

11 June 2013

Mr Tim Bryant
Committee Secretary, Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600
economics.sen@aph.gov.au

Dear Mr Bryant,

Tax Laws Amendment (2013 Measures No. 2) Bill 2013

The Australian Bankers' Association (ABA) is pleased to provide comments to the inquiry into the *Tax Laws Amendment (2013 Measures No.2) Bill 2013*.

This Bill includes a range of changes to various tax statutes, including adoption of monthly instalments in Schedule 1. We are not concerned about many aspects of the Bill.

However, we are very concerned about the changes contained in Schedules 3 and 4. The Bill could capture any Australian financial services (AFS) licensee which provides "tax advice" within the *Tax Agent Services Act 2009*, and therefore, AFS licensees and their representatives would be required to meet the legal obligations and associated registration requirements of the TASA regime in addition to their existing obligations under the financial services regulation (FSR) regime. Over the past three years, and since the TASA legislation was introduced, the financial services industry has been exempt to avoid duplication. The latest exemption is due to expire on 30 June 2013.

Consultation process

The financial services industry has previously made representations to the Federal Government to exempt financial service providers from the TASA regime. Notwithstanding, the Bill captures AFS licensees and their representatives and there are serious legal and technical aspects which have not been afforded reasonable consideration or consultation with the industry. Furthermore, regulations have not been issued for consultation with the industry and much detail regarding the legal and practical impact is unknown.

The ABA believes that the truncated and confidential consultation process relating to the Bill (and the application of the TASA regime to the financial services industry) has been inadequate.

Scope of the TASA regime

The Bill is likely to cover all AFS licensees and their representatives, and consequently, it is likely to capture activities across a range of financial services businesses and operations, including information and advice offered by banks and banking groups in relation to retail banking and lending for individual customers; wealth management, retirement and estate planning, risk management and related advice; and finance and capital management, business planning, risk management and related advice for business customers.

The definition of "tax (financial) advice service" in the Bill covers a very broad range of persons within the financial services industry. In a "financial advice" context, publicly available information may be provided that is incidental to the factual information, financial product advice or credit assistance provided by bank staff ("general tax information"). Importantly, we note that bank staff are already regulated to provide these services subject to the FSR regime in the Corporations Act and the National Credit Code.

General tax information can be provided in a number of contexts and in a number of ways by banks and by bank staff, including:

- Information about not providing a Tax File Number (TFN) when opening a bank account (in a basic banking context);
- Information about how different companies or entities are taxed (in a small business context);
- Information about the concessional tax treatment of superannuation funds (in a superannuation context);

- Information about how life risk insurance can be tax deductible (in a wealth management context); and
- Information about how a mortgage offset account (a separate savings account to a borrower's home loan) can offset interest applied to the savings account to the loan (in a credit and basic banking context).

Importantly, this general tax information may be provided by frontline employees (i.e. branch staff or call centre staff) in the form of factual information or general advice or via publicly available information sources, including brochures, materials, website resources, etc. This factual information and general advice is important to promote financial literacy across Australia¹.

The ABA believes that the definition in the Bill would extend beyond financial planners and advisers and broadly capture other functions across banks and banking groups. Banks and their staff providing this type of general tax information under the Bill would be required to become a registered tax (financial) adviser. We strongly believe this is contrary to the policy intent of the legislation to ensure that persons or entities providing tax advice, which is not merely incidental or general tax information, are covered by the legislation.

Potential conflict between the TASA regime and the FOFA regime

The ABA believes there is likely to be a conflict between the statutes, and in particular, the best interests duty, which will apply to advice providers. It is important for this legal uncertainty to be resolved prior to the commencement of the TASA regime. The ABA believes that the Australian Securities and Investments Commission (ASIC) should amend *Regulatory Guide 175: Licensing: Financial product advisers – conduct and disclosure* [RG175] to enable an advice provider to comply with the best interests duty safe harbour in the provision of personal advice.

Competency requirements and the cost and availability of advice

While the ABA supports higher education and competency standards for advice providers, the TASA regime would impose a number of additional obligations and inefficient business practices on AFS licensees and their representatives, which will increase compliance costs and administrative burden without additional benefit for consumers or the industry.

The education and competency standards for financial service providers under the TASA regime are currently unclear (i.e. 'sufficient' experience competency requirements), however, it is unlikely that the training and competency requirements would do anything more than be a duplication with the knowledge and skill requirements established under *Regulatory Guide 146: Licensing: Training of financial product advisers* [RG146], and therefore, it should be clear that existing requirements and core competencies are satisfactory. (Furthermore, the subsequent costs are currently uncertain, however, it is noted that the Government has announced a cap on education deductions to \$2,000 pa).

Additionally, other obligations for financial services providers under the TASA regime are currently uncertain (i.e. professional indemnity (PI) insurance requirements, adequate supervisory arrangements, etc), and it should be clear that PI arrangements taken out by an AFS licensee which covers all its financial planning businesses and planners under its control is adequate and supervisory and operational requirements imposed by financial regulators on banks and banking groups (both the ASIC and the Australian Prudential and Regulation Authority (APRA)) are adequate.

The ABA believes that the duplication for licensing (under the FSR regime) and registration (under the TASA regime) is unnecessary. Ultimately, we are concerned that additional costs will increase the cost and/or reduce the availability of information and advice for Australian consumers and businesses.

ABA position

The ABA strongly believes that under Australia's three-tiered information and advice model (factual information, general advice and personal advice) entities and persons who provide general tax information should be expressly exempted from the legislation. This approach would reflect the fact that the term "financial adviser" covers a broad range of financial services and that financial advisers generally provide much simpler advice than tax agents (as advice is typically factual information or general advice only).

¹ The banking industry has been strongly committed to lifting the levels of financial literacy in Australia. The ABA's financial literacy program – Broadening Financial Understanding – has been going for almost 10 years and we have published a number of booklets, consumer fact sheets, and other resources which contains basic financial information, including general tax information.

The exemption should apply regardless of whether the information can reasonably be expected to be relied upon and regardless of whether the information is provided by a person or another source, including online information and computer programs and calculators (noting this approach would be consistent with the FSR regime and as reflected in ASIC Class Order 05/1122 *Relief for providers of generic calculators* – and should be adopted for the purposes of TASA).

Therefore, the ABA encourages the Committee to recommend that the Bill be passed only with the following amendments:

- Implement a new category of “tax (financial) advice service” under the legislation and clarify the associated obligations as relevant to the advice service and exempt any entities or persons who provide general tax information as part of the provision of factual information, general advice or credit assistance from section 90-15².
- Extend the commencement of the TASA regime for AFS licensees and representatives for at least six – twelve months so that the outstanding issues can be resolved prior to AFS licensees and representatives being required to register with the Tax Practitioners Board; and
- Afford the financial services industry adequate time to comply with the TASA regime, including notification and registration, and allow the notification period to be three years and then the registration period to be three years. (We note that the accounting profession has been given six years to comply with the new licensing requirements under the Future of Financial Advice (FOFA) reforms.)

Importantly, the ABA believes that the Bill with these amendments must be passed before 28 June 2013. However, should the revised Bill not be passed, the ABA recommends that the current exemption and disclaimer requirements be extended until at least 1 July 2014.

Concluding comments

The ABA notes that this reform is potentially as significant as the FOFA reforms for banks and banking groups, and significantly, is currently due to commence concurrently on 1 July 2013. We are very concerned about the inadequate consultation process on the Bill, especially given there could be substantial implications for banks and banking groups.

The ABA believes that the clarification of the application of the TASA regime and the exclusion of providers of general tax information is required. Furthermore, we believe the delay in implementation of the TASA regime for the financial services industry is required. If the Government is not minded to delay the commencement of the TASA regime for accountants, there should be provision to extend the commencement for AFS licensees and their representatives. Importantly, this approach will allow the financial services industry adequate time to consult with the Government, Treasury and ASIC on the implications of the TASA regime for their businesses and will assist the Tax Practitioners Board be better prepared to process the large number of applications anticipated. Specifically, we note that fundamental aspects of the TASA regime are yet to be settled ahead of its commencement and that the interaction between the TASA regime and the FOFA regime has not been properly worked through with the financial services industry or ASIC.

The ABA supports the technical and detailed comments provided by the Financial Services Council (FSC), including amendments to the Bill necessary to achieve outcomes consistent with the policy intent and to avoid unnecessary compliance costs and administrative burden across the financial services industry. We also support the FSC attempts to seek urgent clarification of the application of the TASA regime to AFS licensees and their representatives.

Yours sincerely,

Steven Münchenberg¹

² The ABA notes that subsection 90-15(3)(b) contains a regulation making power to specify that a service is not a tax (financial) advice service, and this provision should be used to exempt certain advisory services and personal advice as required. Furthermore, we note that the Tax Practitioners Board is able to issue guidelines on what is meant by the term “tax (financial) advice service”. However, due to the importance of the term tax (financial) advice service, we consider that it is inappropriate for clarification or exemption to be delegated. Specifically, we believe that providers of factual information or general advice on financial products (including information and advice on tax and tax-related matters) and providers of credit assistance (including information on tax and tax-related matters) should be excluded from the legislation.