Australian Government

Regulation of tax agent services provided by financial planners

Options Paper
November 2010

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CONSULTATION PROCESS

Request for feedback and comments

The Government seeks the views of interested parties on the options presented in this paper for the regulation of tax agent services provided by financial planners in the context of their financial planning services. To assist those wishing to make a submission, questions for consultation are at page 18. However, you should feel free to address any issue raised in this paper, and should not feel obliged to address every question.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like all or part of their submission to remain in confidence should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982* (Cth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

Closing date for submissions: 25 December 2010

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ACRONYMS

AFSL	Australian Financial Services Licence
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
BAS	Business Activity Statement
Board	Tax Practitioners Board
Corporations Act	*Corporations Act 2001*
EM	Explanatory Memorandum
Licensee	AFSL holder
Regulations	Tax Agent Services Regulations 2009
SMSF	Self managed superannuation fund
TAS regime	Tax agent services regime
TASA	*Tax Agent Services Act 2009*

FOREWORD

I am very pleased to release this options paper on the 'Regulation of tax agent services provided by financial planners'.

On 23 April 2010, the Government announced that it would seek the public's view on the most suitable regulatory oversight arrangements for tax agent services and advice provided by financial planners.

This paper sets out two possible options that could be used to regulate these services. The Government is committed to consultation as stakeholder and community consideration is vital to the development of policy options and their implementation.

Tax agents and financial planners provide services to many individuals and entities. Appropriate regulation of these services is essential to uphold the quality of service and ensure strong consumer protection.

This paper also addresses the implementation of the possible options and I welcome feedback from all areas of industry and the community.

The Hon Bill Shorten MP
Assistant Treasurer and Minister for Financial Services and Superannuation

INTRODUCTION

On 23 April 2010, the Government announced that it would defer the application of the tax agent services regime (TAS regime) to financial planners that provide tax agent services.[1] The purpose of the deferral is to allow for consideration of the most suitable regulatory oversight arrangements for tax agent services and advice provided by Australian Financial Services Licence (AFSL) holders.

The Government announced that two possible options would be considered:

Option	Description
1. Regulation within the TAS regime	Tax services provided by financial planners could be brought permanently within the TAS regime, with minimal additional compliance burden.
2. Comparable regulatory supervision by Australian Securities and Investments Commission (ASIC)	The AFSL regime could provide regulatory supervision of tax services provided by financial planners that is comparable to the supervision of providers of tax services regulated by the Tax Practitioners Board (the Board)

The Government is committed to well-designed regulation that achieves the policy objective in a manner that minimises costs for business and the community. The desired outcomes, regardless of which option is adopted, are:

- appropriate protection for consumers
- certainty for financial planners, tax agents and clients in the community; and
- integrity in the regulation of tax and financial services.

The consideration of options should be anchored in policy principles relevant to the AFSL and TAS regimes.

This paper forms the basis for consultation on options to determine the most suitable regulatory oversight arrangements for financial planners that provide tax agent services in the context of their financial planning services, where financial planners are AFSL holders (licensees) and are therefore already subject to some regulation by ASIC. The paper also outlines the current regulatory arrangements for financial planners and tax agents.

1 Former Assistant Treasurer, Senator the Hon Nick Sherry — see Media Release No. 72 of 23 April 2010.

OVERVIEW

The *Tax Agent Services Act 2009* (TASA) established the Board to administer the system for the registration of tax agents and Business Activity Statement (BAS) agents, and impose sanctions for non-compliance with the Code of Professional Conduct. Entities providing tax agent services must register with the Board.

A tax agent service is not limited to the completion of a tax return or a service that involves the agent interacting directly with the Australian Taxation Office (ATO) on a client's behalf. Tax agent services include determining or advising an entity about liabilities, obligations or entitlements that arise under taxation laws where the entity receiving the services can expect to rely on them to satisfy their obligations or requirements under the taxation law, or claim entitlements under a taxation law. A tax agent service does not include advice that is reasonably relied upon for purposes other than to satisfy tax obligations, for example, making an informed financial decision.[2]

Particular services can be exempted from the regime through the Tax Agent Services Regulations 2009 (the Regulations), for example, an exemption has been made under the Regulations for services provided by an auditor of a self managed superannuation fund (SMSF).

ASIC currently regulates all functions of financial planners. The financial services regime is established in the *Corporations Act 2001* (Corporations Act) which allows licensees to provide financial product advice, including advice on the tax implications of financial products. To ensure that adequate standards of advice are provided, the financial services regime requires licensees to be sufficiently skilled by completing courses and possessing knowledge of relevant tax laws and the tax system.

Broadly, financial product advice includes providing a recommendation or statement of opinion that is intended to influence a person in making a decision about a financial product. Superannuation is also considered to be a financial product. Information about the tax implications of decisions in relation to financial products is a core part of financial advice that appropriately suits the needs and circumstances of the client.

A number of services are excluded from the AFSL regime, for example, persons providing taxation advice, such as registered tax agents, or persons providing advice in relation to the establishment or winding up of a SMSF are not required to hold an AFSL.

The TAS regime and the AFSL regime both address tax related services — the provision of tax agent services and advice on financial products that extends to the tax implications of that product. The potential overlap in the scope of 'financial services' and 'tax agent services' creates uncertainty for tax agents, financial planners and their clients. As the provision of a tax service may be an extension of financial product advice, and may be a necessary part of providing well considered and comprehensive advice to clients, the application of the two regulatory regimes to these services should be carefully examined within a broader regulatory context.

This paper explores how the AFSL regime and TAS regime apply to certain services provided by a licensee. Furthermore, the paper addresses the benefits of regulation for professionals, clients and the community while presenting options that seek to minimise regulatory burdens.

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2 Paragraph 2.36 in the Explanatory Memorandum (EM) for the Tax Agent Services Bill 2009.

THE TAX AGENT SERVICES REGIME

The new national regulatory regime for tax agents and BAS agents commenced on 1 March 2010. The broad objective of the new regime is to ensure that tax agent services are provided to the public in accordance with appropriate professional and ethical standards. A sound regulatory environment provides confidence to the public and certainty to the entities providing tax services. The integrity of the tax system and tax industry is also strengthened by regulating and disciplining tax agents fairly and consistently. Another important aspect of the regime is that it governs BAS agents in the same manner as tax agents, although they can only provide a limited range of services related to BAS provisions in the law. Tax agent services provided by professionals such as payroll providers, research and development specialists and quantity surveyors, as a minor part of their primary services, are also subject to the TAS regime.

To provide tax agent services for a fee to the public, an entity must be registered with the Board. The registration requirements are designed to assure the public that the provision of tax agent services is carried out by a fit and proper person with a certain standard of qualifications and experience. The Board issues advice in relation to the factors taken into account to determine if a person is a 'fit and proper' person, and the educational eligibility requirements for different types of registration. Educational requirements are set by the Board in consideration of the Australian Qualifications Framework and the ongoing competency outcomes desired for the registrants.

The Board is supported by a secretariat and relies, to a significant degree, on information held by the ATO to assist in compliance and registration activities. For example, the Board may seek information about the compliance history of a tax agent or their level of public debt for the purposes of assessing registration applicants and ongoing fitness and propriety requirements. Information exchange is possible, as the TASA contains secrecy and disclosure provisions that allow ATO information to be used for the purposes of the TASA and its associated regulations.

TAX AGENT SERVICES

A tax agent service provided by a registered tax agent is any service that relates to:

- ascertaining or advising about the liabilities, obligations or entitlements of an entity under a taxation law; or
- representing an entity in their dealings with the Commissioner of Taxation (the Commissioner); and

that is provided in circumstances where it is reasonable to expect that the entity will rely on it to satisfy liabilities or obligations under a taxation law or to claim entitlements under a taxation law.

As tax agent services involve the application or interpretation of a taxation law, the provider is required to have a certain level of knowledge and experience in the taxation laws.

Examples of a tax agent service include:

- preparing or lodging a return, notice, statement, application or other document about a client's liabilities, obligations or entitlements under a taxation law;

- giving a client advice about a taxation law that they can reasonably be expected to rely upon to satisfy their taxation obligations;
- ascertaining the withholding obligations for the employees of a client, including the preparation of payment summaries; and
- corresponding with the Commissioner on behalf of a taxpayer as the taxpayer's representative.

The Board may impose conditions on an entity's registration to limit the subject area in which they may provide tax agent services. This mechanism allows individuals with relevant experience in a particular area of tax law or a particular type of tax agent service to be eligible for registration and practice in their area of specialty, but not elsewhere.

Regulations specify that some services are not tax agent services. In addition to the exemption for auditors of SMSFs, other exemptions for services provided by custodians and between entities within the same group have recently been introduced. The Regulations also exempt licensed financial planners from the TAS regime until 30 June 2011.

PROFESSIONAL CONDUCT

Tax agents regulated by the TAS regime have obligations under a Code of Professional Conduct that prescribes the standard of personal and professional conduct expected of a registered tax agent. Tax agents are required, amongst other things, to:

- take reasonable care to ensure that the taxation laws are correctly applied to the circumstances in which they are providing advice to a client;
- not knowingly obstruct the proper administration of the laws;
- advise clients of rights and obligations under the taxation laws that are materially related to the services provided; and
- maintain knowledge and skills relevant to the tax agent services they provide.

If a registered tax agent fails to comply with the Code of Professional Conduct the Board may, following an investigation, issue a written caution, make an order requiring education or supervision, or suspend or terminate the agent's registration. Furthermore, in cases of serious misconduct the Board may also apply to the Federal Court of Australia for an order for the agent to pay a pecuniary penalty or to seek an injunction to prevent the tax agent from engaging in certain conduct.

The Board may address tax agent services provided by unregistered entities. Civil penalties can be imposed by the Federal Court on the application of the Board when unregistered entities provide tax agent services, or advertise or represent that can provide tax agent services. This is an important aspect of the regime, ensuring that tax agent services are delivered by suitably qualified entities and that consumers can trust that their tax agent is competent.

Another key feature of the TAS regime is the use of 'safe harbour' provisions to ensure that taxpayers with agents will not be subject to administrative penalties imposed by the ATO in certain circumstances, such as where a document is not lodged on time due to the tax agent's carelessness.

Overall, the TAS regime provides comprehensive and appropriate oversight of the provision of tax agent services and includes a mechanism for protection of consumers.

FEES

The Regulations include fees of:

- $500 — for registration as a tax agent who carries on a business as a tax agent.
- $250 — for registration as a tax agent who does not carry on a business as a tax agent.

The registration is for a period of at least three years.

Features of the TAS regime

- regulated by the Tax Practitioners Board which is empowered to take disciplinary action;
- entities must be registered to provide, for a fee, tax agent services that can be relied upon;
- includes a Code of Professional Conduct featuring tax specific obligations;
- competency, educational and experience requirements for tax agents providing tax agent services;
- Board can limit registration to particular services;
- requirement to have professional indemnity insurance;
- safe harbour for taxpayers (that is, taxpayer is not subject to administrative penalties in certain circumstances);
- explicit exclusion of certain services; and
- fee paid covers at least three years of registration.

FINANCIAL SERVICES LICENSEES IN RELATION TO THE TAS REGIME

The EM for the Tax Agent Services Bill 2009 discussed the nature of tax related services that may be provided by a financial planner and how they relate to the definition of tax agent services. Paragraph 2.36 of the EM stated:

> Where it is reasonable to expect that advice is to be relied upon for purposes other than to satisfy tax obligations (e.g. for the preparation and lodgement of a return), 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.

The use of the concept of 'reliance' — where a person is relying on advice in order to make a decision or take action — may indicate that the advice they are receiving should come from a source that has appropriate competency in the particular subject matter. This approach would be consistent with the rationale for establishing the TAS regime, namely to ensure that tax agent services are provided in accordance with professional standards. It is also a reason that other professions are regulated.

The EM (paragraph 2.36) includes a number of examples (2.7 to 2.10) that attempt to illustrate when tax related advice that is delivered as part of financial advice may not be caught by the TAS regime. The examples also illustrate when these services may be caught by the TAS regime as they are not 'incidental' to other advice and will be relied upon to satisfy tax obligations. Unfortunately the EM and examples have created uncertainty for licensees and tax agents as to exactly what parts of financial product advice could be caught by the TAS regime.

AUSTRALIAN FINANCIAL SERVICES REGIME

The *Financial Services Reform Act 2001* (the Act) put in place a regulatory framework, now part of the Corporations Act, for harmonised licensing, disclosure and conduct for financial products, financial markets and financial services providers.

Paragraph 1.5 of the EM states that the Act will:

> put in place a competitively neutral regulatory system which benefits participants in the industry by providing more uniform regulation, reducing administrative and compliance costs, and removing unnecessary distinctions between products. In addition, it will give consumers a more consistent framework of consumer protection in which to make their financial decisions. The Bill will therefore facilitate innovation and promote business, while at the same time ensuring adequate levels of consumer protection and market integrity.

The Corporations Act and relevant regulations realise these objectives and creates a single licensing regime for financial sales, advice and dealings in relation to financial products. The regime covers a range of financial products including securities, derivatives, general and life insurance and superannuation.

The regulatory regime will continue to develop as the Government implements the *Future of Financial Advice* reforms, announced in April 2010. These reforms are designed to improve the quality of financial advice and strengthen investor protection, thereby underpinning trust and confidence in the financial advice industry.

In addition to complying with obligations under the Corporations Act, a licensee must also comply with other financial services laws, including the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* and (where engaging in regulated credit activities) the *National Consumer Credit Protection Act 2009*.

Under the AFSL regime an entity must be a licensee in order to carry on a business providing financial product advice. Licensees must comply with a number of general obligations (under sections 912A and 912B of the Corporations Act) including:

- doing all things necessary to ensure that the financial services covered by an AFS licence are provided efficiently, honestly and fairly;
- complying with AFSL conditions and financial services laws;
- maintaining competence to provide financial services; and
- having adequate risk management systems and compensation arrangements in place.

In addition, licensees must comply with conduct obligations under Parts 7.6, 7.8 and 7.10 of the Corporations Act including:

- notifying ASIC of significant breaches or likely breaches of certain licensee obligations;
- assisting ASIC in its regulatory oversight of the licensee (such as producing books or providing information as requested); and
- complying with procedures relating to client money.

As part of providing comprehensive and accurate personal financial product advice, a licensee must:

- make reasonable inquiries into the relevant personal circumstances of the client and have a reasonable basis for the advice (section 945A of the Corporations Act);
- warn the client if the advice is based on incomplete or inaccurate information (section 945B of the Corporations Act); and
- give the client a Statement of Advice as defined in section 761A of the Corporations Act if the financial investments to which the advice is provided exceeds $15,000.

In Regulatory Guide 175.118, ASIC makes it clear that where the advice relates to a financial product with an investment component, the 'relevant personal circumstance' of the client will usually include their 'tax position, social security entitlements, family commitments, employment security and expected retirement age'.

A licensee should have sufficient general knowledge of the tax laws to identify other material tax issues that the client may need further advice on. ASIC Regulatory Guide 175 addresses two possible approaches a licensee could apply when there are tax implications that the client should consider that are beyond the competence of the licensee, as may be the case with complex tax issues. These approaches are:

- the advice can be based on competent tax advice given to the client by someone else; or
- the advice can be limited to those matters on which the licensee is competent to advise, and the client can seek tax advice from an entity that is competent in the required area.

The ATO has issued Taxpayer Alerts (for example TA 2009/13) in instances where licensees (or authorised representatives of licensees) have been involved in the design and promotion of schemes claiming that participants are entitled to certain tax deductions, however, in reality these tax benefits are not likely to be available at law. The expected outcome may have been concluded without taking into account more complex tax laws such as holding period rules relevant to dividend and capital gains tax claims. As a result, the taxpayer may be left with a tax debt.

This is an example of where the tax competency of a licensee who does not comply with the TASA requirements may not be suited to complex tax outcomes.

The training requirements for financial product advisers are outlined in ASIC Regulatory Guide 146 that sets out the knowledge and, in some cases, skill requirements that must be satisfied by licensees. All advisers must have training that provides them with 'generic knowledge' and, where relevant, they must engage in more specialist courses. For instance, it is recommended that financial planners acquire specialist knowledge for superannuation.

Financial planners are expected to apply the knowledge listed under the 'financial planning' category as well as the 'superannuation' category in the Regulatory Guide:

Category of advice	Tax related knowledge required
'Financial Planning'	• Australian taxation and social security systems; • relevant taxation laws and regulations; • effects of taxation on particular financial products; and • effects of taxation on financial strategies of individuals and entities.
'Superannuation'	• investment savings; • employer and employee contributions; • benefit payments and expenses; • tax deductions; • capital gains tax treatment; • roll-overs; • reasonable benefits limits; • superannuation surcharge; • social security pension eligibility; • retirement planning; • death benefits; and • franking credits.

The broad range of tax technical knowledge in the 'financial planning' and 'superannuation' categories is a core part of training required for a financial planner to provide appropriately tailored advice to clients.

The Corporations Act does not specifically require licensees to give tax advice. However, it does require that advice given be appropriate to the client, taking into account the client's personal circumstances. Also, a licensee must consider the point at which a tax related issue is beyond their scope and expertise, and should not be given. Tax agent services provided by licensees in the course of financial advice may include:

- considering the tax deductibility of interest costs and ongoing eligibility for family tax benefits in the context of providing advice on the feasibility of accumulating wealth through a gearing strategy;
- providing advice on the taxation benefits of salary sacrificing into superannuation in the context of a broader strategy to increase retirement savings;
- providing advice on the relative merits of taking out life insurance policies both within and outside superannuation, having regard to the taxation consequences of doing so; and
- providing advice on small business capital gains tax concessions as a means of maximising contributions into superannuation.

If a licensee is found to have breached their licence obligations, ASIC is able to revoke or suspend a licence or impose additional licence conditions (section 915C of the Corporations Act). The financial services regime also requires licensees to have arrangements in place to compensate retail clients for losses they suffer as a result of the licensee's breach of obligations under the regime. The arrangements are designed to reduce the risk that the licensee cannot meet claims for compensation due to insufficient financial resourcing. Importantly, they do not protect consumers from product failure or general investment losses. Most licensees satisfy the requirement by having professional indemnity insurance.

The *Future of Financial Advice* reforms will involve significant changes to the Act that would impact on financial planners. The key reforms include a ban on conflicted remuneration structures in relation to the distribution of financial advice and retail investment products, and a statutory fiduciary duty requiring financial advisers to act in the best interests of their clients, subject to a 'reasonable steps' requirement. There will also be measures aimed at improving access to advice, which is a central objective of the reforms.

EXCLUSIONS

Some services and transactions are not considered to be financial services and are specifically excluded from the financial services regime, meaning that a person does not need to hold an AFSL to provide these services or undertake these transactions.

Advice provided by lawyers and registered tax agents as part of the ordinary course of their respective professions is specifically excluded from the definition of financial product advice in the Corporations Act.

ASIC guidelines also indicate that one-off transactions relating to the provision of financial services and financial products are not likely to be covered by the regime. Furthermore, various 'exempt services' are listed in regulation 7.1.29 of the Corporations Regulations 2001 which detail the circumstances in which a person is taken not to be providing financial services. These circumstances

include the provision of 'advice to another person on taxation issues including advice in relation to the taxation implications of financial products'.

Similarly, advice provided in relation to the management of a superannuation fund is not considered to be a financial service and is therefore not overseen by the financial services regime. Therefore, in practice, accountants who are not licensees can provide advice on the establishment and winding up of a SMSF, but in order to provide advice on the operation of the SMSF they would require an AFSL. On 26 April 2010 the Government announced that the exemption for accountants from the AFSL regime will be removed. In June 2010 the Super System Review chaired by Jeremy Cooper recommended that accountants advising on SMSFs be licensed under the same rules that apply to financial planners. The Government is concerned that this exemption does not provide an appropriate framework for advice in relation to SMSFs and superannuation more generally. The Government has committed to consult with industry on an appropriate alternative to the current exemption, including a potentially streamlined licensing regime.

While tax is obviously a part of providing comprehensive tailored financial advice to a client, the financial services regime does not generally extend to regulation of advice about taxation implications.

FEES

Licensees face an initial application fee as part of the process of becoming a licensee. The fee structure depends on whether the applicant uses an on-line form or a paper form and ranges from $154 (for an individual applying online) to $556 (for a body corporate applying using a paper form).

The licensees are also required to lodge an annual report each year (Form FS70) which attract a lodgement fee.

This effectively gives licensees an annual fee of:

- $139 for individuals; and
- $340 for a body corporate.

ASIC'S REGULATORY ACTIVITIES IN RELATION TO TAX

Beyond the tax related training requirements for licensees, ASIC has no specific on-going focus in determining that tax related advice provided by financial planners is provided competently. ASIC's focus is on the appropriateness and quality of financial product advice. When conducting compliance activities, ASIC does not make an assessment about the accuracy or quality of the tax related component of the financial advice, but whether the licensee has sufficient tax skills to be advising clients on tax aspects of financial advice.

Therefore, should the licensee be considered to have sufficient tax skills but does not detect that the advice is incorrect, there may be no resulting action requiring a licensee to improve their knowledge or undertake additional education. ASIC would be required to build capacity to undertake tax related regulatory activities such as compliance reviews in order to ensure that competency requirements are met and maintained.

Features of the AFSL regime

- regulated by ASIC which is empowered to take disciplinary action;
- includes a Code of Conduct;
- competency requirements;
- entities must be licensed to provide financial product advice;
- services provided by licence holders are limited to financial product advice;
- licensees must have arrangements in place to compensate retail clients for losses they suffer as a result of a breach of the licensee's obligations under the AFSL regime;
- requirement to have professional indemnity insurance;
- explicit exclusions from the regime include provision of advice about tax implications of financial products and managing SMSFs; and
- fee paid for application to become licensed, followed by payment of annual fee.

WHAT DOES THIS MEAN FOR A LICENSEE WHO PROVIDES TAX RELATED ADVICE?

In summary, a licensee:

- must complete training that includes tax related subjects;
- can provide advice to a client in relation to financial products;
- should have sufficient general knowledge of the tax laws to identify other material tax issues that a client may need further advice on, and may refer a client to another person who is competent to provide that tax advice; and
- can provide limited (or incidental) advice to a client on the taxation implications of financial products.

The AFSL regime is designed to operate by including tax as an important part of a client's financial circumstances, but indicates that tax advice is not the core task of a financial adviser, evidenced by the explicit exclusion of tax related advice and the exclusion of advice provided by registered tax agents. This position is mirrored, to an extent, in the EM for the TASA. The current scope of services of each regime means that licensees could possibly provide a limited range of tax agent services (that is, advice to an entity about liabilities, obligations or entitlements that arise under taxation laws) that would not be subject to the TAS regime and these services would not be scrutinised by ASIC. This

outcome and the associated risks for consumers, the financial services industry and the tax agent profession indicate that greater consumer protection is required.

COMPARISON OF REGIMES

The AFSL regime and the TAS regime have several common features. Each seeks to regulate a profession by prescribing standards and obligations within a scope of services to be provided to clients who have some level of protection under the regimes.

Features common in both regimes

- Code of Conduct;
- training and competency requirements;
- licensing requirements and fees;
- professional indemnity insurance;
- consumer protection mechanisms; and
- exclusion of specific services from the regime.

These basic features of the regulatory systems provide tangible benefits to the community and professionals. However, they also make it clear that if a person is subject to the full requirements of both regimes, the duplication and resulting compliance burden would be high, not only in fees, but in relation to training and competency requirements. The high level of duplication presents an opportunity for some form of streamlined regulation of individuals and other entities subject to both regimes.

POLICY CONSIDERATIONS

The policy objective for the tax agent services regime and the AFSL regime is to ensure the provision of quality services to clients who can trust the service and be assured that if the service is inferior or incorrect, there are options for recourse. The quality of advice is at the heart of the TAS regime, just as the quality of financial product advice is central to the AFSL regime.

The purpose of this paper is to help identify and assess an appropriate regulatory regime for tax agent services provided by financial planners. The options should be examined having regard to:

- the need for consistent consumer protection across tax agent services and financial planning services;

- avoiding duplication of regulation and costs for those who are affected by both regimes;
- the benefits to Government, industry and consumers of efficient and effective administration; and
- the costs to government, industry and consumers of the regulatory structure to be put in place.

Within this broad policy context, relevant questions for consideration include:

- Will the outcome ensure that consumers (whether businesses or individuals), as paying clients of providers of tax agent services embedded in financial planning services, receive correct and reliable advice on both counts? If this does not occur will there be a mechanism and process to address the situation?
- What would be the resulting compliance burden for financial planners?
- What would be the resulting regulatory and cost impact on the bodies that regulate these services?

REGULATORY OPTIONS

As noted earlier, two options are being considered in relation to the regulation of tax advice provided by financial planners. Not regulating these tax services is not being considered as it is inconsistent with the policy objectives of the regulatory regimes and would reduce consumer protection and confidence more generally.

Option 1 — Regulation within the tax agent services regime

Tax agent services provided by financial planners would remain within the TAS regime, provided that this imposed minimal additional compliance burdens on them.

Licensed financial planners would be given registration as a tax agent with conditions imposed to limit the tax agent services they are able to provide to those connected to the provision of financial planning advice. Holding an AFSL would make registration for TASA largely automatic, provided that the planner had relevant experience and/or qualifications as determined by the Board. A notification to the Board would still be required to allow the Board to undertake registration activities and a reduced or nominal fee may be payable.

Option 1 provides an avenue for financial planners to be regulated under the TAS regime and thus ensures that the tax services supplied in connection with the provision of financial advice are regulated in line with all other tax agent services.

If a financial planner's education and training gives them appropriate skills to provide tax services that a consumer may rely on, then any licensing/registration requirements within the TAS regime could be streamlined and made cost effective. Should a financial planner not hold the requisite tax knowledge, a transitional period could be used to provide time for financial planners to gain

qualifications and increase their knowledge and experience. A similar transitional period was put in place for tax agents moving from the old regulatory scheme to the new national regime, and for BAS agents who were previously unregulated, but are now within the TAS regime.

The common features of the TAS and AFSL regimes would allow for simplified registration processes that would be enhanced through a cooperative relationship and small scale information exchange between the Board, the ATO and ASIC. The compliance burden that would otherwise be experienced by people subject to both regimes could be significantly reduced under this approach. For example, an agreed set of basic tax related educational requirements could be implemented for registration purposes, a reduced fee structure could be used, and a simplified registration process could be developed.

Example — Possible implementation of Option 1

Justin is a financial planner who holds an AFSL and wishes to provide limited tax advice as part of the financial advice he provides to clients.

As he already holds an AFSL, he will have satisfied the educational requirements for a limited type of TAS registration specifically designed for financial planners. This avenue into the TAS regime will allow him to provide some tax services to clients as part of his financial advice services.

The Board would regulate his personal and professional conduct as a special class of registered 'tax agent', and investigate any possible failure to comply with registration requirements such as the Code of Professional Conduct, and impose sanctions as appropriate.

Protocols between the Board and ASIC would ensure coordinated regulation and compliance activities.

Although a licensee would be subject to two codes of conduct, as a key feature of each regime, these obligations are similar in nature. It is important that a licensee be subject to the TASA Code of Professional Conduct as it contains tax specific obligations and underpins the obligations that providers of tax agent services must comply with. To maintain credibility and professional standards each regime must still be empowered to take action where a breach of the relevant code of conduct has occurred or where a matter requires investigation. Consideration could also be given to the extent to which the two codes could be brought together, reducing the obligation to comply with two codes that bear a high degree of similarity.

Consideration would also be required as to the level of professional indemnity insurance that would cover licensees who are within both regimes. The Board has discretion to not impose additional professional indemnity requirements on tax agents who may have other satisfactory insurance arrangements in place.

Currently, the Board may grant registration to an entity imposing limitations on the services that the registered entity can provide to a client. This model could be used to provide a limited legislated special class of registration to licensees to enable them to provide some tax services that are necessary to the provision of quality financial advice that can be relied upon by consumers. The class of registration would not allow a financial planner to provide the full services provided by a tax agent who is registered with the Board. Should a financial planner wish to provide a broader range of tax services than those inherent in the financial planning they provide, they would need to apply for registration as a tax agent, for example as a non-conditional tax agent.

Overall, the strength of Option 1 is that there are identifiable entry and exit points to an existing regime that has tax expertise, and appropriate and streamlined registration mechanisms could be developed. The costs for registration would be determined at an appropriate level for people registering under two regimes. From an administrative perspective, registration systems are in place and the Board is empowered to create a special class of registration for professionals subject to dual registration. The Board would have responsibility for regulating all tax agent services regardless of the nature of the profession providing the service.

ADVANTAGES AND DISADVANTAGES OF REGULATION WITHIN THE TAX AGENT SERVICES REGIME

Advantages	Disadvantages
• All tax agent services would be regulated by the Board.	• Licensee would interact with either ASIC or the Board depending on the issue.
• An agreed set of educational requirements would be developed by the Board.	• Licensee could pay two fees (although there is an option to only apply a nominal fee for TAS registration, or waive it).
• Safe harbour provisions would be available to clients of registered tax practitioners.	• Licensee would be subject to both Codes of Conduct.
• A limited class of registration would clearly define the tax services that a licensee can provide.	• Clients may not be able to distinguish between a financial planning service and tax agent service, and if redress is necessary they may not know which regulatory body is responsible for handling the complaint.
• Registration and other administrative systems are already in place.	• Any additional costs imposed on financial planners could flow through to consumers.
• The Board is comprised of members with tax expertise.	

Option 2 — Comparable regulatory supervision

Change the AFSL regime to provide regulatory supervision, in relation to tax agent services provided by financial planners, that is comparable to the supervision of providers of tax agent services regulated by the Board.

Under Option 2 tax agent services provided by a licensed financial planner in connection with financial planning advice would be excluded from the TAS regime and regulated by ASIC.

The core services provided under the AFSL regime are concerned with financial products and advice. ASIC holds considerable expertise to efficiently and effectively regulate these core services. This option proposes that ASIC provide supervision of tax agent services provided in the course of financial advice in a manner that is comparable to the supervision that would be provided by the Board.

While ASIC possesses significant technical expertise in relation to finance and markets, it does not have expertise in the areas of the tax law that would enable effective regulation of tax services provided by a licensee. If ASIC supervised providers of tax services to a level comparable with that provided by Board, it would require significant duplication of the role and activities of the Board from the point of registration to ongoing activities such as investigations. Some assistance and advice from the Board may be required in relation to areas where the Board has discretion, for example educational requisites. Cooperation would be essential to ensure that regulation is consistent.

Supervision comparable to that provided by the Board may require:

- expanding the financial planners' Code of Conduct to include tax specific requirements and to ensure appropriate sanctions, including termination, are in place. Consideration could also be given to developing a uniform code of conduct regarding tax agents and financial planners;

- development of an expanded range of educational and competency measures and requirements that provide suitable grounding in tax;

- determination of the appropriate professional indemnity insurance required for professionals providing financial services and tax services;

- application of safe harbour rules to clients who acquire tax agent services from licensees;

- information exchange between the Board, the ATO and ASIC to facilitate appropriate comparable supervision by ASIC; and

- referral mechanisms to exist between the Board, the ATO and ASIC where investigations or audit activities need to be addressed by the relevant regulatory regime.

The advantage of Option 2 is that a licensee need only interact with one regulatory body and pay one fee. A clear set of guidelines and requirements for financial planners would emanate from ASIC, to the extent that the focus of the services provided are related to financial services.

This approach is appropriate only where the scope of tax services provided by a licensee and regulated by ASIC is limited. ASIC supervision of all providers of tax services who are financial planners, for example a licensee who is also an accountant, regardless of the scope of tax services would be extremely inefficient and present unnecessary complexity for the AFSL regulatory structure.

The level of comparable supervision that could be achieved in an efficient and effective manner via ASIC will dictate the extent to which dual regulation can be eliminated. Should a full scale adoption of the TAS regime take place within the AFSL regime, then dual registration would not be necessary. However, this structure would essentially create a duplicate tax practitioners board within ASIC and could undermine the existence, purpose and role of the existing TAS regime.

The TAS regime began operation in 2010 to provide a single regulatory regime with specific integrity measures for the tax agent profession. Delivery of comparable supervision by ASIC of services within the scope of the TAS regime would be costly and increase complexity for the relevant entities and the ATO.

The adoption of a moderated level of supervision would result in professionals possibly moving between regimes or being subject to both regimes, depending on the range and scale of services

they provide. Therefore, consideration would need to be given as to when, or if, a person providing financial and tax services would fall within the scope of the TAS regime. Situations may arise where, for example, a financial planner who also holds accounting qualifications and provides a wide range of services may need to be registered with the Board. Dual regulation may still exist for some people under this option.

Implementation of Option 2 would require additional time to allow ASIC to source and build the expertise and processes to deliver supervision that is comparable to that provided by the Board.

The strength of Option 2 is that licensees need only interact with one regulatory regime to the extent that the tax services they provide are incidental to the financial planning advice given to clients. Similarly, clients will have one point of contact for issues associated with financial planners, such as complaints.

As part of the consideration of this option, it should be noted that ASIC's role and responsibilities have a broad scope related to nine Acts. ASIC's competing priorities and resourcing has recently caused some concern in relation to the oversight of the corporate insolvency sector. In September 2010, the Senate Economics References Committee on the regulation, registration and remuneration of insolvency practitioners in Australia recommended that the corporate insolvency arm of ASIC be transferred to a new Australian Insolvency Practitioner Authority, which would establish a licensing system for corporate insolvency practitioners. However, the Government has not yet responded to this recommendation.

ADVANTAGES AND DISADVANTAGE OF COMPARABLE REGULATORY SUPERVISION

Advantages

- Licensees would only need to interact with ASIC.
- More certainty for financial planners because all of their tax related financial planning services would be covered under one regime.
- Licensees would only need to adhere to one professional code of conduct.
- In seeking redress through complaints, clients of a financial planner would not need to concern themselves with whether the service is financial planning or tax advice.

Disadvantages

- Regulation of some tax services would be split between ASIC and the Board.
- ASIC would duplicate some activities of the Board and there would be an additional cost to Government.
- ASIC does not have a tax focus or tax expertise and would require additional resources.
- A period of at least six months would be required for ASIC to become operational.
- More complex tax related investigatory activities would still need to be referred to the Board.
- Safe harbour provisions would not be available to clients of financial planners, unless specifically extended.

IMPLEMENTATION OF THE OPTIONS

Both options would require legislative changes, design and implementation of administrative systems. Transitional periods may be required to ensure that the chosen regulatory structure can function efficiently and the relevant agency has access to relevant information and expertise. For example, regardless of which option is implemented, ASIC and the Board will need some cross-referral of information in relation to investigations and a process for referrals from one agency to another.

Transitional periods should also be put in place for licensees and consumers to ensure that they understand the obligations, roles and responsibilities established under the chosen regulatory model.

QUESTIONS FOR CONSULTATION

Submissions need not be confined to addressing these questions or the options presented in the paper.

1. If financial planners give advice on tax laws and tax implications, should that advice be scrutinised as part of the tax regulatory regime?

2. If a financial planner who provides tax advice was subject to the TAS and the AFSL regimes, to what extent could their compliance and interaction be streamlined?

3. To what extent could consumer protection be achieved, under each of the options?

4. To what extent is tax advice provided in the context of financial advice *incidental* such that it should not be regulated under the TAS regime like other tax services?

5. Are there other options for regulating tax services provided as part of other services that optimise consumer protection and administrative efficiency while minimising compliance costs for financial planners?