



8 April 2014

Tax Practitioners Board  
PO Box 126  
HURSTVILLE BC NSW 1481

**Via Email**      **[tpbsubmissions@tpb.gov.au](mailto:tpbsubmissions@tpb.gov.au)**

Dear Board

**Exposure draft – TPB information sheet TPB(I) D20/2014**

The Australian Financial Markets Association (AFMA) represents the interests of over 130 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses and retail investors who use the financial markets.

We welcome the opportunity to make a submission to the Tax Practitioners Board (**the Board**) in relation to the exposure draft of the Information Sheet TPB(I) D20/2014, addressing the question “What is a tax (financial) advice service?” (**the Information Sheet**). It has long been AFMA’s view that the clear articulation as to what services trigger a registration requirement with the Board is the most important aspect of the implementation of the *Tax Advice Services Act 2009 (TASA)* to providers of financial advice. While AFMA remains of the view that such articulation should be a matter for the Government, we nonetheless appreciate the Board’s process of opening consultation on this issue.

**AFMA’s policy position – definition of tax (financial) advice service**

During the course of 2013, AFMA lodged submissions with Treasury (in respect of the updated TASA Exposure Draft and accompanying draft Explanatory Memorandum) and the Parliamentary Joint Committee on Corporations and Financial Services regarding the definition of the term “tax (financial) advice services.” Broadly, the points in our submissions were as follows:

- There was considerable uncertainty from the Exposure Draft and draft Explanatory Memorandum as to what would constitute a tax (financial) advice service – indeed this lack of certainty was specifically acknowledged in the Explanatory Memorandum (paragraphs 3.48 and 3.51);
- The legislative construction of the definition of “tax (financial) advice service” is such that it borrows heavily from the definition of “tax agent service.” Accordingly, AFMA submits that, apart from the exception of providers of “tax (financial) advice services” not being able to represent taxpayers in dealings with the Commissioner of Taxation, the ambit of the definitions of the particular services should be equal;
- Notwithstanding, AFMA has formed the view that the approach adopted to define “tax agent services” in the initial iteration of TASA is difficult to reconcile to the approach adopted to define “tax (financial) advice services” in the updated iteration of TASA, especially when examining the examples in the Explanatory Memoranda. This has resulted in uncertainty for industry participants seeking to ascertain whether they have a registration requirement based on the advice provided by such participants; and
- It should be made clear, preferably by the Government, that to the extent that a service that is being provided by a provider of financial advice is not provided under the existing carve-out and does not require the provision of the disclaimer then such a service will not be caught under the definition of a “tax (financial) advice service.”

AFMA understands that the intention of the Government was not to expand the range of services caught under the definition of “tax (financial) advice service” beyond those services contemplated at the time of the carve-out; however this has not been stated explicitly. In the absence of such a statement from the Government we recommend that this comment be included in the draft Information Sheet.

#### **Comments on the draft Information Sheet**

Further to the comments above, it is pleasing to AFMA that the draft Information Sheet does not include (at Appendix A) any services that could be seen as tax (financial) advice services that are not tax agent services. This is consistent with what we understand the Government’s policy perspective to be.

In addition, AFMA make the following points in relation to the Information Sheet:

- We agree with the approach that any advice that is considered to be “general” advice for the purposes of the *Corporations Act* is excluded from the definition of a “tax (financial) advice service.” This will ensure that any dissemination of material that may contain tax commentary but does not refer to the customer’s individual facts or circumstances does not trigger a registration requirement;

- In a similar light, and building on the exclusion in Appendix A of “client related factual information,” we again submit that custodial or depository services, as defined in Section 766E of the *Corporations Act* are specifically excluded from the definition of a “tax (financial) advice service.” This would be consistent with the approach adopted in the *Tax Agent Services Regulations 2009*, which currently excludes such services from the definition of “tax agent services;”
- We reiterate our earlier submissions that there be a general exclusion for authorised representatives of market participants, who provide advice in respect of securities. For example, where a broker advises a client to participate in a buy-back as opposed to selling shares on-market due to a different (and preferable) taxation outcome, this should not constitute a tax (financial) advice service;
- The Information Sheet should confirm, in our view, that trustees/responsible entities determining the income of a trust to which beneficiaries are presently entitled, and the components thereof, are not providing a “tax (financial) advice service.” The trustee/responsible entity, in acting in this capacity, is ascertaining the income of the trust based on the relevant trust deed and effecting the distribution in accordance with the distribution clause of the deed. These are clearly factual matters and do not represent “advice;” and
- AFMA would prefer further guidance on the extent to which the provision of an appropriately worded disclaimer may be effective in establishing that the customer did not (and could not have reasonably) relied on the advice provided.

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AFMA welcomes the opportunity to engage with the Board to ensure appropriate clarity as to the definition of “tax (financial) advice service,” well in advance of the commencement of the regime to providers of financial advice on 1 July 2014. Please contact me on (02) 9776 7996 regarding any aspects of AFMA’s submission.

Yours sincerely,



Rob Colquhoun  
Director, Policy