FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

31 January 2014

General Manager Budget Policy Division
Department of the Treasury
Langton Crescent
PARKES ACT 2600

By email: prebudgetsubs@treasury.gov.au

Dear Mr Lonsdale

Federal Budget 2014-15: FPA submission

The Financial Planning Association of Australia (FPA)[1] welcomes the opportunity to provide input to the 2014-15 Federal Budget.

The FPA strongly recommends that Government introduce budget measures that consider the long term needs for an ageing population and the impact that this will have for future Government budgets.

The FPA believes adopting the following recommendations would effectively deliver good social policy outcomes by improving the long term financial security of all Australians. We would welcome the opportunity to discuss these issues further with the Government.

If you would like further information on the issues raised in this submission, please contact me on (02) 9220 4500 or email: Dante.Degori@fpa.asn.au.

Yours sincerely

Dante De Gori
General Manager Policy and Conduct

1The Financial Planning Association (FPA) represents more than 10,000 members and affiliates of whom 7,500 are practising financial planners and 5,500 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- We banned commissions and conflicted remuneration on investments and superannuation for our members in 2009 – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Professor Dimity Kingsford Smith, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.

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FPA Submission to the Department of the Treasury

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FPA SUBMISSION: FEDERAL BUDGET 2014-15 | DATE: 31.01.2014

INTRODUCTION

The Federal Budget presents a valuable opportunity for Government to exercise prudent economic management, as well as enhance existing public policy positions that will improve the long term future (socially and economically) of the Australian people and the nation as a whole.

To this end, the FPA supports policy that is in the best interest of Australians both for today and tomorrow and we do not support policy that is short sighted and detrimental to the long term future of this country.

The introduction of superannuation represented all that is good about long term public policy planning, and this was evident during the GFC when the strength of the superannuation system played a significant role in keeping Australia out of a recession. Our superannuation system has also contributed to Australia's position of being the fourth largest funds management industry in the world and the largest in the Asia Pacific region.

With an ageing population and the additional pressure this will add to future budgets, the FPA strongly recommends that the Budget reflect policy decisions that are designed to support and encourage today's working Australians to become self-funded in their retirement. Increasing the number of self-funded retirees will greatly assist the Australian economy in many ways, including reducing the reliance and pressure on the Government's Age Pension.

Outside of the family home, superannuation is the largest (and for some the only) asset Australians will have when they retire. The incentive and motivation for Australians to be self-funded and living in their own home should be encouraged. The Government, especially a Coalition Government, do all it can to support the superannuation system to help Australians achieve a self-funded retirement. This includes instilling trust and confidence in the superannuation system.

The FPA, its members, and the millions of Australians that they service, strongly request that the Government does not introduce any changes that will reduce the incentives and benefits of the superannuation system which encourage people to save for their retirement.

The FPA's recommendations address the following key policy issues;

- encouraging a savings culture and improving Australians' retirement preparedness to reduce reliance on the social security system;
- improving access to financial advice for those Australians who are most in need of assistance in managing their financial affairs; and
- removing inconsistencies in the tax system.

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ACCESS TO FINANCIAL ADVICE

Tax deductibility of advice fees

With the banning of conflicted remuneration, there is an opportunity to amend a current anomaly in respect to the tax deductibility of financial planning fees. This is consistent with the Coalition's election commitment to reduce costs for consumers who access financial advice[2].

The precedent of tax deductibility of professional fees is already set and allows consumers to deduct fees paid to registered tax agents, BAS agents and lawyers.

Commencing July 2014, financial planners will be required to register with the Tax Practitioners Board as tax (financial) advisers, and adhere to the requirements of the Tax Agent Services Act, along with their tax agent peers. The amendment to the Tax Agent Services Act in 2013 defines a tax (financial) advice service as a type of tax agent service.

Including financial planners in the Tax Agent Services regime, and the banning of commissions on financial advice, set the right environment for the introduction of tax deductibility of financial advice fees.

Currently, a fee for service arrangement for the preparation of an initial financial plan is stated by the Australian Taxation Office[3] to be not tax deductible under section 8-1 of the *Income Tax Assessment Act 1997*.

Tax Determination TD 95/60 differentiates between a fee for drawing up a financial plan and a management fee or annual retainer fee. The determination states that the ATO is of the opinion that the expense incurred in drawing up a plan is not deductible for income tax purposes because the expenditure is not incurred in the course of gaining or producing assessable income but rather is an expense that is associated with putting the income earning investments in place.

Taxation Ruling IT39 states that where expenditure is incurred in 'servicing an investment portfolio' it should properly be regarded as being incurred in relation to the management of income producing investments and thus as having an intrinsically revenue character.

Consumers are paying for personal financial advice in varying ways that result in different taxation treatments for no apparent public benefit. This variety of treatment appears to be contrary to the ATO's obligation under the Taxpayers Charter it adopted in November 2003 to treat tax payers consistently.

The inability to claim a tax deduction for the fees associated with an initial financial plan acts as a disincentive for people to take the first step towards organising their finances on a strategic basis. This has widespread cost implications, both for the individuals and the community as a whole. Encouraging the use of professional financial planning advice results in a more financially literate community, and benefits society overall.

[2] Media release, Delivering affordable and accessible advice, Senator Sinodinos, 20 December 2013.
[3] Refer ATO Taxation Determination TD 95/60

Quality financial advice can;

- reduce financial and social exclusion for consumers and help them navigate the financial marketplace and learn how to better manage their finances providing them with dignity and peace of mind throughout their life;
- deliver significant consumer benefits including changes in savings behaviour, setting proper budgets, following a plan for paying off debt, and organising finances and building wealth[4];
- change people's behaviour and habits of managing their financial affairs by teaching them sensible and simple practices that can be used in their everyday lives to prepare for their future financial needs;
- improve the financial capability of consumers, enabling them to make informed judgments and effective decisions about the use and management of money throughout their lives.

Public policy initiatives to improve access to affordable advice for all Australians, particularly those most in need of assistance in managing their finances, will reduce the cost of advice for consumers while maintaining consumer protections and advice quality.

Making financial advice more affordable for consumers' supports the Coalition's superannuation policy "[t]o encourage as many Australians as possible to actively plan and save for their retirement, to take full advantage of the benefits the superannuation system provides and to work toward a self-funded retirement."

It also assists Government to fulfil its obligation to address the substantial issues of financial and social exclusion by helping consumers gain access to expertise to help them navigate the financial marketplace and learn how to better manage their finances.

Rice Warner research[5] identified clear societal benefits of financial advice;

- reduced debt - increases disposable income for more productive purposes;
- higher rates of return on investments over long periods - building wealth;
- insurance protection - prevents people from relying on welfare;
- higher levels of savings – reduces reliance on government benefits during and after retirement;
- a financially literate and conscientious society that would make better long-term decisions.

Financial planners provide valuable advice that is important for the long-term economic welfare of Australians. The financial planning profession is uniquely positioned to help Australians build their wealth and plan for a financially independent retirement.

Specifically allowing initial advice fees to be tax deductible would greatly assist consumers' access to affordable financial advice that is beyond mere income tax or of a superannuation nature. While this would involve some additional costs to Government, these costs would be significantly outweighed by the long-term benefits. Including caps on either the size of the tax deduction or an income cap on those able to receive a deduction could control this revenue cost.

[4] *FPA Value of Advice Research*, Rice Warner Actuaries, February 2008.
[5] Rice Warner Actuaries, Value of Advice Research 2008

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Recommendation:
The FPA recommends the preparation of an initial financial plan, and ongoing management fees or annual retainer fees, be expressly stated to be tax deductible.

Alternative payment methods to improve access to advice

Accessing Super

The FPA recommends the extension of the sole purpose test in the Superannuation Industry (Supervision) Act or the inclusion of a specific trustee authority (our preferred option) to enable consumers to deduct advice fees from their superannuation account for personal financial advice which supports the building of retirement savings. These fees should only be charged if the super member requests personal financial advice under this scheme, as well as other restrictions.

A consumer should be allowed to use their superannuation account balance to pay for advice from any qualified financial planner, as long as the advice supports building of retirement savings. Advice fees should be transparently disclosed and clearly separated from fund management fees.

Salary sacrifice

The use of salary sacrifice arrangements to pay for advice would provide an alternative and attractive payment method for consumers, particularly those who fall outside the parameters of the Government's superannuation co-contribution scheme.

Government superannuation co-contribution scheme

There are certain groups that have particular challenges. The lowest levels of financial literacy were associated with;

- those having lower education (Year 10 or less);
- those not working, for a range of reasons, or in unskilled work;
- those with lower incomes (household incomes under $20,000);
- those with lower savings levels (under $5,000); and
- single people and people at both extremes of the age profile (aged 18–24 years and 70 years and over)[6].

The FPA suggests that should the government re-instate its co-contribution scheme, a percentage of the co-contribution could be used to pay for professional advice on superannuation matters. This would be a one-off fee that would greatly assist Australians with lower incomes to access professional advice and make appropriate decisions in relation to superannuation. Consumers should be allowed to use the Government co-contribution to pay for advice from any qualified financial planner. This payment method could be optional for consumers.

[6] ANZ Adult Financial Literacy Survey 2005

For example, of the $1,500 co-contribution, a consumer may choose to use $250 to pay for one-off superannuation advice.

Recommendation:

While the FPA believes the tax deductibility of advice fees in line with fees paid to tax agents is the simplest method to assist consumers to pay for advice, the FPA suggests the following additional alternative payment options would also help consumers:

- **Accessing super** - extend the sole purpose test or amend the law to allow specific trustee authority (preferred) for consumers to deduct advice fees from their superannuation account for advice which supports retirement savings, if the super member requests it. Advice fees should be transparently disclosed and clearly separated from fund management fees.
- **Salary sacrifice** - The use of salary sacrifice arrangements to pay for advice.
- **Government co-contribution scheme** - a small portion of the Government's co-contribution could be used to pay for professional advice on superannuation matters.

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SUPERANNUATION

The current superannuation system contains a high level of complexity and inequity, which significantly hinders Australians' ability and desire to make voluntary contributions to build their retirement savings and achieve a self-funded retirement.

Changes could be made to the rules to allow all Australians to claim a tax deduction for personal contributions. This would achieve a simpler system, the removal of current anomalies, greater equity between employees and self-employed persons, and greater incentives to build retirement savings. To achieve this end, we recommend the following policy changes;

- remove restrictions on the superannuation contribution age;
- remove superannuation guarantee contributions from the concessional contributions cap;
- re-instate the levels of the concessional contribution caps to allow flexibility at older ages when the capacity to contribute is higher;
- remove excess contributions tax on non-concessional contributions over the cap;
- allow personal contributions to become tax deductible; and
- re-instate the original Government co-contribution scheme.

Remove 'contribution age'

To address the demographic, social, and economic challenges of an ageing population the FPA believes that the Government should introduce measures to encourage workforce participation in retirement.

Personal contributions to superannuation are generally not permitted for people aged 75 and over. The FPA recommends that individuals who satisfy the work test should be able to contribute to super beyond the age of 75. This will further align and simplify superannuation rules, encourage contributions into superannuation, and reduce the future reliance on the Age Pension.

The FPA also propose spouse contributions, and any associated age-tested contribution matters to be included, thereby providing Australians with a simpler and fairer superannuation system that encourages older Australians to continue working and contributing to building their retirement savings.

Recommendation:
The FPA recommends the Government provide incentives to encourage people to defer the age pension by allowing individuals who are still working to contribute to superannuation beyond the age of 75.

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Superannuation concessional contribution caps

Concessional contribution limits

Government policy should encourage Australians to contribute to their superannuation and, where possible, fund their own retirement. The overall objective of the superannuation system is to provide an accessible mechanism to encourage Australians to save enough money to be financially independent in retirement to reduce the reliance on the social welfare system, thereby reducing the financial burden on the Government.

Though the FPA acknowledges the increased concessional contribution limit of $35,000 for Australians aged 60 and over (2013/14) and 50 and over (2014/15), the FPA submits that the cap remains too low and not flexible enough to encourage Australians to make additional contributions to superannuation.

The following table highlights that a couple will need $510,000 of retirement savings to support comfortable retirement standard. However, this amount assumes that the couple will still need to rely on a part age pension in order to survive. For Australians to fully fund their retirement well over $510,000 will be required.

Table: Lump sum retirement benefits after 30 years in a taxed fund[7]

Tax treatment and contribution level	Wage of $30,000	Wage of $50,000	Wage of $100,000
9% contributions and investment earnings taxed at current rates.	$110,000	$183,000	$366,000
Lump sum if contributions made at the rate of 12% of salary.	$146,000	$244,000	$487,000
Lump sum needed to support comfortable lifestyle for a couple (**assumes receipt of part Age Pension**).	$510,000	$510,000	$510,000
Lump sum needed to support comfortable lifestyle for a single person (**assumes receipt of part Age Pension**).	$430,000	$430,000	$430,000

The lead up to retirement (such as the last 10 years of full-time work) is a critical period for retirement preparedness, employing sound transition to retirement strategies and growing one's retirement savings. For many Australians, it is these final years of full-time work when they are more likely to be able to afford to make additional voluntary contributions to superannuation.

The FPA recommends the Government increase the concessional contribution cap for those over 50 years to $50,000 (from the current cap of $35,000), two times that of the concessional cap for those under 50 years currently $25,000. Both caps should be indexed. This would encourage individuals to contribute to their superannuation and, in the long-term, reduce the reliance on the age pension.

[7] *The ASFA Retirement Standard*, September 2013

The FPA acknowledges the government's current focus on returning the budget to surplus. The ideal public policy outcome would be to increase the concessional contribution cap for those aged 50 and over to $50,000 in this year's budget. However, to support the government's budget surplus priority, an alternative arrangement could be considered to increase the cap in $5,000 increments every two years until it reaches $50,000.

Concessional contribution definition

The current contribution cap includes personal deductible contributions, Superannuation Guarantee contributions, and voluntary employer contributions, which include salary sacrifice. The penalties for breaching the caps are applied at the member level but the control of contributions can be outside the control of the fund member, creating administrative complexity. For this reason it is recommended that Superannuation Guarantee contributions (which are mandated under specific rules) be removed from the concessional contribution cap. This will become increasingly important with the proposed increase of the Superannuation Guarantee from 9.25 to 12 percent. Examples of what could be unintended consequences with negative implications are outlined below.

Client case study

Barry (age 48) has paid off the house and is maximising his contributions to superannuation in preparation for retirement. Barry is a sales person and earns a base salary of $120,000, plus Superannuation Guarantee of $11,100. He sought advice on the most efficient way to accumulate retirement savings and has arranged for his employer to salary sacrifice $13,900 into superannuation. This is calculated to keep him within the $25,000 concessional contributions cap so an excess benefit will not arise. However, consider the impact of the following scenarios for Barry:

- *Scenario 1 – Barry has a good year and receives a bonus of $50,000 on which his employer is required to pay an additional superannuation guarantee of $4,625. This may cause Barry to breach the cap and be liable for an excess contributions charge, which will also increase the administrative burden on both Barry and the ATO.*

- *Scenario 2 – Barry receives a pay increase of $30,000 during the year. The increased salary will also result in an increased superannuation guarantee payment and Barry could inadvertently breach the cap and be liable for an excess contributions charge, which will also increase the administrative burden on both Barry and the ATO.*

- *Scenario 3 – Barry's employer pays the superannuation guarantee fortnightly. When Barry is planning his level of salary sacrifice he calculates that the employer will pay $427 per fortnight ($11,100 for the financial year). However, this year has an extra pay period and so in this financial year the employer actually pays $11,529 which may result in an excess contribution. Barry can apply to the Australian Tax Office (ATO) to exercise discretion to allocate the extra payment to a different financial year, but this is an unnecessary complexity and an administrative cost to the ATO.*

- *Scenario 4 – As per scenario 3 but now assume that Barry had also made personal non-concessional contributions of $450,000 by utilising the bring-forward provisions during the same financial year. The excess concessional contribution created by this extra payment, if not refunded, would also count towards the non-concessional contribution cap resulting in a further penalty of 46.5%.*

- *Scenario 5 – As per scenario 4 but assume that instead of $450,000 non-concessional contribution Barry contributed $150,000 so as not to trigger the bring-forward provisions. He subsequently makes a $450,000 non-concessional contribution in the next financial year on the assumption that the bring-forward provisions had not been previously triggered. Unfortunately, the additional Superannuation Guarantee payment would have inadvertently triggered the bring-forward provisions in the previous year meaning that around $150,000 of this non-concessional contribution is now excessive and subject to 46.5% tax. The ATO has indicated that it will exercise a de minimus principle approach to such situations but this is another unnecessary complexity and an administrative cost to the ATO.*

- *Scenario 4 and 5 would equally apply if a breach of the concessional contribution cap occurred under scenarios 1 and 2 and the excess concessional contributions were not refunded.*

Recommendation:

To improve the concessional contribution caps the FPA recommends:

A. Superannuation Guarantee (SG) contributions are removed from the concessional contribution cap.

This will ensure those individuals that can afford to contribute to superannuation in excess of their SG amount actually have a 'cap' available. It needs to be recognised that not all high-income earners remain that way indefinitely and there should be the opportunity in good years for these individuals to be incentivised for the income to be contributed to superannuation. This measure becomes even more important as SG increases from 9.25% to 12%.

B. Re-instate the concessional contribution cap for all Australians over 50 to $50,000, with a provision for indexation.

Without a provision for the $50,000 cap to remain and for both caps to be subject to indexation we are moving towards a two-pillar retirement system where it will simply be a function of the Superannuation Guarantee and a heavy and increasing reliance on the Age Pension.

The FPA acknowledges the government's current focus on returning the budget to surplus. While the ideal public policy outcome would be increase the concessional contribution cap for those aged 50 and over to $50,000 in this year's budget, to support that government's budget surplus priority an alternative arrangement could be considered to increase the cap in $5,000 increments every two years until it reaches $50,000.

Non-concessional excess contributions tax

As shown in the example above, it can be very easy for an individual to breach the non-concessional contribution cap despite careful planning to remain within the limits. We were very supportive of the Government on their flexibility regarding the penalties which were in place when exceeding the concessional contribution cap this financial year. By allowing individuals to request a refund of the excess and pay tax at their marginal tax rate (plus a small interest and administrative charge), much of the risk and disincentives for boosting retirement savings have been removed.

Following this same logic, we recommend the removal of excess contributions tax for individuals inadvertently making excess **non-concessional** contributions (as shown in the case study above). We further highlight that where the Government has found it unfair for individuals to pay extra tax on earnings they have not yet been taxed on, it seems exceedingly unfair to further tax money which has already been fairly taxed.

We note that it is Government policy to ensure that the generous superannuation tax concessions are not abused. We therefore propose that in addition to removing the excess contributions tax on excess non-concessional contributions that the excess contributions are refunded by the super fund back to the individual with a small administration charge payable.

Recommendation:
The FPA recommends the Government:

- remove the penalty tax of 46.5% on non-concessional contributions which exceed the cap; and
- refund excess non-concessional contributions back to the individual subject to administration charges.

Personal contributions to be tax deductible

The FPA proposes that Government should consider further incentives for Australians to contribute to superannuation by allowing all personal contributions made to super to be tax deductible.

In particular, the Government should remove the arbitrary complexity of personal contributions not being income tax deductible for those who receive PAYG salary. The amount that can be claimed as a tax deduction should be limited together with any employer (concessional) contribution up to the concessional cap. This gives all Australians the flexibility to either salary sacrifice or make lump sum personal contributions (as suites their needs) and boost their retirement savings in a flexible and tax effective manner.

For example someone aged less than 50 who receives a PAYG salary of $100,000 will be able to claim a tax deduction on personal contributions not exceeding $15,750. This is calculated as the difference between the concessional cap of $25,000 and the compulsory 9.25% super guarantee ($9,250).

Recommendation:
The FPA recommends the Government consider allowing personal contributions to be tax deductible for those who receive PAYG salary.

Government co-contribution scheme

The previous government reduced the Coalition's co-contribution scheme and only partially replaced the reduction with the Low Income Superannuation Contribution (LISC), which provided a rebate of the tax paid on the Superannuation Guarantee contribution for low income earners. This rebate is paid back into the individual's superannuation fund. There is currently a Bill in the Senate which serves to repeal the LISC, but offers no alternative measure to incentivise low income earners to save for their retirement.

People should be encouraged to make voluntary contributions to superannuation wherever possible, especially those on low incomes or with broken work patterns. The co-contribution scheme had evidenced some success in this area.

To incentivise Australians to save for retirement, the FPA recommends the government reinstate the co-contribution scheme with;

- the maximum Government contribution to $1,500 and a timetable to increase; and
- an increased income threshold to allow for greater access to the co-contribution scheme.

These increases would stimulate further incentives for people to actively engage with their superannuation and make after-tax contributions.

While the co-contribution scheme is intended to assist lower income earners, anecdotally it would appear that such taxpayers are often unlikely to be able to avail themselves of the benefits as their disposable income is likely to be totally consumed by household expenditure. This is an area where the Government could work to provide a further concessional adjustment that genuinely assists low-income earners increase their superannuation contributions.

The FPA would like to highlight that the current co-contribution scheme only supports those who are working. We recommend the removal of the work-test requirement to extend the co-contribution to people who are temporarily not working such as stay-at-home parents, carers and those on income protection or workers' compensation insurance benefits.

The FPA suggests the fiscal impact of the re-instatement and broadening of the co-contribution scheme could be offset by the resulting future savings on age pension expenditure and should not be funded by an increase in other superannuation taxes. Funding options could include better targeting of the measure with the introduction of a family income threshold for members of a couple rather than eligibility based on just the individual's income. Not only would this assist with the expansion of the measure to a non-working spouse, but it would also promote greater equity and affordability.

Recommendation:
To encourage Australians to save for retirement, the FPA recommends amending the Coalition's co-contribution scheme with;

- the re-instatement of the maximum Government contribution of $1,500 and a timetable to increase;
- an increased income threshold to allow for greater access to the co-contribution scheme;
- the removal of the work-test requirement to extend the co-contribution to people who are temporarily not working such as stay-at-home parents, carers and those on income protection or workers' compensation insurance benefits; and
- an increase to the income threshold for access to the Government co-contribution (with the potential for a family income test rather than an individual income test).

Assisting seniors to downsize their home

Prior to the last election there was a proposal to trial a means test exemption program for Age Pension recipients who were downsizing from their family home.

Under this proposed program the family home must have been owned for at least 25 years with at least 80 per cent of any excess sale proceeds (up to $200,000) from the family home deposited into a special account by an authorised deposit taking institution. The funds in this account (including interest earned) would be exempt from pension means testing for up to 10 years as long as there were no withdrawals from this account. People who were assessed as home owners who moved into a retirement village or granny flat would also have access to this exemption; however, it was not proposed to be available to those moving into residential aged care.

The FPA suggest this program would significantly assist Age Pension recipients to move to housing which suits their needs in retirement, and allow them to save for greater financial security into the future. In addition, it would bring more houses into the market which would relieve the current housing pressure for first home buyers.

Recommendation:
The FPA recommends the government proceed with the introduction of a trial means test exemption program for Age Pension recipients who were downsizing from their family home. This program should also be open to Department of Veterans' Affairs income support payment recipients.

SUPERANNUATION – Limited Recourse Borrowing Arrangements

Amend section 67A of the *Superannuation Industry (Supervision) Act 1993* (Cth)

In its current form, section 67A of the *Superannuation Industry (Supervision) Act 1993* (Cth) requires that the trustee of a regulated superannuation fund (RSF) who wishes to execute a limited recourse borrowing (LRB) arrangement must ensure that the asset is held by another (the Holder) in such a manner that they (the RSF Trustee) acquire a beneficial interest in the asset. That other person holds the relevant asset via a Holding Trust. The Holding Trust is commonly of a bare or absolute entitlement trust nature though the precise form and structure has been found to vary.

The Holding Trust requirement is unnecessary and causes confusion and additional costs for parties wishing to execute LRB arrangements, without providing any real benefits (particularly in the form of protecting superannuation assets). Therefore, this submission is specifically for the modification of section 67A to enable LRB arrangements without the need for a Holding Trust requirement. The suggested amendments are de minimis.

In support of our recommendation, we make the following comments and observations which, we believe, demonstrate that it accords with the relevant generally-recognised criteria for an efficient tax system, ie. fairness, efficiency and certainty/simplicity.

Nil Cost to Industry - The current law is not displaced or affected, it continues to apply. Adopting our recommendation means that providers of "traditional instalment warrants" arrangements will continue to be within the law (eg. the Macquarie Flexi 100 Trust of Macquarie Financial Products Management Limited). Accordingly, we estimate that there will be nil cost to industry to adapt.

No Grandfathering - The purpose of any change is to improve for the future, not address any past concerns. As a result of the above, and also the fact that our recommendation is prospective only in its application, its adoption will not require any "grandfathering" of existing arrangements. Again, this provides participants and industry certainty and efficiency.

Limited Recourse Retained (LRB) - Very importantly, the adoption of our recommendation will ensure that a fundamental aspect of the existing provisions is retained, ie. protection of the other assets of the superannuation fund from the LRB. That is, our recommendation does not in any way impose any additional risk to retirement savings, by ensuring that the strictly limited recourse nature of the borrowing (which is not enhanced in any way by the existence of the Holding Trust requirement) continues.

Clarity Around Arrangements - LRB arrangements commonly involve the vesting of an absolute entitlement to the relevant asset in the trustee of the superannuation fund. There is some anecdotal evidence that some LRB arrangements have not been so drafted. In fact, we feel that the existence of the Holding Trust requirement has resulted in poorly/incorrectly drafted and/or executed arrangements, with the consequence that there may be unnecessary capital gains tax, GST and/or stamp duty liabilities. The adoption of our recommendation will eliminate the future risk for these liabilities and, therefore, the need to amend the relevant laws (which has been mooted at the federal level in respect of the capital gains tax liabilities and may prove politically impossible in respect of the numerous state/territory stamp duty regimes).

Cost Savings - Finally, we also feel that adoption of our recommendation will result in substantial cost savings for all types of superannuation funds, which would otherwise erode retirement savings. We estimate that those savings (in each LRB arrangement) are as follows:

- Establishment of a corporate holding trustee = $800
- Creation of Holding Trust and other associated legal documents = $2000
- Advice in relation to the above = $1500
- ASIC review of corporate holding trustee = $230 (annual)
- Audit = $400 (annual)
- Accounting = $500 (annual)
- Liquidation of corporate holding trustee = $1500
- Creation of legal documents relating to the above = $1000
- Advice in relation to the above = $1500
- Potential capital gains tax, GST and/or stamp duty liabilities = at least $20 000.

Recommendation:
Our recommendation is for the removal of the Holding Trust requirement in section 67A of the *Superannuation Industry (Supervision) Act 1993* (Cth) with respect to limited recourse borrowing arrangements in accordance with **Appendix A**, with prospective application only.

INSURANCE

Improving tax equity, simplification & efficiency of insurance protection mechanisms

Life, Total and Permanent Disability (TPD), and income protection insurances incur different tax treatment depending on the type of policy, how it was purchased, who purchased it and for what purpose. The FPA suggests that addressing the anomalies and complexities of the tax treatment of insurance would greatly assist in closing the protection gap.

Providing deductibility of premiums and equivalent taxation treatment of death and TPD proceeds payable within and outside the superannuation environment will provide equity regardless of whether individuals access insurances in one regime or the other.

Allowing tax deductibility of insurance premiums for non-super policies will add incentive for Australians to take out life insurances, reducing our documented under-insurance problem in Australia and consequently reducing reliance on government benefits when insurable events occur.

Further, allowing tax deductibility of insurance premiums, especially for disability policies such as total and permanent disability and trauma, should be included in the mechanisms of the upcoming National Disability Insurance Scheme. This greater increase in Australians being covered by disability insurance would relieve the long term budgetary position of the National Disability Insurance Scheme and encourage individuals to assist in providing the funds to support themselves in the event of their disablement.

Equalising taxation treatment will simplify this area on a number of levels:

- Calculation methodology and adequacy requirements for consumers - Currently consumers must take into account both tax deductibility of premiums, and any taxation consequences if a claim is paid when determining the amount of insurance cover to apply for whether held directly, via superannuation, or via a group employer arrangement.

- Where tax is likely to be paid on proceeds, insurance cover must be grossed up to cover the potential tax, in order to maintain the required level of benefit, and the corresponding increase in premium must be weighed up against any deductibility of premiums that is available.

- In assessing what tax is likely to be paid on death or TPD benefits, consumers and their advisers must make assumptions about who will be the beneficiary/ies, and what age they will be, at the time the benefit is payable. The decisions based on these assumptions must be made well in advance of the likely insurable events occurring, making them subject to legislative risk and subjecting consumers to the likelihood they will be unable to re-arrange plans due to potential future uninsurability issues.

- Superannuation administration - The administration related to the taxation consequences of benefit payments and also that related to determining dependency of member's beneficiaries could be significantly reduced. This would reduce reporting, time, training and errors, and lead to more

appropriate cover for consumers. This affects not only superannuation administrators' costs (passed on to consumers) but also costs related to the Superannuation Complaints Tribunal (SCT), as most complaints to the SCT relate to the payment of death and TPD benefits[8].

- Employer administration - The administration related to the taxation consequences of benefit payments would remove the current disincentive for employers to provide group insurance arrangements that have been in place since the "Simpler superannuation" changes were introduced.

- Taxation regime – The ATO would not have to deal with (at least seven) different tables relating to the taxation consequences of employer and superannuation payments on death and TPD. Again, this would reduce reporting, time, training and errors.

Benefit (claim) proceeds

Determining the taxation consequences of receiving death or TPD benefits from superannuation or an employer is a highly complex task. It is unlikely that any person who is not a tax specialist or financial planner would be able to calculate potential tax payable, or the strategic consequences of decisions they make in relation to where they hold these insurances, how benefits are drawn down in the event of death or TPD and to whom those benefits may be payable.

This issue is of particular concern to the FPA and its members as the impacts of the complexity of the system make it extremely difficult for consumers to make decisions at a time when they are already confronted by very emotional and traumatic events in their lives.

Legislation should be amended so that the taxation implications of insurance proceeds received are the same for personal insurance policies held inside or outside superannuation. The proceeds of a death or TPD policy held outside superannuation is generally paid tax-free, so the same tax-free status should apply to policies paid inside superannuation.

The taxation of death benefits from superannuation payable to 'non-dependants' (especially adult children) is inconsistent with that applicable to the terminally ill (who can withdraw benefits tax free prior to death and make gifts to adult children), encourages early withdrawal and unnecessarily complex and expensive strategies such as recontribution.

The application of an element untaxed in the taxable component where an insurance payout is included in the death benefit creates a high level of taxation on death benefits paid to a non-death benefits dependent (eg. payment to an adult child) and the ATO can receive a significant portion of the payment.

> ***Client case study:***
> *A client of an FPA member was 57 when he died very suddenly. He had been a member of a fund for 8 years and had a superannuation balance of $8,000 and an insurance life policy of $100,000. The death benefit was split between his two adult sons. The tax payable on the death benefit was $25,920 and each son received $41,040. If the client had not died so suddenly he could have*

[8] Superannuation Complaints Tribunal, *Annual Report 2007-2008*

withdrawn the full benefit under the terminal illness conditions with no tax payable and then made a tax-free gift of $54,000 to each son.

The untaxed element also creates an anomaly where the life insurance policy is held in a fund that includes accumulated savings compared to a stand-alone insurance fund. The formula for calculating the element untaxed is based on the full death benefit payable (less any tax-free component). In this way, some of the accumulated savings is also converted to an element untaxed and a higher rate of tax of 31.5 per cent applies. If the superannuation fund did not include an insurance payment the accumulated savings only includes an element taxed, and tax of 16.5 per cent is applied.

Recommendation:
The FPA recommends the following changes for equity and simplification:

- Death benefits - the removal of taxation on all death benefit proceeds paid from superannuation regardless of the beneficiary, as per personally held insurances.
- As a minimum, remove the untaxed element calculations for all death benefits and additionally, remove all tax on death benefits paid to adult children.
- If taxation treatment of death benefits is to continue to relate to whether the recipient is a dependant or not, the FPA recommends a standard definition of dependant apply across all regimes - superannuation, taxation and 'anti-detriment' payments
- TPD benefits – the full payment accessed under permanent incapacity should be tax-free.

Improve access to insurance for small business

The complexity and inequity resulting from the differing Capital Gains Tax (CGT) treatment that applies to non-super TPD/trauma policy proceeds compared to the CGT treatment for life cover proceeds can greatly restrict the accessibility to vital risk cover for a broad range of small businesses, particularly where the business owners are not family members.

For life cover, the relevant CGT exemption only applies if the section 118-300 requirements of the Income Tax Assessment Act 1997 are satisfied. However, for a CGT exemption to apply to TPD/trauma proceeds, the different requirements in section 118-37 need to be satisfied.

While these differing CGT exemption requirements rarely cause an issue in personal risk situations, they are a significant concern and a complicating factor in business risk applications such as key person and Buy/Sell (business continuation) insurance arrangements.

For example, where a company taxpayer wants to effect Life, TPD and Trauma key person capital purpose cover on the life of one of its key people, if the three types of cover are owned by the company (for example all under the one insurance policy), any life cover proceeds will be received CGT free, but the company will incur tax on the gain derived from the TPD/Trauma proceeds.

This is a frustrating situation for business taxpayers and their advisers often resulting in extra complexity involved in separating the ownership of the life cover from the TPD/trauma cover and having differing

ownership of the various covers. Worst still it can result in not going ahead with implementation of some or all of the covers.

Applying the section 118-300 rules consistently to all three types of cover – Life, TPD and Trauma – would remove the complexity for business owners and should assist in effecting the required insurance, thereby contributing to the survival of the business in situations where the key people/owners suffer one of these insurance events.

Recommendation:

To improve access to vital insurance cover for Australian businesses, the FPA recommends:

- Capital Gains Tax (CGT) exemption requirements in section 118-300 of the Income Tax Assessment Act 1997 be consistently applied to non-super TPD/trauma policies and life insurance cover; and
- Removal of the CGT exemption requirements that currently apply to TPD/trauma proceeds in section 118-37 of the Income Tax Assessment Act 1997.

Consistent definition of 'dependant'

Currently different definitions of dependants apply for superannuation, employment termination payments, death benefit termination payments, and the increased lump sum death benefit (i.e. the anti-detriment payment) associated with Section 295-485 under the Income Tax Assessment Act 1997 (ITAA97). People do not understand different concepts of "dependant" or the taxation implications associated with these concepts. The provisions regarding dependency in superannuation law result in unnecessary complexity and can be a disincentive to fund for retirement via the superannuation system.

To access insurance benefits provided via superannuation, and accumulated benefits on death or total and permanent disability (TPD) generally, a person must meet a number of definitions. Pension and insurance benefits from superannuation can only be paid by the fund trustee to a member, their dependant as defined in the Superannuation Industry (Supervision) Act 1993 (SIS) or their legal personal representative. The taxation treatment of those proceeds however, will depend on whether the recipient meets the definition of tax 'dependant' under the ITAA97.

Superannuation Industry (Supervision) Act 1993 definition of dependants:

- Current spouse – includes de facto
- Same sex spouse (from 1 July 2008)
- Any child
- Interdependency relationship
- Financial dependant

Income Tax Assessment Act 1997 dependants:

- Current spouse (includes de facto) or former spouse
- Same sex spouse (from 1 July 2008)
- Child under 18

- Interdependency relationship
- Financial dependant

The definition differs again in the case of "anti-detriment payments", representing a refund of contribution tax paid by a consumer over their superannuation membership years under Section 295-485 of the ITA Act 1997:

- Spouse (including de facto)
- Same sex spouse (from 1 July 2008)
- Former spouse
- Any child (including adult)

The design of the 'anti-detriment payment' rules in general makes availability and application of this benefit inconsistent between types of funds. Further, there is the anomaly that a former spouse cannot receive a death benefit under superannuation law, but can under tax law, including the anti-detriment payment. Therefore, for a former spouse to receive a death benefit from a superannuation fund it must go through the deceased estate, an additional complexity to the superannuation death benefit system at time when families may be suffering anguish at the loss of a family member.

Children receiving death benefit proceeds in the form of a superannuation pension must commute the benefit to a lump sum at age 18 or 25 if still a dependant – further encouragement to spend rather than continue to save through the superannuation system.

In addition, a reversionary pensioner (that is the beneficiary who will continue receive a superannuation pension if the first recipient dies) must be a dependent under the SIS Act to be nominated but the pension can only be paid to a tax dependant.

Similar to the tax treatment of insurance benefits, this issue is of particular concern to the FPA and its members as the impacts of the complexity of the system make it extremely difficult for consumers to make decisions at a time when they are already confronted by very emotional and traumatic events in their lives.

Recommendation:

The FPA recommends:

- the simplification of the tax treatment of death benefits including more consistent definitions of "dependant" for tax and superannuation purposes, as well as aligning these with the definition of eligible beneficiary for anti-detriment benefits; and
- the SIS definition of dependant be applied for both SIS and tax purposes.

SOCIAL SECURITY

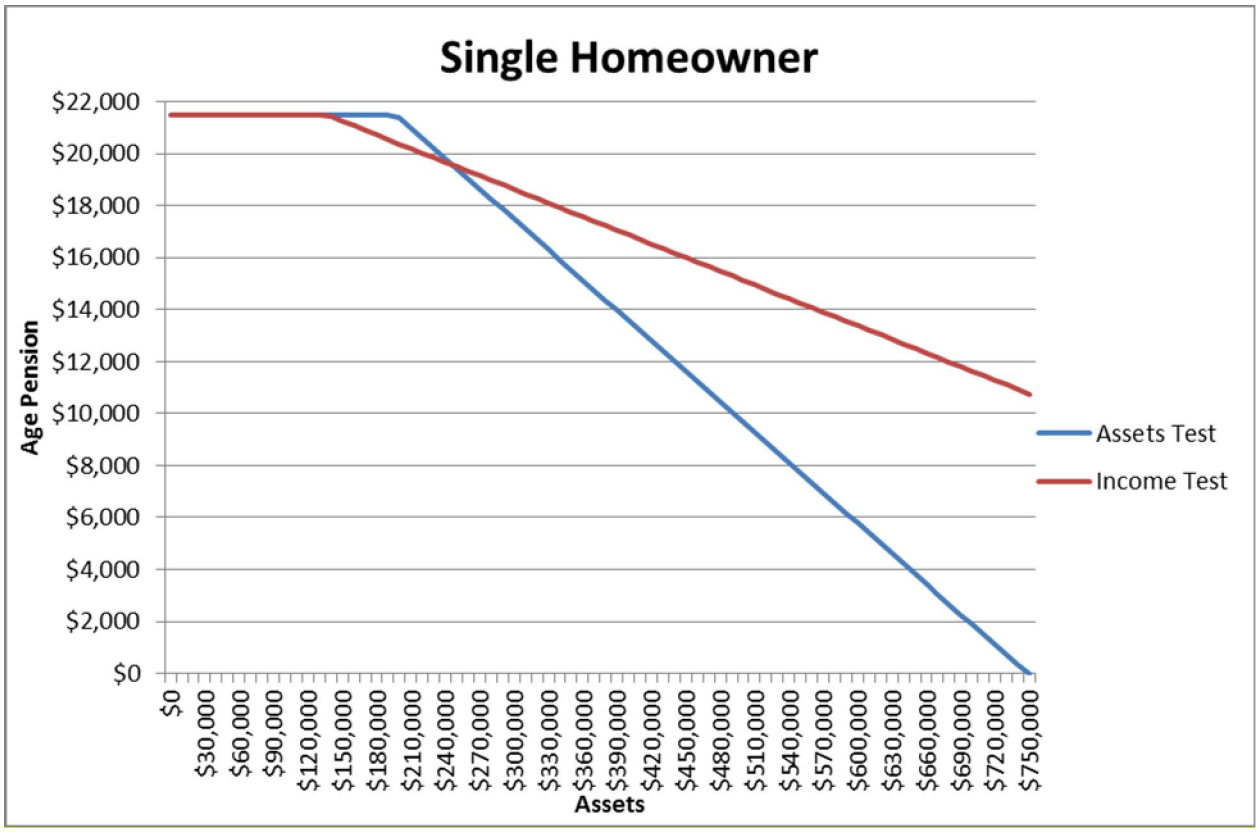
Consistent approach to income test for pensions

The FPA would again like to reiterate our recent submission to the Senate Standing Committee on Community Affairs enquiry into the Social Services and Other Legislation Amendment Bill 2013 and the poor outcomes achieved for income supported retirees because of the proposed changes to deeming of account based pensions from 1 January 2015. Given the Government's long standing encouragement of individuals to grow their super and allowing them to self-fund their retirements, and in particular the Coalition Government's 2007 simplification of the superannuation system which was designed to encourage the use of retirement income streams, the decision to deem account based pensions will only help to encourage Australians to squander their retirement savings creating further reliance on social security benefits. The 2007 simplification of superannuation specifically encouraged account based pensions to help manage retirement cashflow and encourage diversification of assets. The FPA continues to recommend that the Coalition Government drop this policy given it conflicts with their previously stated belief in the benefits of the post-retirement superannuation system.

Given the Government's current focus on returning the budget to surplus, some other ideas to make the means testing of social security fairer may include:

- There is now a significant difference between the income and asset tests for pensions from annuities, defined benefit pension products, and account based pensions which could be brought more into line;

- Whether an asset is affected by the incomes test (due to deeming) or assets test, the test should give consumers the same age pension assessment outcome. The chart below shows that at present, depending on the value of an income support recipient's assets, they are affected by the income or assets test differently which introduces uncertainty and opportunities to manipulate the social security system.



- The social security means test upper thresholds are incredibly generous to self-funded retirees. A single person can earn up to $47,065pa or have up to $748,250 in assets (excluding their home) and qualify to received some social security benefit; while a married couple can earn up to $72,010pa and have up to $1,110,500 in assets (excluding their home) and still get some social security benefit. As such a freezing of these caps for a period of time may achieve a reasonable outcome for the Government's budgetary position and have no significant effect on the retirement affordability of wealthy self-funded retirees.

Recommendation:

The FPA recommends:

- Consistency in the income testing assessment of all retirement income streams;
- Consistent outcomes of income and asset means testing outcomes of assets;
- Relieve budgetary pressure by freezing upper social security means test thresholds for members of the community who are able to self-fund their retirements;

OTHER POLICY PROPOSALS

Enshrinement of the term Financial Planner/Adviser

It is the FPA's strong belief that to strengthen consumer protection and to continue the journey towards creating a true profession, the law must restrict the term financial planner to only those that have the highest level of education, competency, ethics and standards and are a member of a 'recognised professional body'.

A lack of restrictions on the use of the term financial planner is, among other things, a significant gap in consumer protection. It leaves trusting consumers open to influence by unlicensed and unqualified individuals calling themselves financial planners.

During the Parliamentary Joint Committee (PJC) Inquiry into the collapse of Storm Financial, the committee acknowledged that they had [5.87][9]:

> *legitimate concerns about the varying competence of a broad range of people able to operate under the same 'financial adviser' or 'financial planner' banner. The licensing system does not currently provide a distinction between advisers on the basis of their qualifications, which is unhelpful for consumers when choosing a financial adviser.*

The current miss-use of the term financial planner and financial adviser impacts on consumer trust and confidence in the profession. It also results in all financial planners suffering reputational damage when tainted by the actions of incompetent providers who should not have the legal capacity to call themselves financial planners.

The term financial planner is also increasingly being used in marketing and promotional material by persons who provide non-traditional ancillary services, such as realtors, stockbrokers, life insurance agents or brokers, mortgage brokers, property brokers, sales agents of various investment vehicles, accountants, and unlicensed individuals.

The FPA's position is supported by an article in the Canberra Law Review (2011)[10]:

> *Trust and confidence in a professional industry is built upon the belief that the professionals working in that industry have special training and knowledge, high standards of accountability and a belief that advice given is in the best interest of the client seeking expert knowledge. Without adequate training and specialist knowledge, it is difficult to see how any of the previously mentioned factors can be fulfilled, as good advice cannot be given by an adviser whom has not been properly trained and lacks specialist knowledge. In order to restore trust and confidence in the financial advice industry, these issues must be addressed.*
>
> *Furthermore, a closely related matter to this issue that is yet to be implemented is the restriction of*

[9] *Parliamentary Joint Committee, Inquiry into financial products and services, November 2009, pp 90*
[10] *Canberra Law Review (2011) Vol. 10, Issue 3.* THE FUTURE OF FINANCIAL ADVICE REFORMS: RESTORING PUBLIC TRUST AND CONFIDENCE IN FINANCIAL ADVISERS – AN UNFINISHED PUZZLE. *University of Canberra*

the use of the term 'financial adviser' and 'financial planner' to people that have membership to the appropriate professional standards board. Until these issues have been addressed, there will remain significant deficiencies in the implementation of the Ripoll Inquiry recommendations, which will hinder progress in restoring consumer trust and confidence in the financial advice industry.

Recommendation:

The FPA recommends that there should be a criteria limiting the use of the term financial planner and financial adviser, to those adhering to professional obligations arising from their membership of a professional body and following a Code of professional practice.

Restrict the use of the terms financial planner/planning under s923B of the Corporations Act (or in the Corporations Regulations as per s923B(4)(a)(vi) of the Act).

The use of the terms stockbroker, futures broker, insurance broker, general insurance broker, and life insurance broker are currently restricted under s923B. A consistent approach to restricting the use of key terms in the financial services industry would provide greater protection and certainty for consumers.

Federal Budget 2014-15

Proposal to update who can witness a statutory declaration

The Financial Planning Association (FPA) asks for our members given the same standing as members of other professional bodies such as the CPA, ICAA, IPA and NTAA when it comes to being included as 'authorised witnesses' for Commonwealth Statutory Declarations.

Background

Commonwealth Statutory Declarations are currently governed by the Statutory Declarations Act 1959 and the Statutory Declarations Regulations 1993.

Under current legislation only the people listed in Schedule 2 to the Statutory Declarations Regulations 1993. Financial planners are not currently included on the list.

These Statutory Declarations can be used:

- In conjunction with the administration of any Department of the Commonwealth (i.e. ATO, ASIC, etc.)
- For the purposes of a law of the Commonwealth (i.e. Tax, Super, Social Security)
- In connection with any matter arising under a law of the Commonwealth.

Application with other Acts

The statutory Declarations Act 1959 only authorises a person to witness a Commonwealth statutory declaration. Under the Regulations, this list includes a person who is authorised to witness a statutory declaration of a particular State (or Territory) where it is made in that State (or Territory).

Individuals who can witness Commonwealth statutory declarations cannot automatically witness a State (or Territory) declaration. Only where the State (or Territory) also lists the specific occupation, or deems the Commonwealth Regulations, can they also sign the State (or Territory) based declaration. Currently there is one state and one territory that deem occupations listed under the Commonwealth Regulations.

Other Acts, such as the Anti-Money Laundering and Counter-Terrorism Act 2006, deem persons listed under the Statutory Declaration Regulations 1993 to qualify as persons that can certify copies of documents [see the definition of certified copy under paragraph 1.21 of Instrument 2007 (No. 1)].

While the AML CTF rules also allow Financial Planners to certify documents there is the additional requirement that they must be an authorised representative of an AFSL license, having two or more years of continuous service with one or more licensees.

If Practitioner members of the FPA were to be included in the Statutory Declarations Regulation 1993, it would then allow FPA members with less than two years experience (or where they had a career break) to still qualify to certify AML/CTF material.

We have been previously advised that the Regulations are not scheduled to be reviewed until 2017. As there is no intent to specifically exclude financial planners from the current list of professionals, we are urging the Government to bring forward this review and consider this amendment as a priority.

Federal Budget 2014-15

Recommendation:

The FPA requests that the review into the update of the Statutory Declaration Regulations be brought forward, and for our practitioner members be included.

It is our understanding that this could be achieved simply by amending Schedule 2 of the Statutory Declarations Regulations 1993, with a new item number as follows:

Item	Person
239	Certified Financial Planner member of the Financial Planning Association of Australia

Professional Privilege for Financial Planners

Legal professional privilege ("LPP") is a right attaching to qualifying communications between lawyers and their clients. In its basic form, LPP applies to communications for the dominant purpose of:

- Obtaining or giving legal advice ("advice privilege") or
- Preparing for anticipated litigation ("litigation privilege").

This privilege is considered a right of the client rather than the (legal) professional, and it has its roots in the notion that fairness and public interest require a client being able to make full and frank disclosures to their professional adviser without the risk of prejudice and damage by subsequent compulsory admission.

Extending Professional privilege to other advice relationships

It is widely viewed that LPP is necessary to ensure proper administration of justice. However, under common law, LPP only extends to the client-lawyer relationship.

In 2007 the Australian Law reform Commission (ALRC) delivered a report, "*Privilege in Perspective: Client Legal Privilege in Federal Investigations*", which reviewed LPP in the context of federal investigatory bodies, including the ACCC, ASIC, ATO, APRA, AFP and Royal Commissions of inquiry.

One of the major recommendations of the ALRC report was that privilege be extended, in defined circumstances, to include tax advice provided by Accountants. This extension would formalise the Accountant's exemption (see below) and would bring Australia into line with the position in the US, UK and NZ.

The Tax Commissioner vs. professional privilege

Under Sections 263 and 264 of the Income Tax Assessment Act 1936 (ITAA 36) the Commissioner has broad powers enabling the ATO to access to buildings and documents in pursuit of their legal aims. This provision captures the two primary Tax Acts, plus parts of the Taxation Administration Act 1953, which together contains the powers dealing with objections, reviews and appeals and the collection and recovery of income tax.

Since the decision of Baker v Campbell (1983) 153 CLR 52, communications and documents under LPP have not been available for inspection by the Commissioner under sections 263 and 264.

The Accountant's exemption

In the 1980's the Accounting lobby successfully argued that the ability of Lawyers to claim LPP gave them a competitive advantage over the accounting profession when providing taxation advice. In response the ATO issued the 'Access and Information Gathering Manual' guidelines recognising that "*taxpayers should be able to consult with their professional accounting advisers on a confidential basis*" and created self-imposed limits on ATO access to accountant's papers.

This exemption provides different concessions for differing types of documents, such as source documents (*i.e. records of transactions*), restricted source documents (*i.e. Advice documents*) and non-source documents (*i.e. Other advice documents*).

From 1 July 2014, Financial Planners are required to fall under registration and governance of the Tax Practitioners Board. This change recognizes that Financial Planners provide Taxation Advice that clients rely on to make informed financial decisions.

While there is scope[11] for the ATO to lift the Accountant's exemption, there remains a competitive advantage with Accountants having access to this exemption while Financial Planners do not.

It was noted in the 2007 ALRC report that the fact that the same advice can be given by accountants and lawyers on taxation matters as the crucial factor in their push for the extension of privilege to taxation advice. On the same basis this should also extend to Financial Planners providing the same advice.

In 2011 the ALRC provided a submission in response to the Discussion Paper on "*Privilege in relation to Tax Advice*". This submission covered a number of areas, including the extension of the proposed Privilege to BAS agents. The ALRC response was that BAS agents may be included under any extension within their limit to provide advice with respects to taxation law under section 90-10 of the Tax Agent Services Act 2008.

Further, the ALRC made a general observation that it is the lawful provision of advice with respect to particular laws that provides the foundation for applying the rationale to other professionals.

The FPA shares the same interpretation that would see the new category of Registered Tax (Financial) Adviser captured within any law created to extend the provision of LPP (in defined circumstances).

Recommendation:

The FPA requests as an interim measure that Financial Planners are included in the ATO's self-imposed 'Accountants exemption' to ensure there is no commercial advantage where the same advice is being provided by the two different professions.

Longer term, the FPA requests statutory provisions to ensure all practitioners receive professional privilege, in defined circumstances, relevant to the areas of law they provide advice in (i.e. taxation, superannuation, social security, etc).

[11] *White Industries Aust v Commissioner of Taxation (2007)* 66 ATR 306

APPENDIX A

SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1993 - SECT 67A

Limited recourse borrowing arrangements

Exception
(1) Subsection 67(1) does not prohibit a trustee of a regulated superannuation fund (the RSF trustee) from borrowing money, or maintaining a borrowing of money, under an arrangement under which:

(a) the money is or has been applied for the acquisition of a single acquirable asset, including:
(i) expenses incurred in connection with the borrowing or acquisition, or in maintaining or repairing the acquirable asset (but not expenses incurred in improving the acquirable asset); and
Example: Conveyancing fees, stamp duty, brokerage or loan establishment costs.
(ii) money applied to refinance a borrowing (including any accrued interest on a borrowing) to which this subsection applied (including because of section 67B) in relation to the single acquirable asset (and no other acquirable asset); and

(b) the acquirable asset is held BY THE RSF TRUSTEE OR IT IS HELD on trust so that the RSF trustee acquires a beneficial interest in the acquirable asset; and

(c) the RSF trustee HAS LEGAL OWNERSHIP OR has a right to acquire legal ownership of the acquirable asset by making one or more payments after acquiring the beneficial interest; and

(d) the rights of the lender or any other person against the RSF trustee for, in connection with, or as a result of, (whether directly or indirectly) default on:
(i) the borrowing; or
(ii) the sum of the borrowing and charges related to the borrowing;

are limited to rights relating to the acquirable asset; and

Example: Any right of a person to be indemnified by the RSF trustee because of a personal guarantee given by that person in favour of the lender is limited to rights relating to the acquirable asset.

(e) if, under the arrangement, the RSF trustee has a right relating to the acquirable asset (other than a right described in paragraph (c))--the rights of the lender or any other person against the RSF trustee for, in connection with, or as a result of, (whether directly or indirectly) the RSF trustee's exercise of the RSF trustee's right are limited to rights relating to the acquirable asset; and

(f) the acquirable asset is not subject to any charge (including a mortgage, lien or other encumbrance) except as provided for in paragraph (d) or (e).

Meaning of acquirable asset

(2) An asset is an acquirable asset if:
(a) the asset is not money (whether Australian currency or currency of another country); and
(b) neither this Act nor any other law prohibits the RSF trustee from acquiring the asset.

(3) This section and section 67B apply to a collection of assets in the same way as they apply to a single asset, if:
(a) the assets in the collection have the same market value as each other; and
(b) the assets in the collection are identical to each other.

Example: A collection of shares of the same class in a single company.

(4) For the purposes of this section and section 67B, the regulations may provide that, in prescribed circumstances, an acquirable asset ceases to be that particular acquirable asset.

RSF trustee
(5) Paragraphs (1)(d) and (e) do not apply to a right of:
(a) a member of the regulated superannuation fund; or
(b) another trustee of the regulated superannuation fund;

to damages against the RSF trustee for a breach by the RSF trustee of any of the RSF trustee's duties as trustee.

(6) A reference in paragraph (1)(d) or (e) (but not in subsection (5)) to a right of any person against the RSF trustee includes a reference to a right of a person who is the RSF trustee, if the person holds the right in another capacity.