ISN & AIST Submission to Parliamentary Commission on Corporations and Financial Services

A regulatory framework for tax (financial) advice services (previously *Tax Laws Amendment (2013 Measures No. 2) Bill 2013*, Schedules 3 and 4)

About ISN

Industry Super Network (ISN) is an umbrella organisation for the industry super movement.

ISN manages collective projects on behalf of a number of industry super funds with the objective of maximising the retirement savings and incomes of their members through improving the super system and enhancing the value of industry super to members, the value of the generic industry super category and the brand of network participants and expanding the market share of network participants.

About AIST

The Australian Institute of Superannuation Trustees (AIST) is an independent, not-for-profit professional body whose mission is to protect the interests of Australia's $450 billion not-for-profit superannuation sector. AIST's members are the trustee directors and staff of industry, corporate and public-sector superannuation funds, who manage the superannuation accounts of two-thirds of the Australian workforce.

AIST is a registered training organisation and its education program encompasses the growing and changing needs of all members of the not-for-profit superannuation sector.

AIST offers a range of services including compliance and consulting services, events - both national and international - as well as member support. AIST also advocates on behalf of its members to relevant stakeholders.

AIST's services are designed to support members in their endeavour to improve the superannuation system and build a better retirement for all Australians.

Contacts:

- **Matthew Linden**, Director, Government Relations, ISN
  Ph: ; E:

- **Richard Webb**, Policy & Regulatory Analyst, AIST
  Ph: E:

Executive summary

AIST and ISN are pleased to present our recommendations on what were formerly Schedules 3 and 4 of the *Tax Laws Amendment (2013 Measures No. 2) Bill 2013* ('the Proposed Schedules').

Our organisations urgently recommend an extension on the current exemption of between six to 12 months to ensure that this measure can be properly worded to ensure that the issues that we have highlighted in this submission can be resolved. Although some of these issues are complex, a very brief summary of our recommendations is as follows:

- AIST and ISN are concerned with the scope creep of this measure and recommend that the present uncertainties around who are covered by this measure can be resolved by ensuring that references to 'advice' in the proposed section 90-15(1) are replaced with 'personal financial product advice' as defined at section 766B of the *Corporations Act 2001*.
- Further to the dotpoint above, we wish to draw the Committee's attention to the impact that this measure, as presently worded, has on the ability for superannuation funds to provide their membership with appropriate intra-fund advice.
- AIST and ISN believe that terminology contained within this measure could be further simplified in a way that is consumer friendly.
- AIST and ISN strongly recommend that clarification be added to the Explanatory Memorandum (EM) to the Bill about who is responsible for tax advice that is provided and that this clarity flows through to disclosure documents including (but not limited to) financial services guides (FSGs) so that investors can know who is responsible for their advice.
- AIST and ISN strongly recommend that urgent clarification be sought from ASIC and the TPB as regulators, to ensure that the safe harbour rules of section 761B of the Corporations Act can be upheld.
- We are not yet convinced that the new registration type proposed in this measure represents an appropriate value proposition when compared to ordinary registered tax agents.
- AIST and ISN continue to highlight the issue that costs could be substantial and recommend that better guidance be provided with respect to how the supervision rules work.
- AIST and ISN highlight the now changed circumstances that the TPB operates in and recommends that the composition of the Board be changed to better represent its new constituents.

Comments

Introduction

AIST[1] and ISN[2] have been involved in consultation on this measure since we commented on an Options Paper issued by Treasury in November 2010. AIST and ISN embrace the greater scrutiny being applied to this aspect of financial advice and we again welcome the opportunity to provide input on this ED.

The scope of the measure

Our organisations are concerned with the breadth of the scope of this measure, which has evidently crept beyond its originally intended boundaries.

At the commencement of consultations on this measure, it was clear that only professionals who provide a personal financial product advice service would be captured by the provisions of the *Tax Agent Services Act 2009* (TASA). This was explicitly stated with reference to 'financial planners' as being the key group of affected professionals.

During the course of the past two and a half years, this intention was re-iterated by announcements originating either from the offices of the Assistant Treasurer or Minister for Superannuation and Financial Services, or from the Ministers themselves.

However, the criteria that was introduced to Parliament as Schedules 3 and 4 of the *Tax Laws Amendment (2013 Measures No. 2) Bill 2013* ('the Proposed Schedules') appears to cover any professional who provides any financial advice service, where tax advice is provided as part of the service and is charged for.

By way of context, it is necessary to point out that not all content that may be collectively included under a layman's interpretation of the term 'financial advice' is regulated under the *Corporations Act 2001* ('the Corporations Act'). Advice that is regulated under the Corporations Act (defined at section 766B) relates to financial products either specifically, or as a class, and would not cover any other kind of advice. Advice that may not necessarily be financial product advice may address areas such as (but not limited to) financial strategies or structures.

The corollary is that it is required for a financial services licensee to be licensed to provide a financial product advice service, either general or personal. Licensees that provide a 'factual information' service (i.e. no financial product advice provided) are not required to be licensed for this type of service, even though such a service does not preclude licensees from providing financial non-product advice.

Importantly, the measure as contained in the Proposed Schedules is not limited to financial product advice and may include advice that relate to strategies or structures and may be general or personal.

---

[1] AIST (2010) *Response to options paper – Regulation of Tax Agent Services provided by Financial Planners*. [pdf] Melbourne: Australian Institute of Superannuation Trustees. http://is.gd/S7cRCp [Accessed: 8 March 2013].

[2] ISN (2010) *Regulation of Tax Agent Services Provided by Financial Planners* . [pdf] Melbourne: Industry Super Network. http://is.gd/38z5zY [Accessed: 8 March 2013].

It is in this context that AIST and ISN do not believe that the limitation to services that are charged for as proposed in subsection 50-5(2A)(c) is restrictive enough. As part of the MySuper reforms, various advice services are permitted under section 99F of the *Superannuation Industry (Supervision) Act 1993* ('the SIS Act') to be collectively charged across members of superannuation funds defined as 'intra-fund advice' services.

Professionals who provide such services are a broad group and can include call centre operators, business development officers, member education personnel and others who would not ordinarily be considered to fall under the category of financial planners, as originally conceived.

Given that superannuation is essentially a tax environment, it is likely that in all but the minority of discussions with members and other parties that at least part of the proposed section 90-15(1) criteria will be met, merely by mentioning the concessionally-taxed nature of superannuation during the provision of any other services. It is this concessional taxation, and its relativity to the normal income tax regime, that transforms even mundane disclosure of tax information into tax advice under section 90-15(1).

AIST and ISN believe that this situation will be fixed if the text that is presently proposed for subsection 90-15(1) (at line 33, page 63 of the text contained in the First Reading version of the Bill) was replaced with:

> *...giving **personal financial product** advice of a kind usually given by a financial services licensee...*

(bold type denotes our additions)

Furthermore, AIST and ISN recommend that 'personal financial product advice' have the same meaning as that contained at section 766B of the Corporations Act.

Terminology

AIST and ISN have minor concerns about the terminology that is to be introduced with this measure. It is apparent that the primary intention is to introduce terminology that creates a class of tax adviser that is distinct from the existing categories which are regulated by the TPB, as well as differentiating the new service.

Our comments relate to the following terms:

- Tax (financial) advice service; and
- Registered tax (financial) adviser.

In short, we still believe that the terms introduced by this measure are unwieldy. Whilst we understand that there needs to be terms introduced that differentiate advisers from registered tax and BAS agents, as well as the services that they provide, it is our opinion that different and easier terms could be used. However, we welcome the improvements that have been made in the Proposed Schedules, compared to the exposure draft and previous papers.

We continue to recommend that these terms should be changed to something simpler, or that there are shorter or more user-friendly terms created as alternatives.

Consumer disclosure

AIST and ISN have concerns about the messages that are to go to investors under the new regime. We are concerned that there appears to be different entities that are responsible for the tax advice, depending on the licensee's obligations.

In our submission on the exposure draft[3], we pointed to the issue that the explanatory memorandum to the exposure draft provides little or no information to enable us to ascertain who is responsible for the advice that is being provided. This is confusing enough for risk, compliance, legal or advice professionals, but more importantly, this is completely unacceptable for mum and dad investors, who simply must know at the commencement of dealings with an adviser, exactly who is responsible for the advice, that is being provided.

Some discussions with ASIC and the TPB appear to indicate that the regulators see responsibility as similar sheets from different documents.

We are concerned, for example, that disclosure in the form of FSG statements and the like are seen by lawmakers and regulators alike as a tool that is used to discharge a licensee's obligations under the Corporations Act. We are certain that we do not need to remind the Committee that the function of these disclosure documents is to let mum and dad investors know who is actually responsible for the advice that they are receiving.

We recommend that a simple statement along the lines of, 'XXX will be responsible for the tax advice provided,' be included in the explanatory memorandum to make this clear to all. In addition, we strongly recommend that guidance be issued by the corporate regulator, ASIC, preferably in conjunction with the TPB, to ensure that investors are not misled, particularly with regards to disclosure documents including, but not limited to, FSGs, product disclosure statements (PDSs) and statements of advice (SOAs).

In addition, AIST and ISN strongly recommend that a similar approach be taken with regards to external dispute resolution processes to ensure that investors are not unnecessarily inconvenienced when attempting to resolve complaints.

TASA and adviser's best interest duty

AIST and ISN are concerned that there appears to be little detail about how the requirement to work under the TASA regime will interact with the adviser best interest duty.

This has been written about at length, by others, however, most pressing is the issue that existing guidance from ASIC (RG 175[4]) suggests that a regime where one adviser is responsible for the advice as a whole and another may be responsible for tax advice, cannot work in concert with the adviser's best interest duty.

---

[3] AIST and ISN. 2013. *Creating a regulatory framework for tax advice (financial product) services*. [pdf] Melbourne: Australian Institute of Superannuation Trustees, Industry Super Network. http://tinyurl.com/cjzofep [Accessed: 13 Jun 2013].

[4] ASIC. 2012. *Regulatory Guide 175: Licensing: Financial product advisers — Conduct and disclosure (RG 175)*. [pdf] Canberra: Australian Securities and Investments Commission. Available through: asic.gov.au http://tinyurl.com/b6ufrpb [Accessed: 14 Jun 2013]

The major sticking point to this incompatibility is the safe harbour rules under section 961B of the Corporations Act which, under subsection (2)(d), would ordinarily require an adviser to decline to provide the advice if they did not have the expertise to provide the advice themselves.

Complicating this is the view of ASIC, that they believe a licensee and their representatives have complied with the Corporations Act (and are therefore competent to provide advice) if the guidance from RG 146[5] is complied with. It is already well established that RG 146 is insufficient with respect to tax law education to be eligible for registration with the TPB, and therefore, in the opinion of the TPB, not competent to provide this part of the advice.

The most obvious example of how this inconsistency may present itself, is where a hypothetical AFS licensee which is unregistered with the TPB presents an SOA to an investor that contains advice of a tax nature. Leaving aside obvious breaches of TASA, if the adviser and their client are appropriately trained under RG 146 and competent to provide this advice: Is the suggestion that, in the view of ASIC, the adviser has acted in the client's best interests?

We suspect that the answer to this would be no, which, whilst appropriate to consumers, would be inconsistent with statements that have been made by ASIC on this subject.

AIST and ISN urgently recommend that this inconsistency be resolved with definitive statements that address adviser requirements both in TASA and under the Corporations Act. We recommend that RG 175 be re-written to ensure that appropriate guidance is provided on this subject. We further recommend that both regulators work together to provide guidance with regards to training requirements of advisers specified in RG 146 and elsewhere to ensure that any mixed messages are appropriately qualified.

Long-term requirements/future state

AIST and ISN mentioned in our submission on the exposure draft that it is likely that registered tax (financial product) advisers will be held to similar initial and ongoing eligibility criteria as registered tax agents, with the exception of slightly reduced registration fees, as well as slightly different experience requirements. We have since welcomed the draft guidance issued by the TPB around marginally reduced expectations for education in taxation law.

However, we are not yet of this opinion that this goes far enough.

In order to provide an appropriate value dividend to financial advisers, it is ordinarily the case that a carrot will be provided, as well as a stick. In this context, it is accepted as a given that advisers may work under one of two registration types from the TPB: that of ordinary registered tax agents, and that of the new registration type, registered tax (financial) adviser.

[5] ASIC. 2012. *Regulatory Guide 146: Licensing: Training of financial product advisers*. [e-book] Canberra: Australian Securities and Investments Commission. Available through: asic.gov.au http://tinyurl.com/msehxql [Accessed: 14 Jun 2013]

Based on existing guidance, as well as recently released draft guidance[6], we note the following general initial requirements for eligibility, assuming two practitioners who have non- accounting degrees, and are not members of the three accounting associations:

Requirement	**Registered Tax Agent**	**Registered Tax (Financial)Adviser**
Course in accounting concepts or similar	✓	✓
Course in commercial law	✓	✓
1 semester course in taxation law	✓	✓
Additional semester course in taxation law	✓	✗
Must have 12 months full time experience in the previous five years	✓	✓
Must be AFS licence or be representative of a licensee	✗	✓

In return for these requirements, the EM to the Bill specifies the following privileges will be available to registrants:

Privilege	**Registered Tax Agent**	**Registered Tax (Financial)Adviser**
May ascertain a client's tax liabilities	✓	✓
May advise a client about their tax liabilities and potential tax liabilities	✓	✓
May represent a client in dealing with the Commissioner of Taxation	✓	✗

[6] tpb.gov.au. 2013. *TPB(PG) D04/2013 Australian tax law for tax (financial product) advisers*. [online] Available at: http://tinyurl.com/lqdzm8k [Accessed: 14 Jun 2013]

Although the new registration type may come with a slightly reduced registration fee and slightly reduced tax law education requirements, this is in exchange for reduced privileges compared to ordinary registered tax agents. On top of this, there will be increased compliance requirements compared to registered tax agents, who are not required to provide AFS licence information to support their registration. We believe that this may drive a significant portion of advisers to seek registration as ordinary registered tax agents, rather than as registered tax (financial product) advisers.

We highlight this in passing, as it appears to be an unintended outcome, however AIST has indicated in previous correspondence that it would have great difficulty recommending the new registration type to its members without a greater value proposition.

Cost

AIST and ISN point out the obvious problem with this measure in that there are additional costs to be borne by licensees. These costs are actually difficult to ascertain, as there does not appear to be guidance yet as to how many staff at a licensee need to be licensed, but we believe that these could be substantial.

Our organisations work under an AFS licence regime to which this notion of supervision is new. How many advisers can be 'supervised' by each registered tax (financial) adviser?

A more fundamental question is that of supervision itself. What is this? Is it an adviser's direct supervising manager? Is it a pre-vetting process where SOAs are sent to an adviser for sign-off? Is it a centralised office, akin to the responsible managers to an AFS licence? Or is it like the Audit partner in an accounting firm, who is said to supervise an entire division of auditors? What is a 'significant number'?

AIST and ISN recommend that more concrete rules be set with regards to this fluid notion so that more accurate costing can be undertaken by licensees.

The Board

Our organisations wish to point out a final issue, and this is the representation on the Tax Practitioners Board itself.

We understand that traditionally, the Board has regulated the activities of tax and BAS agents, who are traditionally accountants. The new registration type means that this will change and the community of registered tax and BAS agents will now feature members who are not accountants.

Likewise, this means that the composition of the TPB must also change. AIST and ISN therefore wishes to take this opportunity to call for representation from financial practitioner organisations on the Board.