



Exposure Draft Proposed Guideline TPB(PG) D05/2014

Course in commercial law that is approved by the
Board for tax (financial) advisers

Tax Practitioners Board Exposure draft

The Tax Practitioners Board (TPB) has released this draft proposed guideline as an Exposure draft and invites comments and submissions in relation to the information contained in it within **30 days**. The closing date for submissions is **19 September 2014**. A summary of the proposal and the key issues in relation to which feedback is being sought is contained at Appendix A to the draft proposed guideline. The TPB will consider any comments and submissions before settling its position, undertaking any further consultation required and finalising the proposed guideline.

Written submissions should be made by the closing date to the Secretary of the TPB via email at tpbsubmissions@tpb.gov.au or by mail to:

Tax Practitioners Board
PO Box 126
HURSTVILLE NSW 1481

Disclaimer

This document is in draft form, and when finalised as a TPB(PG), will be intended to be issued as a TPB guideline (TPB(G)) under paragraph 60-15(d) of the *Tax Agent Services Act 2009*. The formal drafting and Parliamentary tabling processes have not yet been undertaken.

The information in this draft proposed guideline does not constitute legal advice. It is also only at a preliminary stage. The TPB's conclusions and views may change as a result of comments received or as other circumstances change.

Document history

This draft proposed guideline was issued on 20 August 2014 and is based on the *Tax Agent Services Act 2009*, the *Tax Laws Amendment (2013 Measures No. 3) Act 2013* and the *Tax Agent Services Regulations 2009* as at 1 August 2014.

'A course in commercial law that is approved by the Board' for tax (financial) advisers

This draft proposed guideline (TPB(PG)) sets out the preliminary views of the Tax Practitioners Board (TPB) in relation to the meaning of 'a course in commercial law that is approved by the Board' for tax (financial) advisers for the purposes of Items 301(b), 302(b) and 303(a) of Part 3 of Schedule 2 to the *Tax Agent Services Regulations 2009* (TASR).

The draft TPB(PG) includes information relating to the following aspects of a course:

- topics
- learning outcomes
- duration
- course providers
- education level
- manner of delivery
- assessment
- currency.

The information in this draft TPB(PG) draws on advice given to the TPB in June and July 2014 by Professors Michael Dirkis and Michael Walpole and Mr Gordon Mackenzie.

The purpose of this information is to assist relevant institutions, professional associations, potential registrants and the wider community to understand the factors that provide the basis for the TPB's approach to the educational eligibility requirements for registration as a tax (financial) adviser.

The TPB intends to adopt the views expressed in this draft TPB(PG) when finalised.

The TPB has published a separate document outlining its approval process for courses which are covered by Schedule 2 to the TASR – see *TPB(I) 07/2011 Approval process for course providers* available at www.tpb.gov.au.

Introduction

1. The *Tax Agent Services Act 2009* (TASA) is designed to ‘... ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct’ (see section 2-5 of the TASA). It is therefore both necessary and desirable, in certain respects, to increase the expectation of the thoroughness of education and training that a registered tax (financial) adviser should have when compared with the expectations under the regulatory regime of the *Corporations Act 2001* before 1 July 2014.
2. The TPB recognises that a balance must be struck between what is reasonably achievable within the modern educational and professional paradigm and assuring the public of high professional standards. In doing so, regard has been had to the educational qualifications, and the types of providers of training and education recognised within the Australian Qualifications Framework (AQF) (see <http://www.aqf.edu.au>).

Course in commercial law for tax (financial) advisers

Background

3. The registration process for tax (financial) advisers is designed to assure the public of a necessary basic standard of commercial law education. Thus, in the TPB’s preliminary view, a ‘course’¹ in commercial law should be of sufficient breadth to equip a tax (financial) adviser with a sufficient understanding of commercial law to ensure that the public can have confidence in their advice about the tax impacts of a diverse range of financial transactions that ordinarily arise.
4. The tax system in Australia is very complex, as is the underlying commercial law. The interaction of the tax system with the social security system adds to this complexity. Many financial decisions have a tax impact, and some financial products and much financial advice derive at least some of their value from tax preferences. A basic understanding of the commercial law underlying those transactions is crucial in ensuring that the arrangements do give rise to those tax preferences.

¹ See paragraph 32 for further information on the meaning of ‘course’.

5. The TPB notes that a knowledge of commercial law is not one of the knowledge requirements in Appendix A of the Australian Securities and Investments Commission's (ASIC's) Regulatory Guide 146, *Licensing: Training of financial product advisers* (RG 146). However, within each area of specialist knowledge, advisers are required to have an understanding of the relevant legal principles under the *Corporations Act 2001*, the *Australian Securities and Investments Commission Act 2001* and in some cases the relevant tax laws and regulations.
6. The commercial law advice given by tax (financial) advisers extends well beyond mere assistance with dealing in financial products as contemplated in RG 146. For example, the TPB considers that consumers would expect competent advice by a tax (financial) adviser in that regard to include consideration of not only the effect of a particular financial product but also the effect of alternative courses of action.
7. The lack of commercial law is therefore reflected in both the Financial Planning diploma and advanced diploma course syllabuses examined.
8. To become a registered tax (financial) adviser, an applicant must meet certain eligibility criteria, including the requirements prescribed by the TASR.² In certain cases, one such requirement is that an applicant seeking registration must have successfully completed a course in commercial law that is approved by the Board.
9. An individual must have successfully completed 'a course commercial law that is approved by the Board' if they are seeking registration under any of the following:
 - tertiary qualifications (Item 301(b) of Part 3 of Schedule 2 to the TASR)
 - diploma or higher award (Item 302(b) of Part 3 of Schedule 2 to the TASR)
 - work experience (Item 303(a) of Part 3 of Schedule 2 to the TASR).
10. An individual is not required to have successfully completed 'a course commercial law that is approved by the Board' if they are seeking registration under the following:
 - membership of professional association (Item 304 of Part 3 of Schedule 2 to the TASR).
11. This draft TPB(PG) deals only with the requirements for 'a course in commercial law that is approved by the Board' for tax (financial) advisers. For information on the requirements for 'a course in commercial law that is approved by the Board' for tax agents, refer to *TPB(PG) 02/2010 Course in commercial law that is approved by the Board*, available at www.tpb.gov.au.

² This is subject to the transitional arrangements contained in the *Tax Laws Amendment (2013 Measures No. 3) Act 2013*.

Topics

12. A course in commercial law for tax (financial) advisers should include the equivalent of one commercial law unit covering at least the following key areas:
- (a) introductory contract law
 - (b) fundamental legal concepts of business organisational structures (that is, sole traders, partnerships, corporations and trusts) and the underlying regulation
 - (c) aspects of the law of torts (in particular, negligence and negligent misstatement) and the key provisions of the *Competition and Consumer Act 2010*, including those relating to misleading and deceptive conduct.
13. The importance of each of the topics in paragraph 12 above is illustrated in part by the following:

Introductory contract law

14. A significant number of financial arrangements are contractual in nature and these will have tax consequences. A tax (financial) adviser needs to have the skills to examine an arrangement to identify if a contract exists and when that contract was concluded, particularly where there are changes in the contractual terms between an initial agreement and finalisation of negotiations. This understanding is crucial. For example, a capital gains tax liability is often dependent upon there being a valid contract, and the timing of that agreement can be crucial in giving rise to that capital gains tax liability.

Business organisational structures

15. Business organisational structures are used for both asset protection and tax purposes. Ownership interests and revenue flows through these structures are integral to tax. Accordingly, a tax (financial) adviser should have an understanding of the fundamental legal concepts of business organisational structures and the underlying regulation. This is crucial, particularly in understanding where the commercial law departs from its taxation treatment (for example, the taxation of partnerships).

Aspects of the law of torts

16. A tax (financial) adviser needs an understanding of the basic principles of the law of torts (in particular, negligence and negligent misstatement) as such knowledge is crucial to the public having confidence in the tax (financial) advice given.

Learning outcomes

17. The learning outcomes of a course in commercial law are that the tax (financial) adviser should be able to explain, critically evaluate and (where appropriate) apply the rules and principles attaching to each of the topics listed above in paragraph 12, particularly in the context of financial products.
18. In conjunction with these learning outcomes, tax (financial) advisers should also learn skills to enable them to have knowledge of commercial law and apply it to problems when they are giving tax (financial) advice in practice and so as to keep their knowledge up-to-date.
19. Tax (financial) advisers should understand the boundaries about clients acting on their tax (financial) advice. Further, they should understand which areas are so complex as to need specialised independent advice.
20. The provision of financial, commercial law and taxation advice has the potential to affect clients to a significant degree. This means that advisers may be expected to acquire a great depth of knowledge. However, tax (financial) advisers are not registered tax agents and it would be unreasonable to expect them to have commercial law expertise that equals that of tax agents.

Duration of course/s

21. The topics listed at paragraph 12 above should fit within a single standard 12 to 14 week tertiary period made up of formal instruction (such as lectures), exercises in applying knowledge (such as tutorials) and private study (such as research, reading, and assignment preparation) totalling 100 to 130 hours.
22. Accordingly, the duration of the course in commercial law should be at least the equivalent of one tertiary level unit amounting to a total of 100 to 130 hours of study and tuition.
23. However, duration alone is not a definitive guide as to the quality of a course and from time to time the TPB may have regard to other elements (such as technical content, level of difficulty, nature of assessment etc), in order to come to a final view as to whether the requirements for approval of a course have been met.

Providers of course/s

24. A course in commercial law should be attained through study of units with a university, registered training organisation (RTO) or other registered higher education institution, provided the units are offered as part of a qualification at the requisite level that has been recognised and accredited via the AQF.
25. Unless otherwise approved by the Board, the minimum education level required for an approved course in commercial law is diploma, which meets AQF level 5 criteria. In all cases, the proposed course must satisfy the TPB's requirements relating to assessment (see paragraphs 29 to 31 for further information on assessment).
26. The TPB may also choose to accept courses offered by other providers as long as the provider meets the TPB's conditions and standards as set out in its Information sheet *TPB(I) 07/2011 Approval process for course providers* and the course offered by the provider meets the requirements set out in this draft TPB(PG).

Manner of delivery

27. Although the suggested duration of 100 to 130 hours is based on an assumption of a traditional lecture/tutorial/self-study model there is a diversity of delivery models available – which diversity has been supplemented by modern technological innovation permitting 'distance' or 'flexible' study involving engagement with teaching materials and teaching staff via interactive computer programs, video conference, internet etc. In any case, study by correspondence has been widely available for tertiary study and professional study for many years. Some courses may not require any attendance at lectures or seminars but may rely upon the students' performance in assessment tasks such as a single final examination as a measure of the competence of the students.
28. Accordingly, a hard and fast rule on manner of delivery is not necessary. Provided that whatever manner is adopted in the course of study or its components involves an expectation that students will develop a thorough understanding of the commercial law through technical content, its application and appropriate research, it is immaterial whether they are usually present in a room with the teacher or not. The outcomes of the course in commercial law or its components should be discernible by reference to how the course/components of the course are assessed.

Assessment

29. Objective assessment is a key aspect of the approval of courses for registration of applicants as tax (financial) advisers. Applicants must have demonstrated their knowledge and skills in the relevant course or components by some means of independent and objective assessment. Such assessment should be rigorous and have integrity. Various forms of assessment may be employed. Ideally, because of different learning styles and what is appropriate for different aspects of a course, each course or component should employ a mix of assessment practices including:
- tests
 - examinations (oral and written)
 - problem based assignments
 - essays and reports
 - computer based assessment tasks.
30. Not every one of these assessment methods needs to be present in an approved course. The TPB does not propose to be prescriptive about the style and content of assessments, provided the assessments employed represent a genuine test of relevant knowledge and skills and subject to integrity to ensure the relevant applicant will have undertaken the assessment task/s in question.
31. The assessment should, to a significant degree (that is, at least 40%), be done under some form of independent supervision.

The meaning of 'course'

What is a course?

32. A course consists of a series of components leading to an overall knowledge of an aspect of the law including taxation law or rules. Such components may take the form of small units designed for tuition or training of discrete aspects of the tax law. The TPB notes that although coherence between the parts/units of the course is desirable, not all applicants will have completed a single coherent series of units delivered, for example, by one provider. Accordingly, provided the content set out in the list of topics at paragraph 12 is addressed and provided the material addressed is reasonably current, the components need not be part of a coherent stream and may include some duplication and overlap with each other.

Can a course be constituted solely by recognised prior learning (RPL)?

33. Assessment of knowledge and competence is the best safeguard for the TPB to ensure that it only registers applicants who have the necessary technical qualifications to competently deal with taxpayers' affairs. The TPB recognises that prior learning through experience may be regarded as a proxy for content but it does not propose to accept evidence of prior learning in the workplace that has not been formally assessed in some way (see paragraphs 29 to 31 for information on assessment).
34. In principle, prior learning through experience which has itself been formally assessed would not require further assessment. However, it is unlikely the Board will approve an application if all the education requirements were satisfied by prior learning through experience as the ability to keep up-to-date with changes requires the acquisition of essential learning skills (interpretative, analytical and cognitive skills) that come from the rigour associated with formal training courses.

How current should a course be?

35. Taxation law changes rapidly and the introduction of new taxes to replace others can completely transform the knowledge base of the tax professional community. For example, the replacement of sales tax with the goods and services tax (GST) and simultaneous modifications to the tax collection rules, stamp duty laws and other state taxes transformed aspects of the taxation law in the early 2000's. Similar upheavals were encountered when capital gains tax (CGT) was introduced and when self-assessment was introduced. Some aspects of taxation law change only incrementally as new cases emerge from the courts.
36. Therefore, a course of study can become out of date quickly. It is for these reasons that many universities and other course providers do not normally grant credit for units of study completed more than 10 years prior to application. The TPB adopts this standard *prima facie* in respect of the recognition of units completed to satisfy the requirements of a course in commercial law for tax (financial) advisers.
37. However, the TPB notes that the age of the course has to be balanced with the knowledge and experience of the applicant. Well-educated professionals will keep their knowledge and skills up-to-date and will be required to do so through continuing professional development requirements of professional associations. Given such a person's knowledge, a requirement to repeat their undergraduate studies after 20 years of practice would run counter to the policy intent of the legislation.

38. Therefore, the TPB proposes to accept as approved courses of study in commercial law:
- where the component unit of study was completed fewer than 10 years from the date of the application for registration; or
 - where the component unit of study was completed more than 10 years from the date of the application for registration and the applicant can demonstrate an updating of those skills through work experience and continuing professional development.
39. The TPB recognises that there may be applicants that fall outside these two broad guidelines. In these cases, a submission should be included with the application for registration, which the TPB will consider on its merits.

Summary and conclusion

40. This draft TPB(PG) sets out the preliminary views of the TPB in relation to the meaning of 'a course in commercial law that is approved by the Board' for tax (financial) advisers.
41. A course in commercial law should cover at least the following topics:
- (a) introductory contract law
 - (b) fundamental legal concepts of business organisational structures (that is, sole traders, partnerships, corporations and trusts) and the underlying regulation
 - (c) aspects of the law of torts (in particular, negligence and negligent misstatement) and the key provisions of the *Competition and Consumer Act 2010* including those relating to misleading and deceptive conduct.
42. Further, a course in commercial law should be of 100 to 130 hours duration. This would equate to one tertiary level unit.
43. In addition, a course in commercial law should be attained through study of units at a university, registered training organisation, other registered higher education institution or another provider approved by the TPB.
44. Unless otherwise approved by the TPB, the minimum education level required for an approved course in commercial law should be Diploma, which meets AQF level 5 criteria.
45. Finally, all courses should be assessed to a significant degree (that is, at least 40%) under some form of independent supervision and in a manner demonstrating rigour and integrity.

Appendix A

Summary of proposal and key issues for your feedback

Proposal

The TPB administers the requirements for registration as a tax (financial) adviser under the *Tax Agent Services Act 2009* (TASA) and the *Tax Agent Services Regulations 2009* (TASR), including the requirement, in certain circumstances, for individuals to have successfully completed a course in commercial law that is approved by the Board.

Key issues for your feedback

- (1) Do you agree that a Board approved course in commercial law for tax (financial) advisers should cover the topics listed in paragraph 12 of this draft TPB(PG)? Are there any other topic areas you believe should be covered in the course?
- (2) Do you agree that a Board approved course in commercial law for tax (financial) advisers should be at least of 100 to 130 hours duration, equating to one tertiary level unit?
- (3) Do you agree that a Board approved course in commercial law for tax (financial) advisers should be attained through a university, registered training organisation, other registered higher education institution or another provider approved by the TPB?
- (4) Do you agree that the minimum education level required for a Board approved course in commercial law for tax (financial) advisers should be Diploma, which meet Australian Qualifications Framework level 5 criteria?
- (5) Do you agree that a Board approved course in commercial law for tax (financial) advisers should be assessed to a significant degree (that is, at least 40%) under some form of independent supervision and in a manner demonstrating rigour and integrity?