12 June 2013

Dr Richard Grant
Acting Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

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

Dear Dr Grant

TAX AGENT SERVICES ACT: Schedule 3 and 4 of Tax Laws Amendment (2013 Measures No.2) Bill 2013: Creating a regulatory framework for tax (financial) advice services and other amendments

Thank you for the opportunity to provide a submission to the Senate Economics Legislation Committee's inquiry into these Bills.

The Financial Services Council represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and Public Trustees. The Council has over 130 members who are responsible for investing more than $1.9 trillion on behalf of 11 million Australians. As the representative body of Advice Licensees –our members are responsible for more than 80% of financial advisers/planners in Australia (including accounting professionals licensed today to provide advice).

The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The Financial Services Council promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Please find our submission enclosed. We reserve the right to lodge a further supplementary submission as required. We look forward to discussing the contents with you. If you have any questions regarding the FSC's submission, please do not hesitate to contact me on .

Yours sincerely

CECILIA STORNIOLO
SENIOR POLICY MANAGER

FSC SUBMISSION

Tax Agents Services Act

Tax Laws Amendment (2013 Measures No.2)
Bill 2013 - Schedules 3 and 4 ("Bill")

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

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SUBMISSION CONTENTS

EXECUTIVE SUMMARY

We understand that the objective of TASA is to bring all tax advice providers under the auspice of the national regime to "ensure the consistent regulation of all forms of tax advice irrespective of whether it is provided by a tax agent, BAS agent or entity in the financial services industry"[1].

In context, the tax advice provided by financial advisers is most frequently (general) information in nature (for example, the difference in tax treatment between investing inside or outside super, or stating that your super earnings pay 15% tax) and generally much simpler in nature than tax advice provided by a tax agent.

The FSC is supportive of the amendment of that Tax Agent Services Act to create a specific and appropriate type of tax adviser, which is congruent with the tax advice a financial advice provider gives in the context of financial planning. The FSC is supportive of the regime on the basis that increased advice provider competency is a public good and will enhance the quality and value an advice provider delivers to their client.

It is important to note that the TASA regime is only a competency and registration regime[2]. The aim of the regime is to ensure that all tax advice providers are registered and have the requisite education and experience to provide that advice. The Tax Board will investigate conduct that may contravene the Act[3] – that is ensuring tax advisers are registered and that they comply with the Tax Board code of professional conduct. However, neither the Bill (the Act nor the EM) provide that the Tax Board will monitor or review the quality or appropriateness of the tax advice provided by tax agents to Australians. The Corporation Act regulated by ASIC regulates all Australian Financial Services Licensees (AFSLs) and their representatives' conduct in addition to the quality of the advice they provide Australians.

Whilst we are supportive of TASA, we seek to ensure that any and all legislative regimes which mandatorily aim to increase competency levels are implemented in a manner which is balanced. We also seek to ensure they consider the following matters:

- Allow the industry due process and consultation to ensure the regime is best able to meet its policy objectives and in this regard ensures that advice remains accessible and affordable for all Australians.
- Enables the industry the capacity to amend practises and comply with the change in regulatory regimes. TASA is due to commence on 1 July 2013 – the same time as FoFA and months shy of MySuper's commencement. It is inconceivable that on the cusp of the commencement of significant reforms (FoFA and Mysuper), that the industry needs to again amend business models and practises to comply.
- Whilst coverage was announced to include the industry in 2010, the first details of the regime were only made public for the industry to consider in February 2013. Regulations are

[1] Draft Tax Laws Amendment (2013 Measures no. #) Bill 2013: Tax agent services, page 3.
[2] Paragraph 3.88 of the Explanatory Memorandum accompanying the Bill.
[3] Ob Cit Paragraph 3.89.

not yet public and details of the competency requirements central to the regime are yet to be finalised. We contest that the TASA regime start date should follow the finalisation of all TASA requirements, at which point the three year transition period should begin.

- Enhanced education standards increase at an appropriate pace to allow participants to attend and complete requisite training within appropriate transition frameworks. For example, requiring the successful completion of a degree (tertiary education) which does not yet exist (as a course) to comply with competency requirements which are not yet finalised all within the three year transition is not achievable.
- That participant (re) training is affordable and tax deductible where the individual bares the requirement – recent budget announcements will limit the ability for advice providers to meet formal education and ongoing competency requirements given the proposed limitation on work related education expenses to $2000 pa. Further, the cap on self education proposal seeks to limit the manner in which a provider meets the training need.
- That new regime does not impede the ability of existing and new advice providers to meet new legislative minimum requirements within a reasonable timeframe.
- That a key FOFA objective which is to ensure Australians are able to access affordable advice to assist consumers with their financial advice needs is also considered in the development of other regimes which impact advice.

We note that consumer protection is already afforded Australians not under TASA but under the Corporations Act and from 1 July 2013 under the mandatory Future of Financial Advice (FOFA) measures. FoFA will require Licensed advice providers to demonstrate the advice they provide is in the client's best interest including having to the expertise to do so. Otherwise advice providers are required by legislation to turn he client away.

Commencement

We note that the government has extended the start of this regime by exemption from the legislation for advice providers/financial planners to 1 July 2013. Whilst the amended regime was announced in April 2010, the industry has not had an opportunity to consult on the application or details of this regime until the issue of this draft Bill on 8 February 2013. This gave the industry less than three weeks' consultation to comment on the draft legislation and pre-final regulations.

Recommendation 1:

The FSC calls on the Committee to recommend:

- that the Schedules amending TASA be amended to enable the pragmatic implementation of this regime to AFSLs from 1 July 2013; and
- that ASIC amends RG175 on Best Interest Duty to enable an advice provider to comply with the Best Interest Duty safe harbour (see chapter 3 for details); and
- pass the amended Bill (the Schedules the subject of inquiry before this Committee) before 28 June 2013.

Critically, if the ***amended*** legislation is not able to be enacted by 28 June 2013, we call on the Government to extend the exemption from TASA for the financial services industry for a further six to twelve month period after 30 June 2013 to enable the industry to work with the government to amend the Bill and to enable the Bill to be considered by the new Parliament in an orderly manner.

Importantly, the commencement delay need not affect the proposed final start date of the regime as any extension of time could simply be offset against the end date. This delay in implementation of the regime may also assist the Tax Board to be better prepared to process the approximately 59,564 applications over the next three years.

As this submission highlights, there are a number of key concerns which may have significant impacts to the financial services industry including the advice industry and ultimately impact consumers negatively.

RECOMMENDATIONS

Recommendation 1: General recommendation

The FSC calls on the Committee to recommend:

- that the Schedules amending TASA ("Bill") be amended to enable the pragmatic implementation of this regime to AFSLs from 1 July 2013; and
- that ASIC amends RG175 on Best Interest Duty to enable an advice provider to comply with the Best Interest Duty safe harbour (see chapter 3 for details); and
- pass the amended Bill (the Schedules the subject of inquiry before this Committee) before 28 June 2013.

Critically, if the ***amended*** legislation is not able to be enacted by 28 June 2013, we call on the Government to extend the exemption from TASA for the financial services industry for a further six to twelve month period after 30 June 2013 to enable the industry to work with the government to amend the Bill and to enable the Bill to be considered by the new Parliament in an orderly manner.

CHAPTER 1: DEFINITION (SCOPE)

Recommendation 2: Meaning of a tax (financial) advice service

We recommend the meaning of a tax (financial) advice service at section 90-15 be amended to the following:

> "A tax (financial) advice service is a tax agent service (other as within the meaning of subparagraph (1)(a)(iii) of the definition of that expression)provided in the course of providing **financial advice services as defined below** that relates to ascertaining an entity's tax liabilities, obligations or entitlements or advising an entity about tax liabilities, obligations or entitlements.
>
> For the purpose of this option, financial advice services would mean advice in respect of a client's financial affairs specifically related to wealth management, retirement planning, estate planning, risk management and related advice, including:
>
> - advice on financial products as defined in s764A carried out pursuant to an Australian Financial Services License;
> - advice and dealing in financial products as defined in section 766B and 766C of the Corporations Act;
> - non-financial product advice including financial strategies or structures; and
> - taxation advice which is related to advice provided under (a) or (b) or (c).
>
> For the avoidance of doubt, a tax (financial advice) service does not include preparing, or lodging, a return or a statement in the nature of a return."

Recommendation 3: Expressly exempting non Tax (financial) advice services

For the absence of doubt, the FSC submits that any AFSL and/or their representative who provides tax information (generally available tax information) be exempted from registration with the Tax Practitioners Board ("TPB").

Further we submit that general advice (as defined in the Corporations Act) also be expressly carved out of the Act because as paragraph 3.50 in the EM states, "the service does not take into account all of an entity's relevant circumstances". This can be catered by amending Recommendation 2 of this paper to specify that the service is "provided in the course of providing personal financial advice services". The amendment can be made explicitly by amending s90-15 to apply to personal advice only or by regulation.

Recommendation 4: Reliance

We recommend that the provision of tax information (generally available information) is not a tax agent service and should be expressly exempted in the TASA (for example as an express exemption to s90-15) or related regulations for licensees and individuals.

Further we recommend the drafting be amended such that the provision of the tax information (generally available information) is exempted regardless of whether the information can reasonably be expected to be relied upon.

The EM should also include examples of these circumstances and clarify tax (financial) advice can only be provided directly to the end client via the provision of personal advice. We would be happy to provide examples for consideration.

Recommendation 5: A fee

We recommend that a requirement be added to the Bill and the EM that the tax information needs to be provided to a specific entity or person is included as a means to mitigate the issue of catching all advice. We note that tax information (and general advice under an intra-fund advice model) is generally given without the charging of an express fee but the consumer may be in a fee arrangement or the fee may be bundled with the administration fee of their financial product investment – therefore the fee nexus may exist and may not be relied on by the giver of the advice to claim exemption.

Recommendation 6: Computer program

We submit that the legislation should specify the requirements for calculators and other information posted on licensee websites in the regulations and expressly carve them out as a Tax Agent Service.

CHAPTER 2 REGUALTORY DUPLICATION

Recommendation 7: PII

Where Licensee's PII cover already insures the License for tax advice, the FSC recommends the TPB recognise the PII held by a licensee as sufficient to meet their requirements.

Recommendation 8: PII

The FSC submit that a significant portion of the industry will face increasing cost pressures including increased cost of PII to comply with this legislation which will ultimately be borne by Australians seeking advice.

The FSC submits that the TPB consider the AFLS' PII cover when considering individual entity registrations.

Recommendation 9: PII

We recommend the TPB recognise the PII held by a licensee as sufficient to meet the requirements obligations of individuals/licensee entities registered with the TPB in the Act and Code as required.

Further, we recommend the TPB recognise that there are circumstances where self insurance may be a viable alternative to extra PII requirements.

Recommendation 10: Code of Conduct

The FSC recommends that the tax (financial) advice service providers be exempt from the Tax Board's Code of Conduct in recognition that the Corporations Act requirements supersede the Code.

Recommendation 11: Single Advice Competency Framework

We submit that the TPB work with ASIC and the soon to be established Self Regulatory Organisation, to ensure that competency requirements are appropriate but not mutually exclusive (that is that there are not two different sets of educational requirements covering the same topic area (tax) for the same providers).

Recommendation 12: Competency

The FSC recommends that the maximum 'relevant experience' component of the competency requirements yet to be consulted with the industry, not exceed the transition period which is set at three years.

Recommendation 13: Civil penalties

The FSC submits that the civil penalty applicable to Licensees as contained in paragraph 3.107 of the EM be removed (also from the Bill).

On the basis of the retention of the civil penalties, it is imperative that either or both of the following be in-place from 1 July 2013:

1. That the TPB's Online Tax and BAS Agent register be amended to accommodate for the new type of registration type – that is "tax (financial product) agent) – in recognition that some may qualify for this registration from 1 July 2013 and that the penalties apply from 1 July 2013; and/or
2. ASIC and the TPB deliver an online interface to enable a Licensee to conduct the search they will be required to do to demonstrate they have only used the services of a registered entity.
3. Exemption be extended to Licensees' reliance or use of computer programs or calculator tools provided by persons not registered with the TPB.
4. Further, we would suggest clarification in the EM as to how the licensee can demonstrate that they satisfied reasonable checks on that individual.

CHAPTER 3: INTERPLAY OF TASA AND FOFA

Recommendation 14: FoFA Best Interest Duty

To ensure advice remains affordable (demand side) and accessible (that the supply side is not impeded), and that advice providers are able to comply with both TASA and FOFA obligations, the FSC submits that:

ASIC RG175.298 be amended to include a statement such as "with regards to tax (financial) advice services, an individual advice provider need not be registered with the Tax Board to demonstrate expertise but may provide tax advice under the supervision of a registered tax (financial) advice services entity".

ASIC RG175.301 be amended to read: "(d) an individual advice provider need not have the expertise in the provision of tax (financial) advice services as demonstrated by registration with the Tax Board provided the individual advice provider is working supervised by a registered tax (financial) advice services entity."

Recommendation 15: Competency

We recommend that Treasury and the TPB make public the training/competency and experience requirements applicable for tax advisers in the context of financial planning/advice as soon as possible and allow the industry to consult on these requirements. Furthermore, we submit the TPB have regard for ASIC's training/competency (including ongoing "continuance development" and experience requirements in setting their requirements for this segment of tax advisers. The industry would also welcome the opportunity to consult on these matters.

CHAPTER 4: TRANSITIONAL RELIEF

Recommendation 16: Disclosure

The FSC recommends that the TASA Bill and Corporations Act be amended to provide a transition under TASA and under the Corporations Act to afford the industry at a minimum six months from the commencement of the regime for all Product Disclosure Statements, Financial Services Guides, Statement of Advice Statement templates, Websites and other disclosure documents to be amended to comply with TASA and also to protect the industry from breaching disclosure requirements under the Corporations Act. Alternatively, we submit that ASIC provide the industry with a Class Order exemption from compliance with disclosure requirements (that is regarding using the correct TASA warning) for a minimum of six months.

Recommendation 17: Representatives transition

The FSC submits that the transition should not prohibit individual (representative) registrations to occur pre 1 January 2015 to take advantage of the longer transition phase scope.

INTRODUCTION

1. Process

It is important to note that the application of the Tax Agent Services regime is as significant to the financial services industry as the Financial Services Reform Act and the Future of Financial Advice reforms – both regime changes which consulted broadly and publically with the financial services industry participants and which afforded appropriate transition. The FSC contests that TASA has largely been delivered with little consultation, few amendments and has been rushed to Parliament to commence at the same time as the sweeping Future of Financial Advice and MySuper reforms.

The review and development of a national tax agents regime commenced in 1989 and was developed over a period of 16 years in consultation with the accounting bodies and tax return businesses, including 3-4 years consultation on the draft Bill itself. The Tax Agents Services Act was then enacted in 2009 and commenced on 1 March 2010.

The Financial Services industry was not alerted to the regime until the Act commenced. At which time, it appeared to capture aspects of advice provided by Financial Services licensees. The Industry made representations to have financial services expressly exempted from the Act. However, in April 2010, the government announced the regime would indeed apply and afforded the industry three annual exemptions from the regime to allow the government to work on amendments to the Act to apply the regime to Financial Services entities. Unlike the accounting industry that had 11 years consultation, the financial services industry has largely had 4 months consultation on a regime as significant as the Financial Services Reform Act and Future of Financial Advice.

Following is the timeline of the consultation process with the financial services industry:

23 April 2010	*Media Release:* Government announces further details of the coverage the Act to include in-house advisers, custodians and AFSLs who provide financial advice.
29 November 2010	*Public Consultation:* Issue of an options paper entitled "*Regulation of Tax Agent Services provided by Financial Planners*, puts forward options to ensure financial planners who offer tax agent services are regulated effectively" – provided two hypothetical options to regulate tax advice provided in the context of financial planning.
May 2012	*Confidential*: Framework issued to associations for comments. Three week response period under formal confidential agreements.
February 2013	*Public Consultation*: Draft Bill issued for Public consultation. First time the industry has been consulted on the details of the regime. Four weeks response period provided.
Mid May 2013	*Confidential* discussions held (at association level) with Treasury and the Assistant Treasurer's office regarding the definition (which captures a service within the regime's remit).
29 May 2013	Bill tabled in Parliament
31 May 2013	Parliamentary Committee vote to not hold Inquiry and send Bill back to House.
6 June 2013	Government excise the Schedules from the Bill and refer them to a PJC.

Further, regulation(s) which go to the crux of the matter (the competency requirements) have yet to be issued to the financial services industry for consultation.

In contrast following is a summary of the timeline[4] of consultation the accounting and tax industry were afforded by the government(s):

November 1994	Tax Services for the Public report released by the Steering Committee of the National Review of Standards for the Tax Profession recommends a suite of legislative changes, given the movement to a tax regime based on self assessment principles. Tax Office commences work on the new framework following release of the 1994 report.
6 April 1998	The then Assistant Treasurer, Senator the Hon Rod Kemp, announced that the then Government approved a new legislative framework for tax agent services "with a view to having the proposals commence on 1 July 1999." (Press release number 14 1998). Implementation delayed to allow the tax profession time to adjust to the A New Tax System reforms.
2004-2007	*Confidential consultation* with the tax profession, the Chairs of the state Tax Agents' Boards and the Australian Taxation Office conducted between 2004 and 2005 on the proposed framework and in 2006 and 2007 on draft legislation.
9 May 2006	The 2006-07 Budget contained additional funding to the Australian Taxation Office of $57.5 million over four years for the implementation of the new legislative regime.
7 May 2007	*Public consultation:* Exposure draft Bill, Regulations and explanatory materials released for
29 May 2008	*Public Consultation:* Revised exposure draft package released
13 November 2008	Tax Agent Services Bill 2008 introduced into the House of Representatives.
2009	Tax Agent Services Act enacted.
1 March 2010	Regime commences.

Whilst the regime may have been in development for twenty years, the financial services industry's first look at the manner in which it is to apply only occurred in February and with the Bill's tabling on 29 May 2013.

[4] Media Release No. 099 by Hon Chris Bowen on introduction of the TASA Bill before Parliament, *Bill To Regulate the Provision of Tax Agent Service,* 13 November 2008.

2. A cohesive financial advice provider competency framework

The FSC is concerned the ASIC/Tax Board dual regulation framework being contemplated will add complexity and red tape which will ultimately result in higher costs of advice for consumers and duplication of competency requirements for advice providers.

To be clear, the application of TASA to the financial services industry will result in two regulators regulating the same activity being an advice provider's conduct and competency (the advice they provide), albeit one will only consider tax (the Tax Board) and ASIC considering everything else regarding advice.

To date ASIC has licensed and regulated financial services providers including adviser activities (at the Licensee and authorised representative level rather than at the employee advisers level) including determining advice providers competency which integrally includes the provision of tax advice in relation to financial advice.

It is critical that the Committee consider registration of financial planners/advisers who provide tax advice in the context of financial advice in a balanced and pragmatic manner. The Tax Act Services Act was tailor made for the tax service agent/BAS service[5] provider to ensure that those providers (not licensed by ASIC or operating under the Corporations Act provisions relevant to providers of financial product advice) were adequately trained, competent and acting in a manner consistent with a relevant code of conduct to ensure their clients received competent tax advice and representation to the Tax Commissioner.

We understand the objective of TASA is to:

"ensure consumer protection through adequate supervision to provide competent services"[6].

However, to date, advice providers have been prohibited from providing tax advice such as a tax agent service. ASIC regulates all aspect of advice. Therefore, the FSC contends that there is no consumer protection gap afforded by a delay in the application of this regime to allow the industry to work with the government to implement an efficient regime which does not compromise affordability and access of advice to Australians in the future.

The FSC submits that the government may better meets its objective with regards to financial planners/advisers, without duplication, red tape and increased costs, by the Board continuing to set competency and supervision requirements for providers of tax advice in the context of financial advice in conjunction with or by advising the soon to be established National Exam Organisation (Self Regulatory Organisation which ASIC is seeking to establish). In this manner, the Board would eliminate all duplication and ensure that its key objective of raising provider competence is achieved in an efficient manner and without putting advice out of reach of Australians.

To the extent that the Government proceeds with these proposals and regulates advisers under the TASA regime, we wish to highlight the following observation. The proposed regime appears to be

[5] Op Cit.

[6] Tax Agent Services Act 2009 (TASA) and related Regulations – a proposed new regulatory framework for financial advisers providing taxation advice, Page 24

based on an assumption that registration by all participants should occur in a manner similar to that which applies to tax accountant businesses today. In fact the registration regime is ideally suited to the typical accountant business structure. In FSC's view it fails to adequately cater for financial advisers who generally operate, and are licensed, under an Australian Financial Services Licence. It is critical for financial advice businesses and their advisers that the model of registration and compliance is flexible enough to cater specifically for the AFSL model. We expand on this point under chapter 3 under the heading 'Licensee Registration vs. Individual Registration'

This submission aims to highlight the FSC's key concerns and provides recommendation for consideration to enable the law to apply appropriately to tax advice providers in the context of financial advice. We may submit a further supplementary submission post appearing before the PJC as these are complex legislative instruments.

3. Referencing

For the purposes of this submission, Schedules 3 and 4 to the first reading of Tax Laws Amendment (2013 Measures No. 2) Bill 2013 will simply be referred to as the "Bill".

The accompanying Explanatory Memorandum is referred to as the "EM".

4. Tax deductibility of advice

Given the short timeframe afforded the industry to consider the implications of the Bill we note that preliminary assessment of this Bill by our members indicates that advice provided in the future by a tax (financial) advice services provider may be tax deductible for their clients. We note that this may have budget implications (which are currently forecasted as NIL impact on the forward estimates).

CHAPTER 1: DEFINITION (SCOPE)

1. Meaning of a tax (financial) advice service

We understand the government's intention is to apply the Bill to **all** financial advice providers as announced by the Hon Nick Sherry on 23 April 2010 when the government announced that the coverage of TASA was expanded to apply:

> "Specifically to the coverage of the regime in relation to "in-house" advisors, custodians and holders of Australian Financial Services licenses (AFSL) providing financial planning services."[7]

However, we submit that the definition of tax (financial) advice service in the proposed Bill is broad principles based definition, and may result in unintended consequences. Whilst principles based approaches are generally preferable, we do not support the definition contained in the Bill because the Bill captures all AFSLs and the term "in the course of giving advice of a kind" is so broad in (lay) meaning that the definition goes beyond the intended scope of this regime's application and the government's intended policy enabling tax providers to arbitrage between TASA tax agent categories.

In the two weeks prior to the tabling of the Bill before Parliament, all associations including industry super, accounting and tax bodies, financial planning bodies and the FSC in closed consultation all supported the use of the following definition:

> ***"Option 4***
> A tax (financial advice) service is a tax agent service (as defined in section 905 of the TASA 2009) provided in the course of providing **financial advice services as defined below** that relates to ascertaining an entity's tax liabilities, obligations or entitlements or advising an entity about tax liabilities, obligations or entitlements.
>
> The scope of this service is limited by making it a TASA 2009 registration requirement that the entity be a financial services licensee or a representative of a licensee in order to be registered.
>
> For the purpose of this option, financial advice services would mean advice in respect of a client's financial affairs specifically related to wealth management, retirement planning, estate planning, risk management and related advice, including:
> - advice on financial products as defined in s764A carried out pursuant to an Australian Financial Services Licence;
> - advice and dealing in financial products as defined in section 766B and 766C of the Corporations Act;
> - non-financial product advice including financial strategies or structures; and
> - taxation advice which is related to advice provided under (a) or (b) or (c).
>
> For the avoidance of doubt, a tax (financial advice) service does not include preparing, or lodging, a return or a statement in the nature of a return."

[7] Media Release No. 072 by Hon Nick Sherry, *Coverage of Tax Agent Services Regime,* 23 April 2010.

The FSC together with the associations including the FPA, AFA, CPA and ICAA remain of the view that the definition provided above is a more appropriate definition for a tax (financial) advice service for the following reasons:

1. The service is clearly defined using terms that are known to the industry and defined in the Corporations Act, contained in ASIC Regulatory Guides (especially the new FoFA regulatory guides) and used by the Accounting Professional and Ethical Standards Board in applicable ethical conduct standards;
2. The clearly defined service – clearly delineates and differentiates between the tax advice a financial advice provider gives/will give and those a (full) tax agent provides and as such aims to ensure the boundaries of the two category are clearly established and not left to interpretation nor open to being arbitraged by industry participants; and
3. The definition was supported by the broad group of industry participants engaged in the confidential consultation as being the better option to meeting the government's policy intent.

The Bill tabled in Parliament is a broad principles based definition which captures Australian Financial Services Licensees ("AFSLs") generally (not limited to financial planners/advisers), capturing Fund Managers, Superannuation Funds, Managed Investment Scheme operators and Insurance providers within the regime also because they provide 'advice of a kind'. This is because the relevant test as paragraph 3.41 of the Explanatory Memorandum states 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". For example:

- Super/Pension funds provide members an annual Payment Summary (formally called Group Certificates) with regards to pension payments and/or on redemption from the Fund. Trustees usually produce a helpful Payment Summary guide which informs the client that the "$X" of tax deducted as shown on their Payment Summary should be noted on box "X" in the latest Tax Pack may be deemed a Tax (financial) advice services;

- Insurance providers who pay insured members' income protection/salary sacrifice monies on claim also product Payment Summaries and helpful information accompanying these documents, are now to be deemed Tax (financial) advice services;

- A managed investment scheme operators annual tax guide produced to inform the investor of their investments and the tax position, are now to be deemed Tax (financial) advice services;

- Product manufacturers generally (be they retail or wholesale) may need to consider their disclosure documents and services provided to ensure they operate with the law(s); and

- All advice providers including intra-fund advice providers to superannuation members will be deemed Tax (financial) advice services.

Recommendation 2: Meaning of Tax (financial) advice services

We recommend the meaning of a tax (financial) advice service at section 90-15 be amended to the following:

> A tax (financial) advice service is a tax agent service (other as within the meaning of subparagraph (1)(a)(iii) of the definition of that expression)provided in the course of providing **financial advice services as defined below** that relates to ascertaining an entity's tax liabilities, obligations or entitlements or advising an entity about tax liabilities, obligations or entitlements.
>
> For the purpose of this option, financial advice services would mean advice in respect of a client's financial affairs specifically related to wealth management, retirement planning, estate planning, risk management and related advice, including:
>
> - advice on financial products as defined in s764A carried out pursuant to an Australian Financial Services Licence;
> - advice and dealing in financial products as defined in section 766B and 766C of the Corporations Act;
> - non-financial product advice including financial strategies or structures; and
> - taxation advice which is related to advice provided under (a) or (b) or (c).
>
> For the avoidance of doubt, a tax (financial advice) service does not include preparing, or lodging, a return or a statement in the nature of a return."

2. Information, General advice and non tax agent services

Advice providers operate under the Corporations Act which has created an advice regime which defines advice services as either:

- Information only;
- General advice or
- Personal advice

The TASA regime defines tax advice as either:

- Not a tax agent services or
- Tax agent service

Advice thus becomes a matrix function because an advice provider may be giving general advice but fall within a tax agent service for example – thus creating a complex dual regulatory regime which may have significant impacts to the accessibility and affordability of advice by Australians.

Recommendation 3: Expressly exempting non Tax (financial) advice services

For the absence of doubt, the FSC submits that any AFSL and/or their representative who provides tax information (generally available tax information) be exempted from registration with the Tax Practitioners Board ("TPB").

Further we submit that general advice (as defined in the Corporations Act) also be expressly carved out of the Act because as paragraph 3.50 in the EM states, "the service does not take into account all of an entity's relevant circumstances". This can be catered by amending Recommendation 2 of this paper to specify that the service is "provided in the course of providing personal financial advice services". The amendment can be made explicitly by amending s90-15 to apply to personal advice only or by regulation.

What advice services is not a tax (financial) advice service is less clear. The EM contains many contradictory statements and examples.

Paragraph 3.14 of the EM states:

> *"As noted in paragraph 3.6, 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.'*

On the face of this paragraph the FSC contends that the tax advice most financial advice providers give their clients is not a tax agent service because the advice to "be relied upon" is for the purposes of "making an informed financial ... decision". However, paragraph 3.41 brings advice back within the regime by saying:

> *"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;"*

TASA stipulates that reliance on the advice and the fact a recipient pays a fee[8] for the advice triggers a Tax Agent Service

Example 1:

Neither information nor general advice (as defined by the Corporations Act) take the recipients specific circumstances into regard (that is the 'advice' provided is not tailored nor does it interpret Tax Law) – regardless of whether the recipient paid a fee or not. For example, information or general advice provided to a superannuation member by an intra-fund advice provider on how salary sacrificing generally works.

Therefore the intra-fund advice scenario will require the advice provider to be registered or operate under a registered individual.

Example 2

A brochure suggesting that a taxpayer can contribute up to $25,000 a year to a superannuation fund can reasonably be expected to be relied upon by one of the many people who receive the brochure. This is the case even though the information is not part of advice prepared for a particular person or entity.

Paragraph 3.47 of the accompanying Explanatory Memorandum seems to imply that provision of information even if tax related and given in the context of giving advice is not a tax agent service. However, we submit that drafting (in the legislation) linking the provision of the information to "reliance" on part of the recipient creates uncertainty as to whether the advice is or is not a tax agent service. Unless the legislation or regulation clearly exempts tax information provided under information and general advice (as per the Corporations Act) then uncertainty prevails for the industry.

Example 3.5 provides an example where *general information* provided by a managed investment scheme operator about the tax consequences that arise from holding interests in a managed investment scheme and states "to the extent that this information is not a tax agent service". Then at paragraph 3.49 states an entity is providing a tax agent service if the advice is relied upon.

Lack of clarity is created in particular by the use of like terms of different meaning being used by TASA and the Corporations Act which is likely to result in a conservative response from most AFSLs and their representatives as being thus caught within the regime.

Whilst the positive impact of capturing every AFSL provider is a higher level of competency in advice entities, the negative impacts are far greater including increasing cost of advice for Australians.

At paragraph 3.51 the EM states the relevant test of a service falling with the tax agent service regime is reliance (despite other contradictory statements such as paragraph 3.50):

[8] Paragraph 3.148 of the EM states "An entity that provides tax (financial) advice services for a fee or other reward from 1 July 2013 may be liable for civil penalties under the TASA 2009.."

> "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."

Recommendation 4: Reliance

We submit that the provision of tax information (generally available information) is not a tax agent service and should be expressly exempted in the TASA (for example as an express exemption to s90-15) or related regulations for licensees and individuals.

Further we recommend the drafting be amended such that the provision of the tax information (generally available information) is exempted regardless of whether the information can reasonably be expected to be relied upon.

The EM should also include examples of these circumstances and clarify tax (financial) advice can only be provided directly to the end client via the provision of personal advice. We would be happy to provide examples for consideration.

Recommendation 5: A fee

We recommend that a requirement be added to the Bill and the EM that the tax information needs to be provided to a specific entity or person be included as a means to mitigate the issue of catching all advice. We note that tax information (and general advice under an intra-fund advice model) is generally given without the charging of an express fee but the consumer may be in a fee arrangement or the fee may be bundled with the administration fee of their financial product investment – therefore the fee nexus may exist and may not be relied on by the giver of the advice to claim exemption.

3. Computer program advice , Licensee websites and other online information

The FSC welcomes the inclusion of paragraph 3.50 of the EM which says:

> *"To the extent that a service — such as an online calculator — 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."*

We submit that the legislation should expressly specify the requirements for calculators and other information posted on licensee websites in the regulations or expressly carve them out rather than create ambiguity..

The Future of Financial Advice reforms supported and provides for advice to be provided by computer programs and calculators. These are provided at the outset for the general public free of charge. Arguably online calculators & written materials do not demonstrate the direct nexus to fees required by the legislation. Persons who utilise the calculators and other information may not even be or become a client of the licensee.

Consideration must also be given to advice provided by computer programs/calculators.

For consistency the approach taken in ASIC Class Order 05/1122 *Relief for providers of generic calculators* should be adopted by government/Treasury in clarifying the application of this legislation to calculators.[9] This should ensure that where a licensee provides tax advice in the context of financial planning/advice through a financial calculator they are not required be registered with the TPB, consistent with ASIC's approach.

Further we note example 3.6 is not a useful example to illustrate what the government means by paragraph 3.50 – especially seeing as it is not advice generally provided by financial advice providers and certainly not advice provided by a calculator or computer program. Indeed our interpretation of paragraph 3.5 of the EM is that information and general advice provided by an advice provider as defined by the Corporations Act is not a Tax Agent Service.

Recommendation 6: Computer program

We submit that the legislation should specify the requirements for calculators and other information posted on licensee websites in the regulations and expressly carve them out as a Tax Agent Service.

[9] CO 05/1122 provides an exemption from AFSL licensing requirements (subsection 911A(1) Corps Act) and obligations to provide an FSG, SOA and other disclosure requirements (Division 2,3,4 Part 7.7 Corps Act).

CHAPTER 2 REGUALTORY DUPLICATION

1. Cost of Advice: Efficiencies

Whilst we appreciate and support higher education standards of advice providers generally, the TASA regime enforces a number of inefficient business practices on financial advice providers which will increase the cost of running an advice business and ultimately increasing the cost of advice across the board.

We note a few measures below which may assist in minimising or reducing duplication of efforts and help maintain reasonable business operating costs in an attempt to not disadvantage Australians seeking advice from financial advice providers.

a. Professional Indemnity Insurance

The Bill requires that those registered hold professional indemnity insurance ("**PII**") approved by the TPB. We note that all advice providers (except certain exempted individuals) are required to operate under an Australian Financial Services License, and it is a licensing requirement that the Licensee hold PII cover today[10].

We submit that it is redundant and therefore inefficient for the TPB to also require registered individuals to also hold PII cover. This requirement will simply add to the cost burden of operating an advice business.

Recommendation 7: PII

Where Licensee's PII cover already insures the License for tax advice, the FSC recommends the TPB recognise the PII held by a licensee as sufficient to meet their requirements.

We note that today some AFSL's PI insurers do not cover them (the AFSL) for the provision of tax advice. Despite the fact that the service an adviser provides tomorrow under TASA will likely be exactly the same service they provided pre TASA – many advice providers will need to obtain additional PII cover which clearly will not be without significant cost.

Further, current Corporations Act Licensing requirements impose the PII requirement on the AFSL not individual advice providers. TASA enables individual applicants, provided they are the registered entity (EM paragraph 3.112). This is a significant change to the advice regime and due consideration should be given to the cost of this requirement. The FSC submits that the TPB consider the AFLS' PII cover when considering individual entity registrations.

[10] Section 912B of the Corporations Act requires that licensees have compensation arrangements for loss or damage caused by breaches of their legislative obligations under Chapter 7 of the Act:

> "Under these arrangements, licensees must obtain PI insurance that is adequate having regard to the nature of the licensees business and its potential liability for compensation claims, or be approved by ASIC as alternative arrangements. In determining what is adequate insurance, ASIC will take into account what is available in the market."

Recommendation 8: PII

The FSC submit that a significant portion of the industry will face increasing cost pressures including increased cost of PII to comply with this legislation which will ultimately be borne by Australians seeking advice.

The FSC submits that the TPB consider the AFLS' PII cover when considering individual entity registrations.

Further, we submit that the TPB recognise in certain circumstances that some licensees may be able to demonstrate requisite financial strength (underwritten by a parent company, for example) such that the Board may determine self-insurance as meeting their requirements. We would welcome clarity in the EM that ensures consolidated groups/entities who chose to self-insure are able to either self-determine their sufficiency be able to attest/certify?/readily demonstrate this through the registration process.

Recommendation 9: PII

We recommend the TPB recognise the PII held by a licensee as sufficient to meet the requirements obligations of individuals/licensee entities registered with the TPB in the Act and Code as required.

Further, we recommend the TPB recognise that there are circumstances where self insurance may be a viable alternative to extra PII requirements.

b. Code of Conduct

We note all financial advice providers will be bound by the TPB Code of Conduct from 1 July 2013. However, we contest that the Future of Financial Advice reforms enacted is superior in obligations. As such, the FSC queries the relevance and appropriateness of requiring the registration of financial advisers who provide tax advice in the context of financial advice and the requirement to abide by a Code of Conduct which is tailored for true tax agents (who do not operate by requirement under the Corporations Act).

Other concerns with the Code of Conduct:

The FSC is concerned with the requirement that advice providers must be subject to the Board's Code of Conduct for the following reasons:

- The financial advice industry has not had an opportunity to participate in the development of nor provide feedback on the Code of Conduct.
- The Code has been developed specifically for BAS and registered tax agents whose services are different from those provided by a financial adviser.

- The financial advice industry operates under distinctly different and greater legislative requirements such as a legislated Best Interest duty. As AFSL's they must already meet fit and proper tests.
- Whilst it may be appropriate for BAS and registered tax agents to have an ethical code of conduct with a common law type best interest duty, recent amendments to the Corporations Acts have added a statutory Best Interest Duty plus related obligation which covers similar grounds to the conduct requirement of the Code for providers of financial advice.

It is important to note that some financial advice providers may already be subject to a number of ethical codes of conduct.

For example, a financial adviser who is a Certified Financial Planner working for a bank owned advice licensee may operate under

- a Banking Code of Conduct
- the FPA Code of Conduct; and potentially
- An accounting body's code of conduct (if that financial planner is also a member of a professional accounting body);
- TPB's Code of Conduct

Recommendation 10: Code of Conduct

The FSC recommends that the tax (financial) advice service providers be exempt from the Tax Board's Code of Conduct in recognition that the Corporations Act requirements supersede the Code.

2. Competency requirements

We also note that TASA will create potentially a third set of minimum competency/experience requirements on a financial advice provider. A financial advice provider from 2013 is likely to be required to complete the following just to operate as a financial advice provider:

- RG146 – competency requirements set by ASIC of all advice providers (ongoing minimum training requirements also apply);
- Potentially pass a national entry exam and only knowledge update exams;
- Competency (entry and ongoing) and experience required by the TPB (yet to be articulated by the TPB for this industry); and
- As today there is no "one set of competency requirements" which are portable between Licensees, individual Licensees often provide their own additional training to ensure their authorised representatives/representative are at a consistent level.

Each layer is an additional cost to simply be able to operate as an advice provider and these impacts need to be considered in light of other government initiatives aimed at increasing access to and lowering the cost of advice.

Recommendation 11: Single Advice Competency Framework
We submit that the TPB work with ASIC and the soon to be established Self Regulatory Organisation, to ensure that competency requirements are appropriate but not mutually exclusive (that is that there are not two different sets of educational requirements covering the same topic area (tax) for the same providers).

We are yet to see the regulation which will contain the competency requirements (both formal education and 'relevant experience) to be proven by an application seeking registration with the Tax Board. However, we note that it is both pragmatic and sensible that the experience requirements yet to be determined two and a half weeks before the commencement of the regime, that the maximum 'relevant experience" not exceed the transition period which is set at three years. Otherwise, it will be nonsensical that any new entrant to the industry on 1 July 2013 is unable to qualify for registration under the transitional relief. If we look to like competency regimes such as the removal of the accountants exemption from Licensing (under the Corporations Act), the profession has been afforded six years transition until 30 June 2019 to comply with all AFLS competency requirements.

Recommendation 12: Competency

The FSC recommends that the maximum 'relevant experience" component of the competency requirements yet to be consulted with the industry, not exceed the transition period which is set at three years.

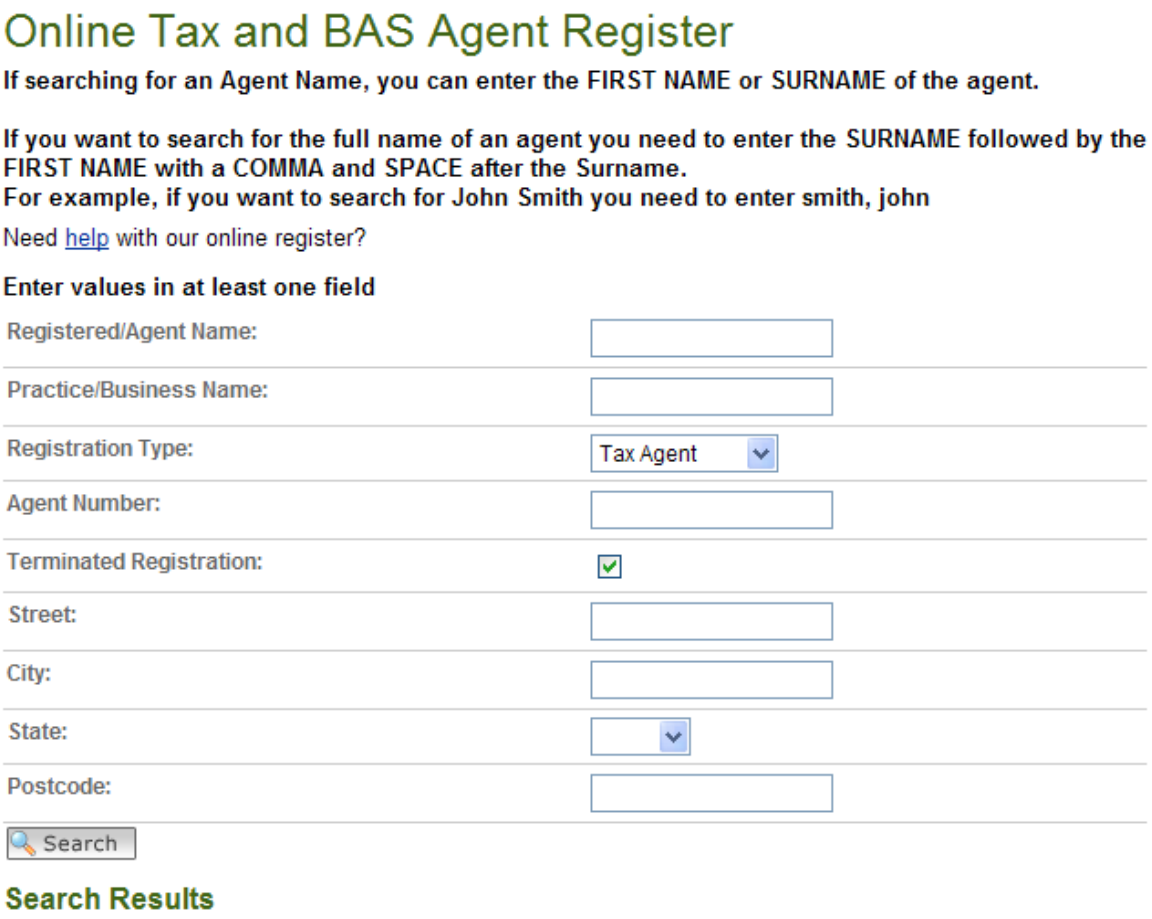
3. Civil Penalties

Currently, the TPB allows you to search for registered tax agents and BAS agents and terminated registration via their online website.
Paragraph 3.107 of EM says that Licensees could potentially be fined 1,250 penalty units @ $170 per unit, if they use the service of a person that had been struck off the register. In relation to the civil penalties, prima facie it would prohibit a licensee employing any person who is not registered and perhaps even using any tools/calculators issued by any vendors who are also not registered.

This obligation will have a number of significant implications for advice Licensees.
First, it defeats the purpose of registering at the Licensee level and contradicts the idea that you only need a sufficient number of individual registrations and not every single employee (to support a licensee registration).

Secondly, there is definitely a need to remove the penalty on Licensees, based on the assumption that the Licensee nominee model is endorsed.

Thirdly, the penalty regime would also be a barrier to re-entry for advice providers who decide to terminate their registration and work for a Licensee, as it implies Licensee would be fined for employing a deregistered entity.



Online Tax and BAS Agent Register

If searching for an Agent Name, you can enter the FIRST NAME or SURNAME of the agent.

If you want to search for the full name of an agent you need to enter the SURNAME followed by the FIRST NAME with a COMMA and SPACE after the Surname.
For example, if you want to search for John Smith you need to enter smith, john

Need help with our online register?

Enter values in at least one field

Registered/Agent Name:

Practice/Business Name:

Registration Type: Tax Agent

Agent Number:

Terminated Registration:

Street:

City:

State:

Postcode:

Search

Search Results

Lastly, if the regime extends to vendors or providers of calculator tools and other advice computer programs must Licensee cease using these providers in the interim or seek confirmation from the providers that they will be registered. This requires clarification.

Again, and in summary, the penalty regime net appears too wide and hopefully unintended. There is a need to at least exempt licensees from these penalties.

On the basis of the retention of the civil penalties, it is imperative that TPB and/or ASIC have systems in place from 1 July 2013, that enable a Licensee to ensure they are using the services of a currently registered entity (for example another Licensee's authorised representative or other independent tax (financial product) advice).

Recommendation 13: Civil penalties

The FSC submits that the civil penalty applicable to Licensees as contained in paragraph 3.107 of the EM be removed (also from the Bill).

On the basis of the retention of the civil penalties, it is imperative that either or both of the following be in-place from 1 July 2013:

1 That the TPB's Online Tax and BAS Agent register be amended to accommodate for the new type of registration type – that is "tax (financial product) agent) – in recognition that some may qualify for this registration from 1 July 2013 and that the penalties apply from 1 July 2013; and/or

2 ASIC and the TPB deliver an online interface to enable a Licensee to conduct the search they will be required to do to demonstrate they have only used the services of a registered entity.

3 Exemption be extended to Licensees' reliance or use of computer programs or calculator tools provided by persons not registered with the TPB.
4 Further, we would suggest clarification in the EM as to how the licensee can demonstrate that they satisfied reasonable checks on that individual.

4. Expressed exemption from TASA

The FSC submits that expressly exempting non-tax agent services as recommended in this submission should not prejudice registered tax agents as stipulated in paragraph 3.59 which says:

> *"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."*

The principle rationale for the FSC's assertion is that the exemptions recommended may also be exempted for remaining tax agents given the 'service' should be neither a tax agent service nor a tax (financial) advice service.

CHAPTER 3: INTERPLAY OF TASA AND FOFA

We remained concerned about the practical commercial reality of the dual regimes on the future ability to provide advice. The following provides a quick snap shot of some key aspects of TASA and the Corporations Act to highlight some duplication and inconsistencies:

	TASA	Corporations Act/ASIC RG
Licencing/Registration	Registration at entity (AFSL) and individual level	At AFSL (Broadly requirements with the except of Best Interest Duty are framed as an AFSL obligation)
Provider must comply with Code of Conduct	Yes	No – must Comply with Corporations Law and all other law that applies to the AFSL.
Act in the Client's Best Interest Duty	Code of Conduct - common law duty requirement	Statutory Duty in addition to common law duty.
Competency (formal education)	Will require tax law and potentially commercial law training at the least.	ASIC RG146 competency training currently contains most tax topics the TPB indications a provider requires (as per TPB's proposed guidelines on a course – noting the regulations are not yet available that may impose other requirements)
Requires the provider hold PII	At Registration at entity (AFSL) and/or at registered individual level	At AFSL level only.
Consumer protection provisions	-Require that tax agent services provider be registered (competent to provide the advice) : -Provider must abide by the Code of Conduct.	Various including: - licensing requirements (capital, fit person etc, PII cover); -Regulates provider conduct; - Quality of advice; - Disclosure/advertising; - Monitoring and enforcement .
Imposes Consumer dispute resolution obligations	No	Yes
Disclosure obligations	Person who will register during transition may use warning re compliance with TASA 2009 until registration or December 2104. Also stipulates advertising constraints.	Broad disclosure and advertising obligations in addition to ensuring the AFSL does not issue false and misleading information.

Key to this concern is the ability for individual advice providers to rely on the (FoFA) Best Interest Duty safe harbour whilst complying with s961B(2)(d) of the Corporations Act which requires as ASIC

Regulatory Guide 175 at paragraph 301 says, that the individual advice provider must have the expertise to provide the advice or refer the client on (decline to advice the client).

1. Licensee Registration vs. Individual Registration

TASA affords the industry the capacity to operate under a supervisory model rather than register every single advice provider. This is generally a welcome concept. Unfortunately, it does not recognise the difference in approach for Australian Financial Services (AFS) licensees who may appoint 'authorised representatives' to provide specified financial services on their behalf. This approach aligns with the "nominee model" that operated prior to the introduction of the Tax Agents Services Regime (TASR).

Paragraph 3.65 and 3.68 of the EM states that it is incumbent on the company/licensee to satisfy the TPB that they have a sufficient number of individuals who are registered as either financial product tax advisers or tax agents, to be able to provide tax advice (financial product) services to a competent standard and to carry out supervisory arrangements. EM paragraph 3.65 indicates that this is consistent with the existing approach in relation to partnerships registering as tax agents or BAS agents.

One potential solution would be to accept the licensee's statutory registration with the TPB and require those financial planners who provide tax advice services in the context of financial planning/advice to operate in a similar fashion to "monitored members". In this case the licensee retains ultimate professional responsibility for the conduct of the member, similar to the role of partners in accounting centric firms.

We agree that the company/licensee should be required to satisfy the TPB that they are capable of providing tax advice services in the context of financial planning/advice to a competent standard and to carry out supervisory arrangements. However, we submit that this satisfaction may be achieved without the requirement to register individual financial planner/adviser (or tax agent) with the TPB.

For example, a licensee may be able to satisfy the TPB by demonstrating overall capability relating to:

- The training and experience of representatives operating under the license
- The monitoring and supervision processes the licensee has in place

Furthermore, we submit that the legislation should prescribe how the TPB will determine "sufficiency" with relation to the number of individuals registered or able to provide tax advice (financial product) services to a competent standard. At the very least the EM should be updated to provide guidance on this matter.

However, we believe neither of the solutions and models suggested above are consistent with FoFA's Best Interest Duty. The new obligation on advice providers squarely places the responsibility of the advice on the individual provider (the AFSL has an obligation to ensure the individual provider complies with the Best Interest Duty).

Monitoring and Supervision

The FSC acknowledges the need for robust monitoring and supervision processes for new and existing advisers and for ongoing training and development of advisers' competencies and knowledge.

Whilst we agree in principle with the rationale for robust monitoring and supervision and ongoing development of advisers, we note monitoring and supervision practices in the financial advice/planning industry are potentially distinct from those employed in the accountancy industry. Without knowledge of the TPB's proposed requirements for the advice industry we raise the following matters to your attention for consideration – and note that these are important matters that need to be publically consulted to ensure that there is not a decline in the supply of financial advice providers in the market and particularly, that rural and remote locations are not left without these crucial services.

Relevant experience requirements will require (to be contained in future regulations) that an applicant for registration have worked "under the supervision and control of a tax (financial product) adviser" and that a person cannot provide tax advice unless they are registered.

Is it the TPB/Treasury's intention that a financial adviser who is yet to qualify for registration:

- Should never provide their client with the tax component of the advice the client requires (thereby hindering the ability of the adviser to comply with the Future of Financial Advice Best Interest Duty and related obligations) and that only registered tax (financial product) advisers can 'give' the advice (that is two financial advisers are meeting with and providing the advice to the client – one that tax component)? OR

- Can the financial adviser (who does not yet qualify for registration) give the client the tax advice, but be physically supervised when giving the client the advice by a registered tax (financial product) adviser (still two advisers in the meeting with the client)? Or

- Can the financial adviser (who does not yet qualify for registration) give the client the tax advice without the registered tax (financial product) agent being physically present at the time of giving the advice – the tax advice component being approved prior to the client meeting by the registered tax (financial product) agent, that the tax advice meets industry and regulatory standards, including Best Interests Duty and TPB's "competent" requirement? OR

- What happens if the financial adviser is a new entrant in a rural or remote location? Does this mean this individual would need to relocate to a city[11] or larger town to work under a registered tax (financial product) adviser (where a registered tax (financial product adviser) is not available in their current location) until they can obtain the required level of experience to qualify for registration?; OR

[11] Noting that city tax advice providers in the context of financial planning may not be 'competent' to provide the tax advice an adviser in rural locations may need to provide.

- Can the financial adviser work under a local tax agent (who may not have any qualifications or competency in financial planning advice and indeed may not be licensed as an Australian Financial Services Licensee – will this meet the appropriate experience competency requirements)?

- Noting that FoFA places the best interest and related obligation on the provider of the advice, whilst a financial adviser is under supervision and not registered, who bears the statutory FoFA best interest duty and related obligations given it is the individual who provides the advice) in addition to the TASA obligation (the registered entity)? Is the registered entity responsible?

- ASIC RG175.301 states that the individual provider bares the obligation of having the competency to provide the advice or else must on refer or decline to provide the advice. How is an individual advice provider competent/possess expertise if they are not a registered tax (financial) advice service provider themselves? Can they be deemed to comply with the Best Interest Duty safe harbour if they work "under" the supervision of a registered tax (financial) advice service provider? Who 'gives' the client the advice (literally) in this scenario? Can a supervisor simply 'signoff' on the tax advice in the SOA to enable the individual advice provider to comply with their TASA and FOFA obligations?

We remain uncertain how the industry is to supervise its new entrants and advisers wishing to up-skill. This uncertainty may create a supply side issue in the availability of advice providers. We submit the following recommendations provide a pragmatic solution to these obligations to ensure that tax advice providers do meet appropriate competency levels for the benefit of consumers in a manner which does not put advice out of the reach of Australians.

Further, as the advice industry re-assesses their advice model in light of the Future of Financial Advice, TASA and MySuper reform changes, which include the potential to provide scalable advice, the reality is that the supervisory and monitoring processes will need to be tailored to meet the need of the advice business and its target client. The FSC proposes that the AFSL is best placed to tailor the supervision and monitoring model and as such enables scalable advice and facilitate greater access to advice (by keeping costs in check) rather than duplication of proof of Licensing requirements which the Bill currently proposes be also provided as evidence to the Tax Board.

Further we note that Licensees have Licensing obligations to monitor and supervise their advisers and ASIC has been reviewing these requirements in their 2011 ASIC Consultation Paper 153: Licensing: Assessment and professional development for financial advisers. Submissions were made by the FSC and a number of other industry participants on matters such as monitoring and supervision before FoFA was enacted.

How a supervisory model will work remains uncertain. The implications of the uncertainty are:

- That advice providers will exit the industry rather than up skill/re-train;
- That advice providers will not meet experience requirements within the transition period.
- Advice providers will not be able to rely on the FoFA Best Interest Duty safe harbour provisions when providing advice as an unregistered tax (financial) advice services provider albeit under supervision of a registered person.

- The previous point may prohibit the employment of future unregistered tax (financial) advice service providers (what salary would you pay someone who is not able to do the job they are employed to do?).

Recommendation 14: FoFA Best Interest Duty
To ensure advice remains affordable (demand side) and accessible (that the supply side is not impeded), and that advice providers are able to comply with both TASA and FOFA obligations, the FSC submits that:
ASIC RG175.298 be amended to include a statement such as "with regards to tax (financial) advice services, an individual advice provider need not be registered with the Tax Board to demonstrate expertise but may provide tax advice under the supervision of a registered tax (financial) advice services entity".
ASIC RG175.301 be amended to read: "(d) an individual advice provider need not have the expertise in the provision of tax (financial) advice services as demonstrated by registration with the Tax Board provided the individual advice provider is working supervised by a registered tax (financial) advice services entity."

2. Transition for existing advice providers and application to new advice providers

By its nature, the requirement for financial advisers to register to become tax agents in the context of financial planning/advice will mean a barrier to continuing or commencing to practice. Therefore corresponding safety nets need to be implemented during the transition period to ensure that agreed service level agreements are in place between the applicant, ASIC and the TPB. By safety nets we refer to publically available (and consulted) processes and procedures including: application processing time frames, an appeals process and options for advisers who may suffer a loss of business as a result of any delays in the registration process. The reality that approximately 16,000-24,000 financial planners could register at or about the same time requires assurance that the TPB will be able to meet this demand so as not to impede advice providers from operating their existing businesses.

Further, given the registration is effectively a gateway requirement (an adviser can not continue nor commence to operate their business with the registration), appropriate safeguards are required for this transition period and beyond to ensure prospective entities seeking registration have sufficient opportunity to comply with these new legal obligations.

Critically, what happens to a new adviser who enters the industry post 1 July 2013? What competency and experience requirements will the TPB impose on them in addition to those imposed by ASIC's licensing requirements? Today, that adviser must complete their ASIC set RG146 training and either hold their own AFS License or operate under a Licensee's authority or as the Licensee's representative. But effectively, a new adviser post 1 July 2013 (without TASA) would be able to advice their clients on general tax information. However, given TASA will apply from 1 July 2013 – what are the requirements applicable to a new entrant commencing on 1 July 2013?

When will the requirements become known publically, so individuals can ensure they commence the appropriate training/supervision to enable them to operate as advisers?

Currently, the industry is only informed on requirements at *What courses will meet the educational requirements, Regulations section 8*. The educational requirements for financial product tax advisers include the adviser having "successfully completed a TPB approved course in Australian tax law for tax (financial product) advisers" (regulations paragraph 8.3). Understandably, there are currently no courses listed on the TPB website that match this requirement given the new concept of tax (financial product) adviser born in this legislation. Will the new adviser need to meet experience requirements (which they may not meet for some years)? If so what are these requirements? See section 5 of the Key Concerns section, for some practical implications to this key concern – namely that the Bill and regulations have not yet informed the industry of the requirements which will impact advice providers from 1 July 2013 (new requirements which impacts an advisers ability to provide advice in four months time).

We submit that the TPB should work with the financial advice industry and ASIC to develop suitable training and educational material to this end.

Recommendation 15: Competency
We recommend that Treasury and the TPB make public the training/competency and experience requirements applicable for tax advisers in the context of financial planning/advice as soon as possible and allow the industry to consult on these requirements. Furthermore, we submit the TPB have regard for ASIC's training/competency (including ongoing "continuance development" and experience requirements in setting their requirements for this segment of tax advisers. The industry would also welcome the opportunity to consult on these matters.

CHAPTER 4: TRANSITIONAL RELIEF

1. Use of disclaimers during transition

We welcome the recognition at paragraph 3.148 and3.149 that the financial services industry needs time to transition into the TASA regime and may continue to provide the services they currently provide to their clients – unregistered for a time – provided they use a disclaimed that they are "not registered tax (financial) advisers under the TASA 2009.

> *"3.148 An entity that provides tax (financial) advice services for a fee or other reward from 1 July 2013 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 3, items 47 and 48, subitem 48(4)]***
>
> *3.149 Unregistered financial services licensees and representatives may only provide these services accompanied by a disclaimer until 31 December 2014. From after that date, unregistered entities that continue to provide tax (financial) advice services may be liable for civil penalties.* ***[Schedule 3, item 47, subitem 48(4)]"***

However, should the Bill pass and apply from 1 July 2013, the implication is that the warning noted in paragraph 3.148 of the EM and in the Bill should be in use from 1 July 2013.

The FSC notes that it will be impossible for the majority of the industry to comply with this requirement on 1 July 2013. Currently, most participants in the industry use a simple warning informing the client to seek tax advice from a qualified tax adviser. Therefore the current warnings would not comply with the TASA warning proposed.

The Bill will require the industry to amend their current warning to the TASA warning by 1 July 2013. Those who intend to register can use the warning until they register (during the transition period or up to 31 December 2014) which is welcome. However, no relief or transition is provided under the Bill or the Corporations Act for providers to comply with the use of the new warning. The industry will require at a minimum six months to enable all their disclosure documents and websites to be amended to comply with the new TASA warning. With appropriate notice the Industry could have prepared disclosure to coincide with FoFA's commencement. All disclosure documents and websites which are now set to commence 1 July 2013 to comply with FoFA will need amending again immediately. The costs for disclosure updates are not without significance and impact on investors and prospective advice consumers.

Recommendation 16: Disclosure

The FSC recommends that the TASA Bill and Corporations Act be amended to provide a transition under TASA and under the Corporations Act to afford the industry at a minimum six months from the commencement of the regime for all Product Disclosure Statements, Financial Services Guides, Statement of Advice Statement templates, Websites and other disclosure documents to be amended to comply with TASA and also to protect the industry from breaching disclosure requirements under the Corporations Act. Alternatively, we submit that ASIC provide the industry with a Class Order exemption from compliance with disclosure requirements (that is regarding using the correct TASA warning) for a minimum of six months.

2. Who is able to transition into the Regime in the transition

We call on the Committee to amend the registration transition process. The Bill's transition provisions are different to those made available for consultation in February 2013.

The Bill will only allow authorised representatives and AFSLs to register during the notification period (1 July 2013 – 31 December 2014). Representatives (individual applicants) are only able to register with the Tax Board between 1 January 2015 and 30 June 2016.

The Bill proposed a sliding scale (re) registration date under which those entities that register earlier are afforded a longer transition period (see EM paragraph 3.157). However, as individual registrations are prohibited in the first eighteen months, individual registered persons are not afforded the benefit of a slightly longer transition to the full regime. Given the uncertainty surrounding:

- How individual providers comply with TASA and FoFA's Best Interest duty;
- That the regulations are not yet public;
- That competency requirements are unknown;
- That the "course" a tax (financial) advice services provider will need to complete does not exist; and
- That there are many more potential individual registrations required.

Recommendation 17: Representatives transition

The FSC submits that the transition should not prohibit individual (representative) registrations to occur pre 1 January 2015 to take advantage of the longer transition phase scope.