Explanatory Paper TPB(EP) 05/2014

Professional indemnity insurance requirements for tax (financial) advisers

This TPB explanatory paper (TPB(EP)) is intended as information only. It provides a detailed explanation of the TPB's professional indemnity (PI) insurance requirements for tax (financial) advisers. Further, this TPB(EP) explains the TPB's interpretation of the provisions in the *Tax Agent Services Act 2009* (TASA) relating to the PI insurance requirements, translating these provisions into practical principles that can be applied by the profession.

Currency of details of the PI insurance requirement

The TPB intends to review the details of its PI insurance requirements periodically, with a view to making any necessary refinements for the future. However, the TPB reserves the right to amend the requirements at any point, including before any formal review, if it becomes necessary to do so.

Key terms

There is a table at the end of the document which lists a number of key terms and the meaning they have in this document.

Document history

This TPB(EP) is based on the TASA as at 21 October 2020 (latest version available at time of publication).

This TPB(EP) was initially issued on 30 June 2014.

On 14 March 2017 the TPB updated this TPB(EP) to remove outdated references concerning previous implementation arrangements (for the period 1 July 2014 to 31 December 2016).

On 11 December 2018 the TPB updated this TPB(EP) to include automatic reinstatements as a recommended additional feature of PI insurance cover.

On 3 May 2019 the TPB updated this TPB(EP) to provide additional information in relation to cyber insurance cover.

On 1 January 2021, the TPB further updated this TPB(EP):

- following a complete review of its PI insurance requirements, to provide additional information in relation to the minimum requirements relating to amount of cover and recommended additional features of fidelity cover and run-off cover
- to update PI insurance requirements at renewal of registration following TASA changes.

Issued: 30 June 2014

Last modified: 1 January 2021

Overview

It is an eligibility requirement for registration that you maintain, or in the case of new applications for registration, will be able to maintain once registered, PI insurance that meets the TPB's requirements.

For newly registered tax practitioners, you must advise the TPB of your PI insurance requirements within 14 days from the date that you are notified that your registration has been granted.[1]

For registered tax practitioners applying to renew their registration, you must demonstrate that you have PI insurance that meets the TPB's requirements at the time of applying for renewal of registration.[2]

It is also a requirement under the Code of Professional Conduct (Code) that you maintain PI insurance that meets the TPB's requirements.[3]

Summary of the TPB's PI insurance requirements

The TPB's PI insurance requirements are outlined in this document. The TPB notes that:

- The primary purpose of the TPB's PI insurance requirements is to ensure tax (financial) advisers that are registered with the TPB have PI insurance that meets the TPB's requirements for the tax (financial) advice services they provide.
- In determining the TPB's PI insurance requirements, the TPB has given detailed consideration to the compensation requirements imposed on Australian Financial Services (AFS) licensees by the Australian Securities and Investments Commission (ASIC). In doing so, the TPB has, wherever possible, adopted a significant number of ASIC requirements to avoid duplication. However, there are two key differences between the TPB and ASIC requirements:
    - The TPB requires PI insurance coverage to include tax advice. ASIC requirements do not extend to tax advice.
    - The PI insurance requirements under the TASA apply to all entities that are registered with the TPB, not just to AFS licensees.
- Generally, AFS licensees are required to have adequate compensation arrangements (which is generally PI insurance cover) under section 912B of the *Corporations Act 2001.*
- Further, under the *Corporations Act 2001*, AFS licensees are required to have internal dispute resolution (IDR) procedures and to be members of the Australian Financial Complaints Authority (AFCA) external dispute resolution (EDR) scheme. (Also see the Key terms section of this TPB(EP)).

[1] Subsections 20-5(1)(c), 20-5(2(d), 20-5(3)(e) of the TASA

[2] Subsection 20-5(1)(d), 20-5(2)(e), 20-5(3)(f) of the TASA

[3] Subsection 30-10(13) of the TASA

- In order for AFS licensees to have compensation arrangements that comply with that Act, the arrangements generally must satisfy the requirements specified in the Corporations Regulations 2001. Those requirements are that AFS licensees must hold PI insurance cover that is adequate, having regard to both:
    - their membership of the AFCA EDR scheme, taking account of the maximum potential liability that could arise from any particular claims against the AFS licensee and claims for which the licensee may be found liable
    - considerations relating to their financial services business. These include the volume and type/s of business, the number and kind of clients and the number of representatives.
- The TPB's regulatory function does not seek to replicate or duplicate the requirements relating to IDR and EDR, nor does it apply independently from the dispute resolution processes in the *Corporations Act 2001*.
- The TPB considers that an extension of the existing PI insurance held by AFS licensees who are tax (financial) advisers, so that the PI insurance held covers the provision of tax advice, will generally meet the TPB's minimum requirements. Accordingly, provided that such PI insurance cover also covers the provision of tax advice, the tax (financial) adviser does not need to have a separate policy or multiple policies to meet the TPB's requirements.
- Further, the TPB will approve certain self-insurance arrangements[4] as PI insurance that meets its requirements, in a manner consistent with that adopted by ASIC.
- The TPB specifically considered the application of its PI insurance requirements to tax (financial) advisers who derive a low turnover. Turnover means the total amount of fees from the provision of services, excluding GST. The TPB considers that it is important for consumer protection that tax (financial) advisers maintain adequate PI insurance cover that covers the provision of tax (financial) advice services to clients, regardless of turnover.[5]
- Tax (financial) advisers who do not provide tax (financial) advice services for a fee or other reward are not required to have PI insurance cover in order to meet the TPB's PI insurance requirements.
- In relation to charging or receiving a fee for providing tax (financial) advice services, a tax (financial) advice service is taken to be provided for a fee even if the fee for the service is bundled with other fees for other services (for example, financial planning services or advice).
- Tax (financial) advisers who only receive an honorarium (or honorary reward) for tax (financial) advice services will not be required to have PI insurance in order to meet the TPB's requirements.[6]

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[4] ASIC *Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees* provides that self-insurance relates to setting aside a calculated amount of money to form a source of compensation for potential claims.

[5] *Lengyel and Tax Practitioners Board* [2012] AATA 134.

[6] An honorarium includes an honorary reward for voluntary services or a fee for professional services voluntarily rendered. For example, the voluntary provision of tax (financial) advice services for a not-for-profit entity.

- A tax (financial) adviser will meet the TPB's PI insurance requirements if they do not hold their own PI insurance policy but they are adequately covered under a policy held by another registered tax (financial) adviser entity.
- If an employee is providing in-house tax (financial) advice services to their employer, the employee will not be required to have PI insurance in order to meet the TPB's requirements.
- It is important to note that TPB's PI insurance requirements in no way affect or modify the requirements for an AFS licensee to have adequate compensation arrangements in place for itself, and its representatives, for the purpose of their licensing with ASIC.

The legislative framework

What 'maintain' means

The TPB will consider a registered tax (financial) adviser who is required to have PI insurance as maintaining PI insurance that meets the TPB's requirements if:

- the tax (financial) adviser holds a PI insurance policy that meets the minimum requirements set out in this TPB(EP);
- the tax (financial) adviser is covered by a PI insurance policy that meets the minimum requirements set out in this TPB(EP), that is held by another tax (financial) adviser; or
- the tax (financial) adviser has an alternative arrangement that has been approved by the TPB, as described in this TPB(EP).

As noted earlier, if a tax (financial) adviser is covered by existing PI insurance to meet the adequate compensation arrangements obligations under section 912B of the *Corporations Act 2001*, the tax (financial) adviser will not need a separate PI insurance policy in order to meet the TPB's requirements, as long as the PI insurance covers the provision of tax advice and otherwise meets the TPB's minimum requirements.

Further, the TPB understands that generally, an AFS licensee will hold PI insurance that covers their representatives. If a tax (financial) adviser who is a representative does not hold its own PI insurance but is covered by the PI insurance that meets the TPB's requirements held by an AFS licensee, the representative will meet the TPB's PI insurance requirements.

What 'will be able to maintain' means

The purpose of the wording ‘will be able to maintain’ is to accommodate those new applicants who are applying for registration but who, at the time of applying for registration, do not maintain PI insurance that meets the TPB's requirements.[7]

[7] See example 3.16 in the Explanatory Memorandum to the *Tax Laws Amendment (2013 Measures No. 2) Bill 2013*, which amended the PI insurance requirements in the TASA from 30 June 2013.

The following example illustrates the purpose of the words 'will be to maintain':

> Ted applies to the TPB for registration as a registered tax (financial) adviser. In addition to having to satisfy the TPB that he is a fit and proper person and that he can meet the registration requirements (prescribed by the regulations), Ted will need to satisfy the TPB that he will be able to maintain PI insurance that meets its requirements as soon as he is registered.
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> Assuming that the TPB grants Ted’s application and he becomes a registered tax (financial) adviser, three years later Ted applies to the TPB to renew his registration. As Ted already has PI insurance, he need only satisfy the TPB that this insurance meets its requirements.

In circumstances where a new applicant for registration does not maintain PI insurance that meets the TPB's requirements at the time of applying for registration and indicates to the TPB that they will be able to maintain PI insurance once registered, the applicant will meet the PI insurance eligibility requirement for registration.

If the applicant is granted registration, the TPB will generally require that the now registered tax (financial) adviser provides the TPB with details of how they meet the TPB's requirements within 14 days from the date that the tax (financial) adviser receives notification that their application for registration has been granted.

For registered tax (financial) advisers who are applying for renewal of registration, they must demonstrate that they maintain PI insurance that meets the TPB’s requirements at the time of applying for renewal of registration in order to be eligible.

What are the TPB's requirements for tax (financial) advisers who do not receive a fee or other reward?

The TPB understands that some tax (financial) advisers do not receive a fee or other reward for the tax (financial) advice services that they provide, for example:

- employee tax (financial) advisers who provide tax (financial) advice on behalf of their employer registered tax (financial) adviser;
- employee tax (financial) advisers who provide in-house tax (financial) advice services to their employers; or
- contractor tax (financial) advisers who provide tax (financial) advice services on behalf of another registered tax (financial) adviser.

The TPB will consider employee and contractor registered tax (financial) advisers (as described above) who do not, in their own right, receive a fee or other reward for the tax (financial) advice services that they provide as meeting the TPB's requirements if they do not hold their own PI insurance policy, but are covered by another registered tax (financial) adviser policy.

Background: regulation of financial advisers who provide tax advice

The TPB has considered the PI insurance requirements that all tax (financial) advisers will need to meet in order to be eligible for registration under the TASA, and to comply with subsection 30-10(13) of the Code.

In any industry or profession, from time to time, clients might suffer loss due to an act, error or omission by a service provider. In relation to tax (financial) advisers, there needs to be a mechanism to ensure that funds are likely to be available to compensate clients who may suffer loss due to tax (financial) advice services provided by a tax (financial) adviser.

Paragraph 2.57 of the Explanatory Memorandum to the *Tax Laws Amendments (2013 Measures No. 3) Bill 2013* explains the purpose of introducing the PI insurance requirement for tax (financial) advisers:

> Certainty and consumer protection would be enhanced under this model, as there is a proposed requirement that financial advisers ensure that their professional indemnity insurance (PI insurance) will cover them not only for the financial advice that they provide, but also for their tax advice.

The TPB has developed the policy objective for its PI insurance requirements (which is set out below) on the basis of the above principle, as far as it relates to the provision of tax advice by tax (financial) advisers.

Policy objective

The TPB's policy objective is:

The TPB’s PI insurance requirements for tax (financial) advisers are to reduce the risk that a client’s losses (due to the provision of tax advice) are not compensated, due to the tax (financial) adviser having inadequate financial resources or for any other reason, as far as this is practically possible.

The policy objective complements the object of the TASA which is to ensure that tax (financial) advice services are provided to the public in accordance with appropriate standards of professional and ethical conduct.[8]

The TPB's PI insurance requirements

The TPB's general approach

The TPB's objective

The objective of the TPB's PI insurance requirements is to ensure those entities that are registered with the TPB have adequate PI insurance cover for the tax (financial) advice services they provide.

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[8] *Tax Agent Services Act 2009* (TASA), section 2-5

What this means for tax (financial) advisers

In order to be eligible for registration under the TASA all applicants (including AFS licensees and representatives),[9] must meet the eligibility requirements contained in the TASA, including maintaining, or being able to maintain, PI insurance that meets the TPB's requirements.

In order to meet the PI insurance eligibility requirement when applying for registration, an AFS licensee or representative will need to satisfy the TPB that the AFS licensee or representative maintains PI insurance, or that the AFS licensee or representative will be able to maintain PI insurance cover that meets the TPB's requirements once registered.

To be eligible for renewal of registration under the TASA, registered tax (financial) advisers will need to satisfy that they maintain PI insurance that meets the TPB’s requirements at the time of applying for renewal.

The requirement to maintain PI insurance that meets the TPB's requirements is an ongoing requirement for tax (financial) advisers, and the TPB may require a tax (financial) adviser to provide a Certificate of Currency or other evidence in relation to their PI insurance at renewal or when requested, to satisfy the TPB that they meet the ongoing PI insurance requirement.

What this means for consumers of tax (financial) advisers

It is important to recognise the limitations of PI insurance as a consumer protection mechanism. PI insurance protects consumers indirectly and it is not a guarantee that compensation will in fact be paid. PI insurance protects the tax (financial) adviser against the risk of financial losses arising from acts, errors, omissions and other misconduct by the tax (financial) adviser in the provision of tax (financial) advice services. This might occur where the tax (financial) adviser is otherwise unable or unwilling to compensate a client in respect of a loss caused by the tax (financial) adviser and there is or would be a liability to do so.

The PI insurance cover required by the TPB is not necessarily intended to cover what a client might perceive as a loss in every circumstance.

Providing evidence of PI insurance cover to the TPB

When applying for registration under the TASA, tax (financial) advisers will need to satisfy the TPB that they have PI insurance cover that meets the TPB's requirements, or that they will maintain PI insurance cover that meets the TPB’s requirements upon becoming registered.

For renewing registration, registered tax (financial) advisers will need to satisfy that they maintain PI insurance that meets the TPB’s requirements at the time of applying for renewal.

Additionally, tax (financial) advisers will be required on an annual basis to provide the TPB with evidence that they have maintained PI insurance cover that meets the TPB's requirements.

Further, the TPB may require a tax (financial) adviser to provide a Certificate of Currency in relation to their PI insurance at renewal or when requested.

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[9] Section 910A of the *Corporations Act 2001* defines representatives of an AFS licensee as an authorised representative of an AFS licensee, an employee or director of an AFS licensee, an employee or director of a related body corporate of an AFS licensee or any person acting on behalf of the AFS licensee.

If a tax (financial) adviser cannot or does not comply

If a new applicant for registration does not satisfy the TPB that they have PI insurance cover that meets the TPB's requirements, or declare that they will maintain PI insurance cover that meets the TPB's requirements upon becoming registered under the TASA, the TPB will not grant the applicant registration under the TASA. This is because the applicant will not meet the eligibility requirements. Similarly, if a registered tax (financial) adviser does not satisfy the TPB that they have PI insurance that meets the TPB's requirements at the time they apply for renewal of registration, the TPB will not renew their registration.

Once registered, if a tax (financial) adviser fails to maintain PI insurance cover that meets the TPB's requirements during the period of registration, the TPB may terminate the tax (financial) adviser's registration on the basis that they cease to meet a registration requirement.[10]

Alternatively, if a tax (financial) adviser fails to maintain PI insurance that meets the TPB's requirements during the period of their registration, the TPB may sanction the tax (financial) adviser for a breach of the Code under subsection 30-10(13) of the TASA. Depending on the circumstances, the sanctions available to the TPB range from cautions to suspension or termination of a tax (financial) adviser registration.

Key principles

Table 1 sets out the key principles of the TPB's PI insurance requirements.

Table 1: Key principles

Principle 1: Fit to achieve the policy objective	Adequate cover is cover that will: (i) satisfactorily indemnify a tax (financial) adviser against civil liability that may arise in the tax (financial) adviser provision of tax (financial) advice services; and (ii) which meets the policy objective of reducing the risk that client losses are not compensated by the tax (financial) adviser due to the tax (financial) adviser having inadequate financial resources or for any other reason.
Principle 2: Responsibility of tax (financial) adviser to assess adequacy	It is the basic responsibility of each tax (financial) adviser to determine what is adequate PI insurance cover for them having regard to the risks that are associated with the provision by them of tax (financial) advice services. Additional insurance cover, to that needed to satisfy TPB obligations, is to be obtained where such additional adequate cover is required.
Principle 3: Practical availability	An element of adequacy is what is practically available at any given time.

[10] See Part 4 of the TASA

Principle 1: Fit to achieve the policy objective

PI insurance is a way of reinforcing a tax (financial) adviser ability to meet any client losses caused by an act, error, or omission of the tax (financial) adviser by making funds available to the tax (financial) adviser under the terms of a PI insurance policy. PI insurance protects the tax (financial) adviser against certain risks, and indirectly protects consumers, however it is not a guarantee that compensation will be paid to consumers. PI insurance is an agreement between an insurance company and a tax (financial) adviser; consumers will not be a party to these insurance policies.

The concept of what is adequate is an important element of the TPB's overall requirements for PI insurance for tax (financial) advisers. The TPB will consider what is adequate with reference to the minimum requirements, set out in Table 3 of the TPB (EP). For further guidance, see the Adequate PI insurance cover section of this TPB (EP).

Principle 2: Responsibility of tax (financial) adviser to assess adequacy

The TPB considers that compliance with the PI insurance requirement should form part of the tax (financial) adviser overall risk management processes.

The TPB accepts that different tax (financial) advisers will have very different businesses and risks, which will impact on what PI insurance arrangements are adequate for them. Therefore, subject to certain minimum requirements of the TPB, the TPB considers that tax (financial) advisers should undertake their own analysis of what is an adequate level of insurance for them.

Minimum PI insurance standards set by ASIC for AFS licensees, as well as other relevant industry and professional bodies, might also provide a guide for tax (financial) advisers in this process. However, compliance with ASIC and/or industry standards will not necessarily mean that a tax (financial) adviser meets the PI insurance requirements of the TPB. The TPB requires an objective assessment of the adequate scope and level of cover for the business and risks of a particular tax (financial) adviser.

Some tax (financial) advisers might find it helpful to engage external consultants, actuaries, brokers or advisers to undertake a risk assessment of their business and provide advice on the amount and terms of cover that they should obtain. The TPB encourages this, provided that the TPB's minimum requirements are met.

Principle 3: Practical availability

One of the considerations relevant to the assessment of the adequacy of PI insurance cover is what is practically available at any given time.

The TPB is aware that the nature and extent of coverage of PI insurance may be limited from time to time by what the PI insurance market will provide in a fluctuating market and that there may be times where PI insurance is less freely available (for example, during a future hard insurance market). This can have a material impact on the scope and effectiveness of PI insurance cover and therefore PI insurance cover that achieves the policy objective may sometimes be more difficult to achieve.

The TPB has considered these factors in the formulation of its PI insurance requirements and in the setting of the minimum requirements set out in Table 3 of this TPB(EP). The TPB believes that its minimum requirements are reasonable and should generally be able to be achieved by tax (financial) advisers. The TPB will continue to monitor and consider what is practically available in the insurance market and how that will affect the TPB's PI insurance requirements.

Adequate PI insurance cover

What is adequate

Tax (financial) advisers must at all times maintain adequate PI insurance cover which complies with the TPB's requirements. Adequate cover is cover that will:

- adequately indemnify a tax (financial) adviser against any civil liability that may arise in the tax (financial) adviser provision of tax (financial) advice services; and
- which meets the policy objective of reducing the risk that client losses are not compensated by the tax (financial) adviser due to the tax (financial) adviser having inadequate financial resources or for any other reason.

The TPB requires that tax (financial) advisers hold PI insurance that is adequate, having regard to the nature of the tax (financial) adviser business, including:

- the volume of business in terms of turnover (see the Key terms section of this exposure draft)
- the number and kind of clients
- the kind or types of tax advice provided
- the number of representatives
- the degree of risk.

Further, in relation to a tax (financial) adviser who is also an AFS licensee and a member of the AFCA EDR scheme, the TPB considers that adequate cover is cover that will adequately indemnify the tax (financial) adviser for potential liability for claims that might be brought under that scheme in relation to tax (financial) services provided by:

- the tax (financial) adviser
- a representative of the tax (financial) adviser (for example, an employee or another tax (financial) adviser who provides services under the license held by the AFS licensee).

This is not an exhaustive list of the factors that tax (financial) advisers need to take into account in assessing what PI insurance cover is adequate in their circumstances.

Amount of cover

To be adequate overall, a PI insurance policy must have a sufficient amount of cover that at least meets the TPB's minimum requirements and covers a reasonable estimate of clients potential losses (see step 2 in Table 2 and amount of cover in Table 3 below).

Further, the TPB requires that tax (financial) advisers obtain PI insurance cover that provides legal and defence 'costs exclusive' or 'costs in addition' amount of cover, or a level of cover that is sufficiently increased to take into account these costs.

Scope of cover

The TPB's PI insurance requirements require that the insurance must cover civil liability arising from any act, error or omission in the provision of tax (financial) advice services (also see scope of cover in Table 3 below).

Terms and exclusions

If exclusions in a PI insurance policy undermine the policy objective, the cover may not be adequate. This applies especially to exclusions that directly affect the minimum requirements set out in Table 3 below. If an exclusion removes a minimum requirement, the cover will not be adequate.

Deductibles, excesses and the tax (financial) adviser financial resources

Consideration of the financial resources of the tax (financial) adviser seen through the size of the business of the tax (financial) adviser is a necessary element in assessment of the adequacy of PI insurance cover.

The TPB is aware that there is generally an excess on insurance policies. All tax (financial) advisers who are insured need to consider how they will cover the excess.

To meet the TPB's minimum requirements, tax (financial) advisers must ensure that any excess under the PI insurance policy is at a level that the business can confidently sustain as an uninsured loss taking into account the tax (financial) adviser financial resources.

Tax (financial) advisers should retain records of this assessment of their excess level. These records should indicate how the financial resources were calculated using capital, cash flow, overdraft or support from a parent company.

Assessing adequacy

Whether a particular PI insurance policy or cover is adequate for a particular tax (financial) adviser depends on all the facts and circumstances, including the nature, scale and complexity of the tax (financial) adviser business, and their other financial resources. Therefore, it is the responsibility of each tax (financial) adviser to determine what is adequate PI insurance cover for them and to obtain the required PI insurance cover, ensuring that it at least meets the TPB's minimum requirements.

Table 2 gives guidance on the processes the TPB recognises that tax (financial) advisers should go through to determine what is adequate PI insurance cover for them. However, the TPB will not generally approve a tax (financial) adviser PI insurance arrangements on a case by case basis unless, in the TPB's discretion, there is reason to do so.

Initial assessment

The TPB suggests that tax (financial) advisers use the assessment process in Table 2 to determine what will be adequate PI insurance cover.

Table 2: Initial assessment process

Step 1: Assess the business	Review the business, taking into account any proposed changes to the business. Review the claims history (if any) and risk management procedures. Note: the tax (financial) adviser should have regard to the factors listed under the 'What is adequate' section of this document, to assess the nature of the tax (financial) adviser's business.

Step 2: Assess potential liability	Determine the maximum liability that has, realistically, some liability potential to arise. The TPB suggests a tax (financial) adviser does this by making a reasonable estimate of the following factors: • the maximum exposure to any single client (worst case scenario per client) • the number of claims that could arise from a single event (potential for multiple claims) • the number of claims that might be expected during the policy period.
Step 3: Approach insurers/brokers	Ask insurers or insurance brokers for a list of key policy features, insurers/brokers exclusions and available extensions (based on full disclosure of your assessment in steps 1 and 2).
Step 4: Assess amount of cover	Consider whether the amount of cover is adequate. It should at least meet the TPB's minimum requirements set out in Table 3 below.
Step 5: Assess scope of cover	Consider whether the scope of cover is adequate. It must at least meet the TPB's minimum requirements.
Step 6: Review policy terms and exclusions	Review the policy features having regard to the TPB's minimum requirements set out in Table 3. Identify any exclusions and gaps in cover.
Step 7: Consider financial resources	Check that you have the financial resources to pay the excess, the estimated number of claims, and cover any gaps and legal costs. Consider how these claims will be covered and retain records of the assessment, for example, through capital, cash flow, overdraft, support.

Ongoing assessment

The TPB requires tax (financial) advisers to review their PI insurance cover at least annually to ensure it continues to be adequate, for example, when their existing policy is due for renewal.

Tax (financial) advisers should also review the adequacy of their PI insurance coverage in light of any major changes in their business, for example, if they start providing new services or engage more representatives.

Once obtained, tax (financial) advisers must maintain PI insurance cover for as long as they are registered with the TPB, although this need not be done through the same insurer or insurers.

Compliance systems

The TPB holds tax (financial) advisers accountable for ensuring that their PI insurance policies are renewed when required, that premiums are paid on time and that their policies or other compensation arrangements continue to be adequate.

Authorised insurers

Generally, the cover needs to be from an insurer regulated by the Australian Prudential Regulation Authority (APRA), or operating under an exemption within the *Insurance Act 1973* or the *Insurance Regulations 2002*. The TPB will advise tax (financial) advisers on a case by case basis if it determines some alternative source of cover is acceptable.

What the policy should cover and include

Minimum requirements for adequate PI insurance cover

Table 3 sets out the TPB's view on the features a PI insurance policy should have in order for it to be adequate. The table includes what is considered to be the minimum requirements for these features. Additional factors tax (financial) advisers should consider when determining what is adequate, depending on their business and individual circumstances, are also suggested in the notes set out in the table.

Table 3: Features of adequate PI insurance cover and minimum requirements

Policy feature	Minimum requirements and factors to consider
Amount of cover	The TPB requires that tax (financial) advisers have a minimum amount of cover of $2 million for any one claim and in the aggregate for tax (financial) advisers with total revenue of $2 million or less. For tax (financial) advisers with total revenue greater than $2 million, the TPB requires cover to be approximately equal to actual or expected revenue (up to a maximum limit of $20 million). Further, a tax (financial) adviser must assess their own PI insurance requirements by considering their own business and risk circumstances and obtain PI insurance that is appropriate for them, factoring in legal or defence costs. If the results of the assessment are that less cover may be required, a tax (financial) adviser must nevertheless have cover to at least the minimum amount of cover. The TPB encourages tax (financial) advisers to discuss their particular business circumstances with an insurance provider to assist in determining what is adequate PI insurance cover for a tax (financial) adviser. In addition to turnover, other factors that tax (financial) advisers should consider in determining what amount of cover is adequate include (but are not limited to):

Policy feature	Minimum requirements and factors to consider
	• size and kind/s of business • number and tax affairs of clients (including, for example, potential tax liabilities) • degree of complexity of tax (financial) advice services • structure of business (for example, relative number of supervising registered tax (financial) advisers to unregistered employees and representatives) • geographical distribution of any unregistered employees and representatives who provide tax (financial) advice services on behalf of the registered tax (financial) adviser • degree of risk. Please note that what is an appropriate amount of cover for a tax (financial) adviser may in fact be more than what is set as the minimum requirement. A tax (financial) adviser who is also an AFS licensee and a member of the AFCA EDR scheme should also ensure that their PI insurance provides an adequate and appropriate amount of cover for potential liabilities for claims that might be brought under the AFCA EDR scheme in relation to tax (financial) advice services provided under their license. In determining whether the amount of cover is adequate for this purpose, the tax (financial) adviser should include consideration of any potential claims and liabilities arising from personal advice (as defined in the *Corporations Act 2001*) which involve the application of taxation laws to the circumstances of clients and which clients can reasonably rely on to satisfy tax liabilities or claim tax entitlements. Note: The TPB understands that some AFS licensees who are tax (financial) advisers may hold PI insurance policies that include both an aggregation clause (in which the insurer treats multiple claims as related and therefore subject to a single indemnity limit), and a sub-limit on the amount of cover the insurer will provide for claims resulting from AFCA EDR scheme awards. In some policies, the sub-limit may restrict the cover to an amount that is less than the monetary compensation limit that AFCA has the jurisdiction to award (per claim) for the particular type of claim. Depending on how the insurer aggregates claims and the amount of sub-limit applied to those claims, the amount of cover for AFCA EDR scheme awards could result in significant gaps. If the tax (financial) adviser does not have sufficient financial resources to cover any gaps, they are unlikely to maintain PI insurance that meets the TPB's requirements.

Policy feature	Minimum requirements and factors to consider
	Factors to consider: • Nature and types of services and tax (financial) advice the tax (financial) adviser provides, and kind or kinds of clients. For example, do they provide tax advice on financial products to multiple and/or related clients at any given time? • Are they covered by a policy that contains an aggregation clause and a sub-limit on the amount payable by the insurer in relation to AFCA EDR scheme awards? • If so, what is the sub-limit amount as compared to the EDR compensation limit (per claim) for the particular type of claim, and would the aggregation of claims and application of the sub-limit by the insurer likely result in gaps in cover? If so, the tax (financial) adviser will need to consider how to cover any gaps. If they do not have sufficient financial resources to meet any gaps, they may need to consider obtaining cover on a 'per claim' (instead of an 'aggregate') basis. Also see the Key terms section of this document for further information about AFCA EDR scheme awards and aggregation clauses.
Scope of cover	The policy must include civil liability arising from any act, error or omission in the provision of tax (financial) advice services as defined in the TASA. In relation to a tax (financial) adviser who is also an AFS licensee and a member of the AFCA EDR scheme, the policy must also effectively provide cover for potential liabilities for claims that might be brought under the scheme which arise from the provision of tax (financial) advice services.
Persons covered	The policy must cover: • the tax (financial) adviser, directors, principals, partners, representatives and employees who provide tax (financial) advice services on behalf of the tax (financial) adviser • contractors who provide tax (financial) advice services on behalf of the tax (financial) adviser (refer to Note 2 below) • any other individuals or entities that provide tax (financial) advice services on behalf of the tax (financial) adviser. Note 1: Tax (financial) advisers need to take into account all of their employees and representatives who are occupied in the provision of tax advice when considering the type and extent of cover that will be adequate. A client will generally have the same remedies against the tax (financial) adviser as it has against its employees and representatives of the tax (financial) adviser.

Policy feature	Minimum requirements and factors to consider
	Note 2: The tax (financial) adviser policy does not need to indemnify the tax (financial) adviser for acts of its contractors and or representatives if such acts are adequately covered by the contractors or representatives own PI insurance cover. Factors to consider Are there many employees or representatives geographically dispersed? If so, the limit of indemnity might need to be higher to manage this risk. Note: Experience suggests that the greater the number of employees or representatives that are working for a tax (financial) adviser and the more geographically dispersed they are, the greater may be the potential for client losses to occur. The number and distribution of employees and representatives might affect the tax (financial) adviser ability to adequately supervise its employees and representatives, and a tax (financial) adviser with a greater number of employees and representatives is likely to provide services to a greater number of clients.
Exclusions	The policy must not have the effect of excluding cover for the work of contractors if the result is that there is no cover for the tax (financial) advice services that are provided to the client. Note: A policy may include a term prohibiting the tax (financial) adviser from admitting liability for any claim, loss or demand. In relation to a tax (financial) adviser who is also an AFS licensee and a member of the AFCA EDR scheme, the policy must also not have the effect of excluding cover for potential liabilities for claims that might be brought under the scheme which arise from the provision of tax (financial) advice services.
Excess/deductibles	Tax (financial) advisers must ensure that any excess under the PI insurance policy is at a level that the business can confidently sustain as an uninsured loss taking into account the tax (financial) adviser financial resources. Note 1: A business with a lower cash flow available to meet claims might require a larger amount of cover or cover with a lower excess or both. If there is a limited asset base available to meet claims, a policy with a lower excess might be preferable. The TPB is aware that available PI insurance policies generally have an excess. Therefore, the TPB considers that whether a tax (financial) adviser has sufficient cash flow to meet the excess for a reasonable estimate of claims is a relevant consideration in determining whether a PI insurance policy is adequate for that tax (financial) adviser.

Policy feature	Minimum requirements and factors to consider
	Note 2: If the excess is significant relevant to the limit of indemnity, tax (financial) advisers should seek approval from the TPB as an alternative arrangement as we consider this kind of arrangement to be effectively self-insurance rather than PI insurance.
Insurance provider	The TPB requires that the PI insurance cover must be provided by: • an APRA approved insurer • an insurer who is not APRA approved but otherwise permitted to provide insurance in Australia under the *Insurance Act 1973* • an unauthorised foreign insurer if they are providing insurance in accordance with Part 2 of the Insurance Regulations 2002, or • other insurance providers as approved by the TPB.
Legal/defence costs	Defence costs must be in addition to the minimum limit *or* the level of cover must be sufficiently increased to take into account these costs.
Retroactive cover	If the tax (financial) adviser had an immediately previous PI insurance policy, the policy must provide retroactive cover to the earlier of: • the retroactive date specified in the most recent PI insurance policy; or • the commencement date of the first PI insurance policy in the series of continuous policies.

TPB recommendation on additional features of PI insurance cover and extensions

There are some features of the PI insurance cover and extensions to PI insurance cover which the TPB recommends tax (financial) advisers obtain. These are set out in Table 4 below.

Table 4: TPB recommendations on additional PI insurance features and extensions

Policy feature	TPB recommendation
Fraud/ dishonesty/ fidelity	The TPB recommends that tax (financial) advisers have innocent party fraud/dishonesty cover in respect of the actions of employees or partners/directors (except sole practitioner tax (financial) advisers).

Policy feature	TPB recommendation
	Once a tax (financial) adviser has undertaken a risk assessment, the TPB also recommends they consider whether they require innocent party fidelity cover for any financial loss they may suffer as a result of the actions of employees or partners/directors (except sole practitioner tax (financial) adviser). Note 1: Fidelity cover generally provides cover to insured entities for direct financial loss they sustain due to conduct by employees or partners/directors (for example, theft of money or business assets). This is in contrast to fraud/dishonesty cover, which generally covers civil liabilities for claims made against insured entities arising from the conduct of other individuals. Note 2: A policy may include a term prohibiting the tax (financial) adviser from admitting liability for any claim, loss or demand.
Automatic reinstatement	The TPB recommends agents obtain the benefit of at least one automatic reinstatement, if not multiple or unlimited reinstatements. Note 1: Automatic reinstatement means that if the limit of the policy is exhausted before the end of the policy period (by reason of claims being made or paid under insurance), the limit of indemnity is reinstated for the balance of the period to cover any new claims that may arise. This is important, as agents must ensure their PI insurance cover is adequate at all times.
Run-off cover	The TPB recommends that a tax (financial) adviser obtain run-off cover if the tax (financial) adviser proposes to cease providing tax (financial) advice services. Should an entity no longer remain registered as a tax (financial) adviser after they cease providing tax (financial) advice services (for example, due to surrender and termination or non-renewal of registration), they will no longer be required under the TASA to maintain PI insurance that meets the TPB's requirements. However, given the operation of State and Territory statutory limitation periods, an entity may still be subject to a civil claim made years after the cause of action arose, which might also be after their registration with the TPB ceased. Accordingly, the TPB recommends that tax (financial) advisers who no longer maintain registration after ceasing to provide services assess any ongoing risk of claims and, if appropriate, consider whether they should obtain run-off cover for a continued period for potential claims.

Policy feature	TPB recommendation
	Note: The compensation requirements imposed by ASIC on AFS licensees do not require licensees to obtain automatic run-off cover, having regard to the limited availability of this policy feature in the PI insurance market.[11] The TPB therefore recognises that the availability of run-off cover at any given time may impact on the ability of tax (financial) advisers to hold-off cover and the period of such cover.
Cyber insurance cover	Once a tax (financial) adviser has assessed their risk of a cyber-attack, the TPB recommends they consider whether they require additional protection against cyber threats, including losses that a tax (financial) adviser may suffer from a cyber-attack (first party losses[12]).

Cyber insurance

It is important to note that PI insurance policies are limited to responding to losses stemming from a deficiency in the tax agent services provided by the tax practitioner. Therefore, PI insurance policies will generally cover tax practitioner liability for cyber-related events or incidents if the liability arises in relation to the tax practitioner's provision of tax agent services. This is in contrast with cyber insurance cover, which generally covers for events such as third party cyber liability, first party hacker damage, cyber extortion, data breach notification costs and public relations costs. Accordingly, the TPB recommends that tax (financial) advisers obtain additional cyber insurance, in addition to maintaining PI insurance that meets the TPB's requirements.

Applications for alternative arrangements to be considered as meeting the TPB's PI insurance requirements

The TPB will generally consider that applications for alternative arrangements meet the TPB's PI insurance requirements for operations where it can be demonstrated that there are satisfactory arrangements for compensation of clients of tax (financial) advisers, having regard to the policy objective and the requirements set out in this document.

Further, the TPB considers that self-insurance arrangements are alternative arrangements which require TPB approval in order to be considered as meeting the TPB's PI insurance requirements.

[11] See ASIC *Regulatory Guide 126: Compensation and insurance arrangements for AFS licensees*, at RG 126.40

[12] First party losses resulting from a cyber-attack that an entity may suffer include 'denial of service' attack, costs of rectifying harm done (such as repairing and restoring systems that have been damaged by malicious acts), the costs of improving cyber security, undertaking forensic investigations to identify the source of a cyber-attack, reputational damage and the costs of managing a reputational crisis and extortion costs.

How to make an application for alternative arrangements

Tax (financial) advisers who wish to apply to have alternative arrangements considered as meeting the TPB's PI insurance requirements will need to lodge an application.

An application to the TPB for alternative arrangements, to be considered as meeting the TPB's PI insurance requirements, should address the following issues:

1. Which tax (financial) advisers and representatives will be covered by the alternative arrangements, for example, will the alternative arrangements cover a group of related tax (financial) advisers or an industry sector?
2. How the compensation arrangements that the applicant has in place do and do not meet the criteria for assessing adequate PI insurance in accordance with the TPB's PI insurance requirements (see the Adequate PI insurance cover section of this TPB (EP)).
3. Any benefits, risks, or costs to clients arising from the tax (financial) adviser using alternative arrangements as opposed to the TPB's general PI insurance requirements.
4. Any circumstances particular to the tax (financial) adviser or the industry sector which make these arrangements more appropriate than the TPB's general PI insurance requirements.
5. Confirm that the tax (financial) adviser will advise the TPB if the alternative arrangements are cancelled, varied or become unavailable for any reason.
6. Whether the compensation arrangements have been approved by ASIC in accordance with RG 126, under paragraph 912B(2)(b) of the *Corporations Act 2001*.

The TPB will generally ask for an expert report, for example an actuarial report, to be submitted with the application to assess whether the alternative arrangements provide a satisfactory level of compensation to the clients of the tax (financial) adviser, having regard to the policy objective and the requirements set out in this document.

Tax (financial) advisers who wish to maintain arrangements that were already in place before 1 July 2014 must address the same criteria as for new applications for alternative arrangements.

Applications must be made in writing and sent to the Secretary of the TPB, either through our General enquiry form, or by post to:

Tax Practitioners Board
GPO Box 1620
SYDNEY NSW 2001

How the TPB will assess applications for alternative arrangements

The TPB will assess each application on its merits. The TPB may, if appropriate, give priority to group applications, for example, for an industry sector or sub-sector.

The TPB will only approve an application for alternative arrangements to be considered as meeting the TPB's PI insurance requirements where it can be demonstrated that there are satisfactory arrangements for compensation of clients of tax (financial) advisers, having regard to the policy objective and the requirements set out in this document. The TPB recognises that some alternative arrangements may in fact provide a higher level of cover.

In considering applications, the TPB will take into account the factors used to assess adequacy of PI insurance in accordance with the TPB's PI insurance requirements. This means that any alternative arrangements must also be adequate having regard to:

- the volume of business in terms of turnover
- the number and kind of clients
- the kind or kinds of business
- the number of employees and representatives, and
- the degree of risk
- any potential liabilities for claims under the AFCA EDR scheme.

These factors together with any additional factors considered to be relevant should be addressed in the application made to the TPB.

An important feature of PI insurance is that it is provided by a third party, which offers some security that the arrangements will be enforceable in the event of fraud by tax (financial) advisers or their officers. Therefore, one factor that the TPB will consider in assessing alternative arrangements is the degree to which the arrangements are provided on arm length terms.

Example: Self-insurance

Approval of self-insurance will depend on the amount of compensation that would be available for clients and having regard to the size and risk of the tax (financial) adviser business. When considering an application for self-insurance to be approved by the TPB as meeting its PI insurance requirements, the TPB will also take into account whether ASIC has approved the arrangement.

Compensation arrangements during the assessment process

The process for consideration of an application for alternative arrangements to be considered to meet the TPB's PI insurance requirements may be time consuming to assess. Until notified of the decision, tax (financial) advisers applying for approval of an application should continue to hold any PI insurance cover they have previously obtained or keep in place any other compensation arrangements they have previously implemented.

Key terms

The following is a list of key terms and their meaning in this document.

Alternative arrangement	An alternative arrangement is an arrangement that is not a contract of PI insurance, but which the TPB may approve as adequate to satisfy the TPB's PI insurance requirements.
Amount of cover	The amount of cover is the maximum amount of money the insurer has agreed to provide for payment of claims made against a tax (financial) adviser.

APRA	The Australian Prudential Regulation Authority.
ASIC	The Australian Securities and Investments Commission.
AFCA	The Australian Financial Complaints Authority
AFCA external dispute resolution (EDR) scheme award	AFCA operates the sole EDR scheme for financial services authorised under Part 7.10A of the *Corporations Act 2001*. The purpose of the scheme is to assist individuals and small businesses to reach agreements with financial firms to resolve complaints that firms are unable to resolve as part of their internal dispute resolution procedures. Under the *Corporations Act 2001*, all AFS licensees are required to have a dispute resolution system that includes membership of the AFCA EDR scheme. The AFCA Complaint Resolution Scheme Rules set out the types of complaints that AFCA has the jurisdiction to consider and remedies it can award (AFCA EDR scheme award). The types of complaints that AFCA can consider include those relating to tax (financial) advice services, and the remedies it can award include the payment of monetary compensation amounts (in addition to costs and interest) by financial firms to complainants. For non-superannuation related complaints, AFCA applies compensation caps, which generally limit the maximum amounts that AFCA can award against financial firms to pay to complainants. These compensation cap amounts vary, depending on the relevant type of claim, and apply on a 'per claim' basis. This means that if a complainant makes separate claims, AFCA must not aggregate (combine) those claims to determine the maximum amount it can award to the complainant.
Aggregation clause	A provision in a PI insurance policy that aggregates related claims so that they are treated by the insurer as one claim with a single limit of indemnity. The circumstances in which an insurer treats claims as related for the purposes of aggregation generally vary from policy to policy. For example, an insurer may treat claims as related if they arise from the same event (such as the failure of a financial product). In those instances, if the insured entity provides different pieces of advice to a number of unrelated clients in relation to a financial product that collapses and this results in losses to those clients, the insurer may aggregate claims by the clients and treat them as subject to a single limit of indemnity.

	In other instances, an insurer may treat claims as related if they arise from, or are attributable to, the same facts and circumstances or the same conduct / omission by the insured entity. In those instances, if the insured entity provides a piece of poor advice that multiple clients rely on to make an investment decision and which results in losses to those clients, the insurer may aggregate claims by the clients and treat them as subject to a single limit of indemnity.
Automatic reinstatement	In the event that the limit of indemnity (amount of cover) is depleted (reduced) by a claim or series of claims that equal the limit of indemnity under the policy, the limit of indemnity is automatically reinstated. Depending on the number of reinstatements provided by the policy this clause can provide indemnity for multiple claims during the year where the total of these claims exceeds the policy limit of indemnity. It is important to note that no one claim payment by the insurer will exceed the policy limit of indemnity. For example, if an insured entity purchases a policy with a $2 million limit of indemnity and the policy contains one automatic reinstatement, the policy provides cover for claims aggregating up to $4 million during the period of insurance, subject to any one claim being no greater than $2 million.
Civil liability	Civil liability is liability of one party to another arising out of civil law, as opposed to criminal law. There are generally four branches of civil law: 1. tort law (such as the common law torts of negligence, nuisance, and defamation) 2. contract law (breach of contract) 3. statutory law (for example, the *Competition and Consumer Act 2010)* 4. equity (a system of law based on the principle of fairness designed to furnish remedies for wrongs which were not legally recognised or for which no adequate remedy was provided by the common law). A civil liability wording ordinarily covers all four branches of civil law. However, the policy only responds to civil liability for claims arising from the conduct by the insured of the nominated professional services stated in the policy schedule.
Code of Professional Conduct (Code)	The Code is contained in section 30-10 of the *Tax Agent Services Act 2009*. It sets out standards of professional and ethical conduct with which tax (financial) advisers must comply.

Costs exclusive (or costs in addition)	Legal/defence costs cover does not form part of the amount of cover that is used to pay a claim as opposed to costs inclusive where the legal/defence costs cover forms part of the same amount of cover that is used to pay a claim.
Cover/coverage	Tax (financial) advisers are only required to have PI insurance cover to meet the TPB's requirements. This may mean that they do not actually hold their own PI insurance policy, but rather are covered by the PI insurance policy of someone else. For example, an individual tax (financial) adviser who is an employee of a registered company tax (financial) adviser would likely be covered by the PI insurance policy held by the employer registered company tax (financial) adviser, therefore the individual would not have to have their own PI insurance policy in order to meet the TPB's PI insurance requirements.
Excess (also known as deductible)	The first part of a loss, which is borne by the insured. The insured is responsible for the loss up to the deductible/excess amount and the insurer pays the remainder of the loss up to the policy limit. The excess can be inclusive or exclusive of costs and expenses.
Exclusion	A provision of an insurance policy that precludes coverage in particular circumstances.
Fraud/dishonesty cover	Covering claims made against an innocent insured for compensation resulting from fraudulent, dishonest or criminal acts. Cover will not extend to the perpetrator of such fraudulent, dishonest or criminal act.
Innocent party	Some cover, such as fidelity and fraud/dishonesty cover, will only extend to the insured tax (financial) adviser if they were an innocent party, that is, they were not responsible and had had no prior knowledge of the conduct that led to the claim.
Insured	Any person who is covered by the PI insurance policy.
Insurer	The entity providing the PI insurance policy.
Legal/defence costs	The costs associated with defending a claim for civil liability.

Minimum requirements	'Minimum requirements' means the amount and terms of cover that the TPB requires to be included in the insurance coverage of a registered tax (financial) adviser, as specified by the TPB from time to time.
PI insurance	Professional indemnity insurance.
PI insurance requirements	The overall description of the TPB's PI insurance requirements that are set out in this document.
Run-off cover	Professional indemnity policies are usually on a claims made and notified policy basis. This means that in order to trigger the policy the claim must be made against the insured and reported to the insurer during the policy period. Tax (financial) adviser companies or individuals ceasing business still have exposure to claims being made after their business ceases arising from their previous business activities. Run off cover provides cover for unknown claims made and reported following expiration of the PI insurance policy arising out of acts, errors or omissions occurring during the period of run-off insurance cover. Some PI insurance policies will provide automatic run-off cover up until the end of the policy period of insurance should the policy be cancelled during the policy period.
Self-insurance	Setting aside a calculated amount of money to form a source of compensation for potential claims (this could include large institutional entities).
Scope of cover	The scope of cover defines the terms and conditions under which indemnity is provided or excluded under the insurance policy.
Sole practitioner tax (financial) advisers	A sole practitioner tax (financial) adviser is a tax (financial) adviser who operates on their own with no partners, employees, representatives or contract staff. Certain areas of cover, such as fidelity and fraud/dishonesty cover, are not required of sole practitioner tax (financial) advisers, nor would it be available as the insured tax (financial) adviser could not be an innocent party if they operate their business on their own.
Turnover	The total amount of business revenue received by the tax (financial) adviser excluding GST.