

4 April 2014

Tax Practitioners Board  
PO Box 126  
HURSTVILLE BC NSW 1481

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

Dear Sir/Madam,

**Re: Exposure Draft Information Sheet TPB(I) D20/2014**

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds who manage the superannuation accounts of nearly two-thirds of the Australian work force.

As the principal advocate and peak representative body for the \$600 billion not-for-profit superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST welcomes the guidance provided in this exposure draft information sheet (“the ED”, “the information sheet”, TPB(I) D20/2014) about when a tax (financial) advice service is provided. AIST welcomes all guidance that will ensure a seamless transition into the new requirements under the *Tax Agent Service Act 2009* (TASA).

Our comments on the ED may not necessarily explicitly reflect the fact that with three months to go before the notification period commences for entities who are required to register with the Board, there exists considerable uncertainty with regards to precisely who is required to register. Nevertheless, this is the context within which this submission is to be read.

Our general comments address very minor uncertainties that are contained within this document. Overall, we welcome documents which provide guidance of this nature and consider this to be a comprehensive and well-constructed document.

**Element 3**

AIST has concerns around about the first part of paragraph 17, specifically the sentence that reads:

*For the purposes of being a tax (financial) advice service, it does not matter whether the advice is financial product advice or dealing in a financial product as defined in the Corporations Act 2001.*

Although this appears to be sound, it is important to view this within the context provided in paragraph 12, where the requirement is that a tax (financial) advice service must be provided, ‘in the course of giving advice of a kind usually given by a financial services licensee or a representative of a financial services licensee.’

Paragraph 16 goes on to clarify the meaning of financial product advice, as defined at subsection 766B(2) of the Corporations Act. Left unstated is the remaining scenario, the provision of factual information that relates to financial products.

In the paragraph referred to above, paragraph 17 suggests that dealing in a financial product is separate from financial product advice; however, we are not aware of any situation where advice that is provided when dealing in a financial product is not also financial product advice. We believe that the inclusion of both in this sentence could confuse readers.

Further to the point raised above, we have concerns about the next sentence in paragraph 17:

*This means that the service will usually take the form of tax advice that can reasonably be expected to be relied on for tax purposes that is given for the purpose of helping to **fully inform** a client about their current and future financial affairs.*

(our emphasis)

We are uncertain what the inclusion of “fully inform” is intended to mean. We provide the following case study to illustrate our uncertainty:

#### **Case study**

Amy is a financial adviser who represents Cooper Financial Services, an AFS licensee and a registered entity which provides tax (financial) advice services.

Dennis, the risk and compliance manager at Bloom notes that in providing financial product advice to Amy’s clients, figures based on contingent tax liability are only approximations, given the daily-changing nature of her client’s investments, and the habit of rounding which Amy’s clients engage in when providing financial information.

Dennis considers that Amy is unlikely to ever be able to provide tax advice to clients that fully informs them of their current and future financial affairs. Further, as Amy is still able to meet her obligation to her clients under section 966B to act in their best interests, Dennis believes that this represents a situation where Amy is not providing a tax agent service.

Dennis recommends to Amy that she ensures that her clients are aware of this through verbal discussions, and a strongly worded disclaimer in Amy’s statements of advice to ensure that clients cannot reasonably be expected to rely on tax advice that is provided. The disclaimer also recommends that her clients seek the independent services of a registered tax agent to be fully informed.

Dennis also recommends to Barry, the CEO of Cooper Financial Services, that the firm is unlikely to ever meet Element 3 of TPB(l) D20/2014 based on his findings, and therefore no longer needs to be registered.

Whilst the above case study could be considered an extreme example, the qualifier “fully inform” is not defined and it is therefore possible that the conclusions of Dennis might be considered to be reasonable. We strongly recommend that examples be provided to determine what is meant by this qualifier, if not an outright definition.

Furthermore, we recommend that the paragraph be re-worded to read as follows, where the expression “fully inform” has been appropriately defined elsewhere in the document:

*A tax (financial) advice service will usually take the form of tax advice that can reasonably be expected to be relied on for tax purposes that is given for the purpose of helping to fully inform a client about their current and future financial affairs. As such...*

#### **Element 5**

We welcome the guidance provided at paragraph 22 around the list of key facts and circumstances to consider when determining if an entity has provided tax advice that a client can reasonably be expected to rely on for the purposes of the dot points in paragraph 21.

We understand, as hinted in the start of paragraph, that this list is essentially a ‘live document’ and will be updated as more guidance is obtained in the future from legislative changes, or case law. We support the fact that this list will not necessarily be exhaustive by its nature.

AIST believes, however, that this list would benefit from the addition of examples that might illustrate how the dot points might indicate that Element 5 has been met. For examples of where we believe this might be improved, we have considered the eighth and ninth dot points in the list.

Dot point eight asks that “the level of complexity surrounding the particular service” be considered. We wish to draw the attention of the Board to the types of service which is provided to super fund members by member funds of AIST. Feedback from our members points out that complex advice regarding one’s superannuation is highly improbable, as the vast majority of advice provided (including all advice that would fall into the category of intra-fund advice, as prescribed by section 99F of the *Superannuation Industry (Administration) Act 1993*) is unlikely to be considered to be ‘complex’. In fact, we would be comfortable in describing most tax advice provided by representatives of superannuation fund trustees as being relatively simple.

AIST would be happy to facilitate a demonstration to the Board of the type of modelling that is done for the provision of personal financial product advice to members of APRA-regulated superannuation fund members in order to demonstrate how simple it is. Of course, the question of complexity versus simplicity is both relativistic and crude, and we believe it is appropriate that the information sheet provides guidance that clarifies this.

On the other hand, dot point nine asks one to consider the question of ‘whether the entity providing the service suggested or encouraged the client to seek further independent advice in relation to the matter’. Unlike the previous dot point, this appears to be a straightforward Boolean indicator, and guidance could be easily provided in the form of a yes/no question.

AIST would like to draw the Board’s attention to the previous case study again. We believe that it is imperative that guidance contained in TPB(I) D20/2014 directly addresses the issue raised by Dennis’ recommendations to Amy, above.

### **Paragraph 23**

Paragraph 23 addresses a core issue to this information sheet, explaining that if all five elements are met, then a service that is provided is likely to be a tax (financial) advice service. We consider that this paragraph’s location towards the end of the document both understates its importance, and may cause readers to think that it forms part of Element 5.

Ideally, we would recommend that this paragraph, along with paragraph 24, be moved ahead of the paragraphs explaining each of the elements (paragraph 6 onwards), or alternatively these paragraphs could be given their own subtitle.

### **Appendix A**

AIST welcomes the list of services provided in Appendix A. We accept that this list is not an exhaustive list, and welcome the implication that this will therefore form a ‘live document’ and be updated correspondingly.

We agree with the inclusion of items 2, 4, 5, 6, 7 and 8, which determine that whilst personal advice is in scope, both general advice and factual information is out of scope.

However, we wish to express some reservations regarding item 2. We note that in his address to Parliament on 20 June 2013, the Assistant Treasurer under the previous government, the Hon David Bradbury MP, announced that intra-fund advice provided by representatives of superannuation funds should not constitute tax agent services under TASA. We further note that even though a number of unenacted and unlegislated measures have been addressed by the current government, no statement has been made regarding intra-fund advice with respect to its inclusion (or otherwise) in TASA.

We are uncertain whether the inclusion of intra-fund advice in this item may therefore be regarded as inappropriate and recommend that this issue be urgently referred to Treasury or the Government for their consideration.

AIST expresses concern about the inclusion of item 3. We are unaware of circumstances where such advice might be provided that is not financial product advice, and recommend the inclusion of an example to illustrate this.

We are uncertain whether items 9, 10 or 12 are directly relevant to this information sheet, however offer no suggestions beyond concatenation of these items within the one item.

If you have any further questions regarding this submission, please contact Richard Webb, Policy & Regulatory Analyst on 03 8677 3835 or at [rwebb@aist.asn.au](mailto:rwebb@aist.asn.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Garcia', is written over a light blue horizontal line.

Tom Garcia  
**Chief Executive Officer**