

19 May 2014

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

Dear Mr Taylor,

Tax Agents Services Act 2009 ('TASA')

- What is a tax (financial) advice service in Stockbroking?

The purpose of this letter is to seek clarification from the TPB as to common scenarios in stockbroking involving taxation of financial products and whether they constitute a tax (financial) advice service within the meaning of TASA.

A. Introductory Comments

Market Participant regulation

We acknowledge that Financial Advisers actually providing Tax Agent Services, however limitedly, should be regulated in the interests of competence assurance and investor protection. If the TPB happens to be the relevant body, then so be it, but given that AFS Licensees are typically regulated by ASIC and AUSTRAC, and by ASX/Chi-X where they are a Market Participant (i.e. a stockbroker), everything should be done to avoid introducing a new Regulator to our regulatory environment, with its own additional and purpose-built legislation (and Code of Professional Conduct) to administer TASA.

We would like to emphasise that the stockbroking sector, which was not involved in the negotiations to resolve issues between the FPA and the tax agents which led to TASA, is already subject to robust, sophisticated and sector-leading regulation. Unfortunately, there appears to have been less consultation with AFS Licensees who aren't Members of the FPA or who aren't providers of Financial Planning-like Services.

In addition to being subject to regulation by ASIC as AFSL holders, stockbrokers are subject to an additional layer of regulation by ASIC under the Market Integrity Rules. These rules have applied since 2010, when ASIC took over market participant regulation from ASX upon the entry of other market operators (principally Chi-X) into the ASX-listed market. The rules, whose breach can result in **civil penalties of up to \$1m**, include requirements in a wide range of areas including the following:

- Minimum Liquid Capital
- Management and Supervision
- Prohibition on Unprofessional Conduct¹
- CPD (particularly for senior officers, known as Responsible Executives), and
- Insurance.

ASIC market regulation is funded by levies imposed on stockbrokers (market participants) and market operators which currently total over \$17m per annum, the vast majority of which (\$14m) comes from market participants².

The TPB should take comfort from this additional layer of regulation. The regulatory regime administered by the TPB, which is designed for businesses dedicated to (and holding themselves out as providers of) Tax Agency Services, cannot (and should not) be applied to the entirety of an AFS Licensee's business. TASA and the Exposure Draft Information Sheets do not sufficiently recognise the regulatory benefits of AFS Licensees – especially those which are market participants - being subject to a regulatory environment separately administered by ASIC, AUSTRAC and often others, which makes for an inefficient and unnecessarily costly regulatory outcome.

¹ Under ASIC (ASX Markets) Market Integrity Rule 1.4.3,

“**Unprofessional Conduct**” includes:

- (a) conduct which amounts to impropriety affecting professional character and which is indicative of a failure either to understand or to practise the precepts of honesty or fair dealing in relation to other Market Participants, clients or the public;
- (b) unsatisfactory professional conduct, where the conduct involves a substantial or consistent failure to reach reasonable standards of competence and diligence; and
- (c) conduct which is, or could reasonably be considered as likely to be, prejudicial to the interests of the Market Operator or Market Participants,

by a Market Participant, or an Employee, whether in the conduct of the Market Participant's business as a Market Participant or in the conduct of any other business, and need not involve a contravention of these Rules or any law.

² ASIC [Cost Recovery Impact Statement](#) for 1 July 2013 – 30 June 2015 at page 28 of 35

Information v. Advisory Services

The regulatory regime for Financial Services recognises the distinction between information and advisory (i.e. General and Personal Advisory) Services. In logic, given the definition is tailored to AFS Licensees providing a Financial Service (i.e. Advice), the TPB could better leverage ASIC's mature, policy landscape for Retail/Wholesale Advisory Services. No representation is permitted to be misleading or deceptive. Information includes absolutely no opinion or value-judgement about a Financial Product(s). General Advice does include a rating or opinion/ recommendation to do or not do something, but takes no account of any element of the Retail/Wholesale Client's personal circumstances. Personal Advice is advice that is found to be suitable/appropriate for that Retail/Wholesale Client personally. Information, General and Personal Advice can each be reasonably relied upon, but only Personal Advice would be relied upon as personally tailored for the situation, needs and objectives of that particular Retail/Wholesale Client.

Our concerns are that the Exposure Draft doesn't expressly recognise the distinction between information, General and Personal Advice about obligations arising under Taxation Law. Nor does the Exposure Draft address consideration of a modified stance for those clients who qualify as a Wholesale Client.

Because of their mathematical nature, information (particularly basic matters such as CGT, Dividend Imputation) is best explained and presented by worked-example, which should be construed as falling within the category of 'calculator', and not necessarily assumed to be General Advice. A worked-example, which merely demonstrates a calculation, should be regulated as information rather than advice. As should input of different numbers to demonstrate comparative outcomes. At some point, the cumulative effect of a number of hypothetical scenarios, to compare two or more different investment strategies, would amount to General Advice. It should not necessarily be construed as Personal Advice in the first instance. Such information and General Advice are the best means of 'educating' Retail/Wholesale Clients on matters relevant to investment and investment strategy (e.g. Negative Gearing, using a Margin Loan, the treatment of pre-/post-tax superannuation contributions). These 'worked-examples' can appear in information sheets, briefing notes, and PDS/Prospectuses etc. And they can be relied upon by the client/investor. There must be clear space for recognising the distinction between working through a hypothetical example and working with the client's actual circumstances.

Code of Professional Conduct

We are also concerned that if AFS Licensees only providing the typical suite of stockbroking services are obliged to register, the regulatory benefits are far outweighed by the onerous impacts of the Code of Professional Conduct and the other consequences set out in the TASA. The TASA regime was designed for businesses dedicated to Tax Agency Services, not

businesses whose Tax (Financial) Advice Services (if any) are merely incidental to their Financial Services business, which is subject to a complex, multi-layered regulatory environment designed with (inter alia) promoting professional standards and investor protection in mind.

Registration

We are also concerned about the TPB's expectations regarding Organisational Competence. Will there be a minimum number of Tax (Financial) Advisers required to be registered within an AFS Licensee depending on its size and/or nature of its business? Will the licensee and/or its representatives be required to be separately registered?

Code of Professional Conduct

Concerning the Code of Professional Conduct, its application isn't limited to the provision of Tax (Financial) Advice Services. The expectation in relation to confidentiality goes further than permitted by the Privacy Act, and is unworkable in the context of the typical suite of stockbroking services, and Retail/Wholesale Client expectations regarding those services. Similarly, there must be due recognition of the Retail Compensation/PI Insurance, supplemented by Market Integrity Rule requirements, like the prohibition on Unprofessional Conduct.

Continuing Professional Development

Arrangements already in place at AFS Licensees, and a constructive attitude to CPD, given the RG 146/CPD Arrangements required at an AFS Licensee, should also be recognised.

B. The 'Typical' Stockbroking Scenario

We would now like to look at the specific application of TASA to Stockbroking. In this letter, we have made particular reference to the [Exposure draft](#) of the TPB Information Sheet TPB(I) D20/2014 *What is a tax (financial) advice service?* which was released for comment by the TPB and the Government on 7 March 2014 (the '**Exposure Draft**').

While business models vary across the industry – for example, it is not uncommon for a stockbroker to have a holistic financial planning division within or alongside its stockbroking division – usually stockbrokers do not give tax advice. Usually, clients are informed of this via disclosure documents like the Financial Services Guide and Product Disclosure Statement, and in client agreements and the Statement of Advice. If clients need tax advice or tax issues ever arise, Clients are advised to seek their own advice from their accountant or tax adviser.

C. Stockbroking Tax Scenarios

We would seek clarification on the following scenarios, which we would submit do not involve the giving of tax (financial) advice. Common Scenarios which we would like to explore are set out below:

1. **Dividend Imputation:** General information about dividend imputation and franking credits, for example how credits are calculated with reference to the tax paid by the company paying a dividend, the fact that credits give a tax benefit, and the minimum holding periods which apply for obtaining credits;
2. **Capital Gains Tax:** General information about capital gains tax, for example the fact that CGT on assets held over 12 months is calculated on 50% of the capital gain on disposal, but if held less than 12 months it is 100%. This would be highly relevant in a situation where a client wishes to liquidate holdings, and is considering which particular shares to sell. Without giving personal tax advice, it would be very important for such a client to be told about the 12-month rule, and arguably a serious omission if the client was not;
3. **Margin Loans:** Advice about a share portfolio that has been financed by a margin loan, provided that the advice does not include the personal tax position of the client;
4. **Portfolio Statements:** periodic Portfolio statements and summaries (particularly around financial year end), setting out holdings, transactions during the period, capital gains/losses based on market prices, dividends, franking credits and corporate actions, etc;
5. **Corporate Actions:** information about the different tax effects of corporate actions. For example, in 2011 BHP Billiton conducted a \$6bn share buy-back. The buy-back structured so that most of the price paid to shareholders (i.e. \$40.57 out of \$40.85 per share) was paid as a fully franked dividend. This was a matter of public record, and advisers ought to be able to explain such transactions to clients so that they understand them, without the need for formal tax qualifications or registration.
6. **Options Traders – Tax Category:** for tax purposes clients who deal in Options need to know whether their trading is to be taken on the income account or capital account. While the client in this case would be referred to their tax adviser, information on this is also given in Product Disclosure Statements for options, to which the adviser can refer.

D. What is a Tax (financial) advice service?

We note that 'Tax (financial) advice service' is defined in section 90-15 of the *Tax Agent Services Act 2009* (TASA) as follows:

- (1) A ***tax (financial) advice service*** is a tax agent service (other than within the meaning of subparagraph (1)(a)(iii) of the definition of that expression) provided by a financial services licensee or a representative of a financial services licensee in the course of giving advice of a kind usually given by a financial services licensee or a representative of a financial services licensee to the extent that:
 - (a) the service relates to:
 - (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or
 - (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; and
 - (b) the service is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:
 - (i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law;
 - (ii) to claim entitlements that arise, or could arise, under a taxation law.

We also note that whether a particular service is a tax (financial) advice service is a question of fact, meaning that that each service will need to be considered on a case-by-case basis having regard to the facts and circumstances surrounding the provision of the service (*Exposure Draft* point 3).

E. The 'Five Key Elements' of a tax (financial) advice service

The Exposure Draft (at point 5) sets out the 5 Key Elements of a tax (financial) advice service, namely:

- i. it is a tax agent service (excluding representations to the Commissioner)
- ii. provided by a financial services licensee or a representative of one
- iii. provided in the course of giving advice of the kind usually given by a financial services licensee or a representative of one
- iv. the service relates to ascertaining, or advising an entity about, liabilities, obligations or entitlements that arise, or could arise, under a taxation law
- v. the entity can reasonably be expected to rely on the service for tax purposes

We would now like to comment on the various stockbroking tax scenarios set out in Part C. above in the context of the 5 Key Elements.

Element 1 – tax agent service (excluding representations to the Commissioner)

We note that tax advice provided in circumstances where an entity can reasonably expect to rely on it to satisfy liabilities or claim entitlements under the taxation laws is a tax agent service that will generally also be a tax (financial) advice service (*Exposure Draft* point 7).

However, we also note that ‘general advice’ as defined in section 766B of the *Corporations Act 2001* will not be a tax agent service (and therefore also not a tax (financial) advice service) as it does not take into consideration a client’s specific circumstances and thereby is not reasonable to expect an entity to rely on it (*Exposure Draft* point 8).

Comment: We would submit that giving information of the nature set out in Part C. above would either constitute giving general tax advice, or mere factual information, because no regard has been given to the client’s specific circumstances. Indeed, this would be case even if the substantive advice regarding the buying or selling of financial products was personal advice, because such advice clearly did not include tax advice.

Element 2 – provided by a financial services licensee or a representative
and

Element 3 – provided in the course of advice usually given by a licensee or representative
For present purposes, we will assume that Elements 2 & 3 are satisfied.

Element 4 – relates to ascertaining or advising about obligations under a taxation law

We note that under Element 4, to be a tax (financial) advice service, the service must relate to:

- ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or
- advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law.

(*Exposure Draft* point 18)

Comment: We would submit that none of scenarios in Part C. above involve ascertaining or advising the client about any liabilities or obligations of the client under a taxation law.

Element 5 – reliance for tax purposes

We note that under Element 5, a service will be a tax (financial) advice service only if it is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:

- to satisfy liabilities or obligations that arise, or could arise, under a taxation law
- to claim entitlements that arise, or could arise, under a taxation law.

(*Exposure Draft* point 21)

At point 22 of the *Exposure Draft*, a non-exhaustive list of key facts and circumstances are set out to determine circumstances in which a client can reasonably be expected to rely on a service being provided. Those key facts and circumstances are set out as follows:

- whether the entity providing the service has to **interpret or apply a taxation law** and therefore requires a certain level of **knowledge** about a taxation law
- whether the entity providing the service **applies knowledge** of the taxation laws to a **client's individual circumstances**
- whether the client, or another entity, **checks or reviews** the work before purporting to rely on it
- whether the entity providing the service **intended the client to rely** on the advice or information provided
- whether the client has a **relative lack of knowledge or prior experience** in relation to the service, perhaps indicating that the client regards the skill and experience of the entity providing the service as superior to their own
- the availability of **other expert/s** and the ability of an entity to form their own judgment or rely on their own knowledge
- the **circumstances surrounding the provision of the service**, including the nature of the relationship/dealings between the parties (for example, whether the service is provided as part of a formal consultation or merely during the course of a casual conversation/engagement). Further circumstances that may be relevant include whether the client has specifically requested the service or has paid for the service
- the **level of complexity** surrounding the particular service
- whether the entity providing the service suggested or encouraged the client to **seek further independent advice** in relation to the matter
- the **nature of the advice or information** given (for example, it will not likely be reasonable to expect a client to rely on a provisional opinion in speculative circumstances or an "off-the-cuff" statement where the service provider gave no indication that they possessed greater knowledge or skill in relation to the matter)
- whether the entity providing the service has provided an **effective disclaimer against responsibility** for the service (not the disclaimer in reg 13(2) of the TASA Regulations). However, the existence of a disclaimer **does not automatically absolve** the entity providing the service from registration and the effect of such a disclaimer will generally depend on all the circumstances of the case, including the relative knowledge and skill of the provider and the complexity and/or significance of the service provided.
(*emphasis added*)

Appendix A to the *Exposure Draft* sets out a non-exhaustive list of the types of services commonly provided and whether they constitute a tax (financial) advice service.

In the context of the current discussions, the most relevant types of services in Appendix A are shown as follows:

Item	Service	Tax (financial)	Tax agent
4	Factual tax information which does not involve the application or interpretation of the taxation laws to the client's personal circumstances. Such information could be included in, but is not limited to: <ul style="list-style-type: none"> - regulated disclosures such as product disclosure statements and financial services guides - other products such as general marketing and promotional materials. 	No	No
5	Client tax-related factual information. Such information includes, but is not limited to: <ul style="list-style-type: none"> - payments summaries - other documents such as annual summary of interest paid and account statements. 	No	No
6	General advice (as defined in the <i>Corporations Act 2001</i>).	No	No
7	Any service that does not take into account an entity's relevant circumstances so that it is not reasonable for the entity to expect to rely on it for tax purposes (this includes simple online calculators as defined in the Australian Securities and Investments Commission's Class Order (CO 05/1122)).	No	No
8	Factual information provided by call centres and front line staff and specialists that would not be expected to be relied upon for tax related purposes.	No	No

Comment: in relation to **reliance** by the client on the information given by the stockbroker of the kind set out in Part C. above, we would submit that the client could not be reasonably expected to rely on it. In support of that submission, we note the following:

- the circumstances of the service, in which it is made clear that the client is not receiving and the adviser is not giving (and cannot give) tax advice;
- the matters involve the giving of mere factual information as contemplated by Items 4 & 8 of Appendix A set out above, and therefore would not constitute tax (financial) advice;

- in the case of Portfolio summaries (Part C.4.), these are only given to allow the client to seek tax advice from an independent adviser. This is contemplated in Item 5 of Appendix A and would not constitute tax (financial) advice.

We would be grateful to receive your response to these matters at your earliest convenience. Should you wish to discuss these matters further, we would be happy to meet with you and your officers at your office or elsewhere at a convenient time.

With the TASA regime commencing on 1 July 2014, obviously we are very keen to clarify these matters for our Members as soon as possible.

Thank you for your consideration. Should you have any inquiries or wish to discuss any matter, please contact me, or Doug Clark, Policy Executive dclark@stockbrokers.org.au.

Yours sincerely,



David W Horsfield
Managing Director/CEO