax-related information provided in this context should be excluded from being regarded as a tax (financial) advice service. However, there may be doubt about whether the tax-related information provided in this context is simply general or factual in nature even though it is given in the context of general advice.

It would be useful for the Board to confirm that tax-related information provided in the context of giving general advice does not amount to a tax (financial) advice service to the extent that only factual information is provided.

We also note that reference is made to “financial produce advice” under the heading “General Advice” in paragraph 16 and this should refer instead to “financial **product** advice”.

## 2. Element 5 – reliance for tax purposes

- a) The last bullet point in paragraph 22 refers to a disclaimer. We understand the “disclaimer” being referred to is a general disclaimer a financial adviser may give when providing their advice and not the “disclaimer” in sub-regulation 13(2) of the *Tax Agent Services Regulations 2009* (Cth) per footnote 3 on page 6 of the Exposure Draft. We suggest that this reference also refer to subsection 49(4)(b) of the *Tax Laws Amendment (2013 Measures No. 3) Act 2013* (Cth) which is the statement that should be provided by an entity providing a tax (financial) advice service during the Notification period (1/7/14 to 31/12/15) that has not registered with the Board.

We also query the reference to “registration” and whether this point needs to be further expanded to explain that even though a general disclaimer is being provided, it may be that the entity providing the service may be required to be registered with the Board which is a separate enquiry. This is not entirely clear on the face of this bullet point.

- b) In paragraph 23, reference is made to Tier 1 and Tier 2 products. This seems to be a reference to *ASIC Regulatory Guide 146 Licensing: Training of financial product advisers*. The terms should be defined and included in the “Key Terms” section of the Exposure Draft.

3. Other matters to be included in the Exposure Draft

- a) A person who applies the Exposure Draft to a service they are providing may conclude that they do not need to register with the Board simply because the service they are providing does not meet the definition of a tax (financial) advice service without considering whether the service they are providing is actually a tax agent service. Therefore, a statement should also be included in the Exposure Draft directing a person to consider whether the service they are providing otherwise amounts to a tax agent service (for which they should be registered as a tax agent in order to provide the service) or may be legal advice.
- b) A statement should be included in the Exposure Draft dealing with the circumstances where a person has provided advice (eg a recommendation is given to transfer assets held personally to a trust) and the advice is silent on the potential tax consequences. In this regard, we query whether a disclaimer should accompany the advice to direct the client to seek specialist tax advice elsewhere (eg from a tax agent or lawyer) or what other obligations an adviser has in this circumstance.
- c) We raise for the Board’s consideration whether a note should be included in the Exposure Draft about whether providing advice concerning the tax advantages of a financial product (ie what appears to be promoting a scheme; to use a live example: advising a client about “dividend washing”) amounts to the provision of a tax (financial) advice service or whether this should be the subject of a separate guidance document.

4. Minor issues

- a) The *A New Tax System (Goods and Services Tax) Act 1999* (Cth) should also be included in the list at paragraph 19.
- b) The end bracket is missing at the end of the second last bullet point listed in paragraph 22.
- c) For consistency, the wording included in the brackets in Item 9 in the table in Appendix A (“to provide this service would require registration as a tax agent”) should also be included in Items 10 and 12.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours sincerely

A handwritten signature in black ink, appearing to read "M. Flynn", followed by a long, horizontal, slightly wavy line.

Michael Flynn  
President