

23 April 2019

Individuals and Indirect Tax Division
The Treasury
Langton Crescent, Parkes, ACT 2600

By email: TPBreview@treasury.gov.au

Dear Mr Westerink,

Review of the Tax Practitioners Board

CPA Australia represents the diverse interests of nearly 165,000 members working in 150 jurisdictions and regions around the world. We make this submission on behalf of our members and in the broader public interest.

As a general observation, it is our view that the Tax Practitioners Board (TPB) has evolved into an effective regulator, although there remains room for improvement, particularly in its capability and capacity to act against those wilfully breaching the requirements under the *Tax Agent Services Act 2009* (the Act).

An important feature of the TPB is that its Board largely comprises tax practitioners. This means that the Board's actions are typically pragmatic, reflecting the experiences and knowledge of the Board members as tax practitioners. Therefore, generally there is a higher level of acceptance of TPB decisions by tax practitioners. While it remains critical to maintain tax practitioners on the Board, it could be enhanced by diversifying the representation to provide a wider range of perspectives. In our view, the governance model which has a majority of tax practitioner expertise must be maintained and should be emulated by other regulators.

It is also important to note that there are tax practitioners who are regulated by multiple regulators for essentially the same or similar work. The Review should consider options to improve the entire regulatory framework faced by a tax practitioner.

We support the Review recommendation that the TPB be given additional resources. The additional funding should come from consolidated revenue rather than further charges on tax practitioners. That is, we do not support the imposition of the government's full cost recovery model on the TPB.

CPA Australia's comments in response to the submission questions are enclosed.

If you have any queries do not hesitate to contact [REDACTED].

Yours sincerely

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Submission questions for consideration

i. Are the governance arrangements for the Tax Practitioners Board working effectively and could they be improved?

The Tax Practitioners Board (TPB) performs its role in the public interest and its independence and objectivity is critical to the regulation of those who fall under the *Tax Agent Services Act 2009* (the Act).

The TPB Board members are experienced and highly qualified in the field of tax law and accountancy. CPA Australia highly values their expertise, professionalism and willingness to engage with the profession and their professional bodies. There may, however, be potential to diversify the Board composition to provide a wider range of perspectives and bring in experience from outside the sector, such as a consumer advocate and people with experience as a regulator or in public administration.

As part of this Review, TPB committees, especially the decisions of the Board Conduct Committee and its delegates, it would be beneficial to assess the effectiveness of decision making and whether the Board is sufficiently resourced or supported to consider a growing number of investigations each year; as well as govern the administrative functions of the TPB.

Further, the relationship between the Chair and Board, and the TPB's CEO-Secretary is somewhat unclear. Where practical, we believe that the Chair or another person from the Board should be the public face of the TPB. Further, while CPA Australia is satisfied with the TPB's current structural relationship with the ATO, there can be a perception of a lack of independence and consideration should be given to the issue of whether, as part of this Review, the TPB should be a separately funded and governed entity.

On the TPB's consultation with registered bodies, we suggest that the TPB appoint a co-chair from the professional bodies to help with the running of the meeting and encourage greater input from the professional bodies. Minutes and key messages should be published on the TPB website similar to the successful approach taken with ATO consultative meetings¹.

CPA Australia recommends:

- Greater clarity around Board Conduct Committee processes and delegated decisions
- Greater diversity on the TPB Board with the potential inclusion of members from consumer advocacy, academic and regulatory backgrounds, however maintain a majority of tax practitioners
- Publishing a practice statement outlining the delegated authorities of the Board and the responsibilities of the Secretary-CEO
- The TPB appoint a co-chair from the professional bodies to help run their consultation meetings

¹ For example, the ATO's [Tax Practitioner Stewardship Group](#) and [National Tax Liaison Group](#)

ii. Are the qualification and experience requirements for individuals seeking to become a registered tax practitioner, or to renew their registration, appropriate?

The integrity of the tax system is highly dependent on agents providing high quality, professional services and advice. The role of a public practitioner is multi-faceted, and they are required to comply with a range of regulatory, legislative and professional obligations, to a high standard.

The changing nature of education and the dynamic tax environment require ongoing vigilance to ensure that approved courses and providers maintain high standards. The professional standards also need to strike a balance between those agents who provide relatively simple services (e.g. completion of individual salary and wage income tax returns) and those tax agents providing services for corporations or financial planners for high wealth individuals.

The overarching driver of the education pathways should be to focus not just on holding a specific qualification, but more importantly should ensure that an individual has the appropriate level of technical expertise and skill to provide quality tax agent services.

For this reason, the pathways should not be prescriptive or unnecessarily detailed but rather provide greater flexibility and recognition of the range of relevant education and training that could be recognised towards the qualifications and experience requirements.

Consideration should also be given to other relevant disciplines, such as financial advisory services, with a view to harmonising entry pathways. Further, it should extend to other relevant obligations, such as ethical conduct and behaviour, and establishing a consistent and harmonised legislative framework.

This consistency and oversight should lead to improved outcomes for consumers, by fostering the development of an ethical culture and increased professionalism across relevant advisory disciplines.

Given the importance and complexity of this question, CPA Australia submits that a separate review be undertaken on this issue. Until that time, CPA Australia emphasises the need for regular TPB scrutiny of qualification offerings and strict assessments of applicants' evidence of relevant experience.

The TPB's 2017-18 Annual Report shows 76 per cent of 77,749 registered agents are recognised members of professional associations². Professional bodies, including CPA Australia, provide continuous professional development (CPD) and require specific educational credentials and subject completions to become a member.

However, once membership is obtained, there is great diversity in the CPD available to maintain membership and the public practice environment is dynamic and often complex. There remains an open question regarding the best methods to evaluate the ongoing professional competency of an agent who may have obtained membership several decades earlier and who may not necessarily have kept up-to-date with contemporary events, digital systems, legislative reform or client needs.

In addition, TPB registration under *regulation 206 – membership of a professional association* should be regularly checked against professional association membership lists. The TPB should be provided with the ability to request this information from associations, rather than being solely dependent on agent self-reporting. This may be done periodically with a goal to transition to real-time reporting where practical.

² P.8, Tax Practitioners Board, [TPB Annual Report 2017-18](#), Commonwealth of Australia, 2018

CPA Australia recommends:

- A separate review on the qualification and experience requirements of tax agents is undertaken
- Designing a mechanism to cross-check professional association memberships against TPB registrations on a regular basis.

iii. Are the Tax Practitioners Board's compliance and investigation powers and functions appropriate?

The TPB performs an important consumer protection role in regulating tax practitioners. CPA Australia supports the TPB in undertaking compliance and investigation activities to maintain the integrity of the tax services profession and the tax system.

The TPB confronts similar issues to those faced by CPA Australia's disciplinary process. While the TPB has greater existing powers than professional associations such as CPA Australia, additional powers or changes to administrative policy and resourcing may be required to address the known issues related to 'bad actors' operating in the profession. The TPB would benefit from enhanced powers, greater latitude in investigation timeframes, ability to impose administrative financial penalties and banning orders, and increased investigation resources.

CPA Australia supports the TPB's efforts to assist early resolution and light touch interventions that positively change behaviour. It is noteworthy that almost 800 registrations were surrendered because of TPB compliance casework³, indicating that the TPB is effective in removing many non-compliant agents from the system without the need for Board decisions.

Ability to initiate an investigation and time constraints

Section 60-95 of the *Tax Agent Services Act 2009 (TASA)* provides a broad mandate to initiate an investigation. However, there is a general public understanding that the TPB will not initiate an investigation unless there is sufficient existing evidence. This approach is in line with the Government's expectations⁴ of a risk-based approach to compliance and enforcement.

However, the inability to request the production of a document or thing, or to take evidence on oath or affirmation outside an investigation, means that the TPB is unable to develop intelligence or reports beyond what is voluntarily provided or enabled through other mechanisms (e.g. ATO information exchange with the TPB⁵). This constraint on the TPB to gather sufficient information to open an investigation leads to the risk that intelligence cannot be actioned, and potential avenues of investigation are unable to be pursued. In 2017-18, over 400 compliance cases were unable to identify or prove a breach⁶.

Consideration could therefore be given to expanding the information gathering powers contained in Subdivision 60-E of the *TASA* to support preliminary inquiries. Also, there may be the opportunity, subject to consultation and safeguards, for the TPB to be provided with the authority to request information from professional associations with respect to client complaints against association members and disciplinary investigations without a TPB investigation necessarily having commenced.

³ P.41, Tax Practitioners Board, [TPB Annual Report 2017-18](#), Commonwealth of Australia, 2018

⁴ The Treasury, [Statement of expectations – the Tax Practitioners Board](#), Commonwealth of Australia, June 2017

⁵ ATO, [ATO information exchange with Tax Practitioners Board](#), November 2017

⁶ P.41, Tax Practitioners Board, [TPB Annual Report 2017-18](#), Commonwealth of Australia, 2018

The six-month period following the commencement of an investigation in which a Board must decide is restrictive⁷ and while the opportunity to extend is available, the definitions of undue delay or complexity are unclear. The short period in which to complete investigations may lead to unintended effects such as: a reluctance to commence an investigation until sufficient information is available to ensure a case brief can be prepared within the timeframe; or a dependence on agencies such as the ATO to undertake extensive pre-TPB investigation activities prior to initiating a TPB investigation. This can lead to tax agents being allowed to practice longer than is reasonable or may result in a lesser sanction than if a longer, more detailed investigation was undertaken.

Investigations can be time-consuming and resource-intensive. The evidence required to prove a case and then, potentially, have the Board decision sustained at the Administrative Appeals Tribunal is substantial. The TPB is also obliged to act as a model litigant⁸.

CPA Australia supports enhanced resources for TPB investigations that will support more responsive and appropriate outcomes. It is positive that the TPB has increased the staffing in its Regulatory Assurance functional area from 31 to 41 in 2017-18, however it is likely that greater investment in investigation resources and capability is required to deal with the most egregious behaviours. If not already in place, an investigation capability framework should be developed and opportunities to second experienced investigators from other agencies could be considered.

However, we reiterate that we do not support an increase in funding for the TPB paid for by tax practitioners through a large increase in the fee they pay the TPB as was the case with the 2018-19 budget. Given that a well-functioning and regulated profession is critical to the tax system and is therefore of benefit to the broader community, such an increase in funding should primarily come directly from consolidated revenue.

Further, we are strongly opposed to the application of the 'Australian Government Cost Recovery Guidelines' on the TPB – that is, the full cost recovery model. The main function of the TPB is to regulate tax practitioners to protect consumers – it is therefore consumers who primarily benefit, in the public interest, from the work of the TPB; and so funding should primarily continue to come from consolidated revenue, not a user pays system.

Finally, many tax practitioners undertake other regulated roles, such as SMSF auditors, and/or provide financial advisory services. By doing so, they are already facing large increases in regulatory charges from multiple sources. It is essential that this cumulative impact of higher regulatory charges on professional accountants offering a range of services beyond tax services, for the benefit of consumers, be considered.

Administrative sanctions, civil penalties and prosecution of offences

In the past two years, only 41 agents have been terminated and three suspended out of 3000 complaints. A further 184 orders were imposed but most of the sanctions (~600) were written cautions. If an agent satisfies the requirements prescribed by the regulations and is not under administration, the 'fit and proper person' criteria in sections 20-15 and 20-45 of the *TASA* become the main basis upon which an agent can be terminated.

It is arguable that these criteria can generally only be satisfied where action has been taken by agencies other than the TPB, such as the ATO, Australian Federal Police, ACCC, ASIC or state police. Therefore, the effectiveness of the TPB will be closely linked to the strategies, resourcing and priorities of other agencies. The extent to which a history of civil litigation or dispute resolution related to agents and their clients may be considered in initiating TPB investigations is unclear.

⁷ Subsection 60-125(3) of the *TASA*

⁸ Appendix B – *The Commonwealth's obligation to act as a model litigant*, [Legal Services Directions 2017](#)

As a consumer protection agency, the TPB should be provided with greater ability to sanction agents who have been reported to them, especially if independent complaints are made on an ongoing basis related to a single practice or agent. Further, the TPB's administrative sanctions do not include pecuniary penalties. This removes the ability of the TPB to influence agent behaviours through the imposition of fines.

The *TASA* civil penalty and injunction provisions are, in the main, focused on conduct prohibited without TPB registration. Since its inception in 2009, the TPB has brought 13 cases before the Federal Court⁹ and been the respondent in 21 other cases. Such cases are costly and in the main deal with unregistered individuals operating outside of the regulatory environment.

CPA Australia supports the consideration a broad range of interactions, interventions and disciplinary actions including preventative approaches such as visiting high-risk agents or banning orders preventing a sanctioned individual from working with or for a tax practitioner. The increased referrals from the ATO are a positive step and the pathway should be further developed.

In the absence of public detail of the delegated authorities, the CEO-Secretary or his/her delegates should be provided with the authority to determine sanctions where the offending and subsequent sanction is comparatively minor in nature.

In addition to the ability to prosecute offences for the failure to provide information under the *Taxation Administration Act 1953 (TAA)*, the *TASA* should be amended to enable the TPB to prosecute false and misleading statement offences¹⁰ under the *TAA*. This is the *TAA* corollary of the *Criminal Code* provisions included in subsection 60-115(2)(e) of the *TASA*. This provides a more efficient way to summarily prosecute false and misleading statements made during the course of a TPB investigation.

In relation to the prosecution of offences under the *TAA*, the ATO and CDDP Memorandum of Understanding could be reviewed to include the prosecution by ATO prosecutors of *TAA* offences related to TPB investigations, rather than the Commonwealth Director of Public Prosecutions, to achieve efficiencies. Alternatively, the Commissioner of Taxation could provide a prosecution resource to the TPB to undertake such activities, supported by a TPB and CDDP Memorandum of Understanding.

CPA Australia recommends legislative amendments to provide for the:

- Ability to gather information prior to commencement of an investigation
- Removal or extension of six-month investigation timeframe
- Introduction of administrative pecuniary penalties
- Consideration of expansion of definition of 'fit and proper person'
- Access to the false and misleading statement provisions in the *Taxation Administration Act 1953*

Additionally, CPA Australia recommends:

- Increased investigation resources for the TPB
- That the government directly increase its funding of the TPB so that it can better support the work of the ATO to improve the integrity of some tax practitioners
- That the government make a commitment to not introduce the full cost recovery model on the TPB.

⁹ [ACD65/2013](#), [NSD451/2012](#), [NSD2602/2013](#), [NSD28/2013](#), [NSD12/2014](#), [NSD8/2014](#), [QUD136/2012](#), [QUD253/2012](#), [QUD269/2012](#), [QUD515/2012](#), [QUD125/2014](#), [QUD106/2019](#), [VID1028/2013](#)

¹⁰ [Section 8K False or misleading statements](#) and [Section 8N Recklessly making false and misleading statements](#) of the *TAA*

iv. What other legislative measures could be implemented to further protect consumers of tax services?

Update Code of Professional Conduct to encompass information security and digital data

The rapid evolution of digital services, information and data has created a new operating environment for agents. The client information held by agents on their hardware, information systems and software platforms is highly sensitive. The substantial risks associated with breaches and stolen identities mean that agents have an obligation to secure and protect this data. Consideration should be given to updating the Code of Professional Conduct to include a requirement that agents actively maintain the security of their clients' information, particularly that information held on digital systems.

CPA Australia has also been notified of instances where agents have held the primary subscription to software such as Xero and then withheld client access to accounts when a dispute has occurred. The software company cannot release the information without the authorisation of the primary subscriber, leaving clients without access to their accounts. In these instances, the traditional concepts of ownership do not necessarily apply, and clients may have limited or no legal recourse to access their information. Consideration should be given to updating the Code of Professional Conduct to include a requirement that agents provide full and timely access to their accounts and other information held by the agent, both physical and digital.

Enhanced information sharing between regulators

By the nature of the services provided, registered agents are often members of professional bodies and subject to additional regulatory frameworks. Professional associations such as CPA Australia provide additional oversight, while many registered agents will provide services regulated by ASIC, Companies Auditor Disciplinary Board, APRA, AFSA and the ATO. State and territory consumer protection agencies and industry ombudsmen such as AFCA may also have powers to support consumers. In instances of criminal fraud, the AFP or state and territory police may investigate.

However, there are no provisions that enable the TPB to disclose their intelligence or information obtained during investigations to other regulatory authorities or professional associations, except for publication of information under section 60-140 of the *TASA*. This limits the ability of other agencies and professional associations to respond within their capacity, or for the TPB to collaborate on investigations with other agencies. The TPB's ability to share information should therefore be enhanced with clarity on the circumstances in which it will do so.

Impact of the Royal Commission into misconduct in the Banking, Superannuation and Financial Services Industry¹¹

The findings and recommendations of the Royal Commission articulate principles related to community expectations, professional standards obligations, consumer protection, remuneration and conflicts of interest. CPA Australia does not support the extension of the Royal Commission findings to the TPB and its legislative mandate.

Tax practitioners are bound by the *TASA* as well as professional standards such as the Code of Ethics¹² and the requirements of their professional associations. Therefore, the Royal Commission recommendations are already covered in existing legislation and professional protocols.

¹¹ Hayne, Kenneth M., [Final Report - Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry](#), Commonwealth of Australia, 2019

¹² Accounting Professional & Ethical Standards Board, [APES 110 Code of Ethics for Professional Accountants \(including Independence Standards\)](#), November 2018

If specific gaps or deficiencies are identified during the course of this Review, they should be addressed outside of the context of the Royal Commission.

CPA Australia recommends:

- Enhancing the Code of Conduct to introduce requirements related to digital information and data security
- Enhancing the ability of the TPB to share and request information from other regulatory, administrative and enforcement agencies.

v. Is the ‘safe harbour’ provision in subsection 284-75(6) of Schedule 1 to the Taxation Administration Act 1953 effective?

CPA Australia is not aware of any issues with this provision or its administration by the ATO¹³.

vi. Are there any other suggestions to strengthen the operation of the Tax Agent Services Act 2009 or the Tax Agent Services Regulations 2009?

The TASA and the Regulations constrain the TPB and limit its ability to effectively deal with the behaviours and consumer impacts of the most egregious behaviours of agents. As a regulator, the TPB has significant responsibility in monitoring the professionals who provide tax agent services to millions of individuals and businesses. Therefore, they require commensurate powers and latitude to enable them to perform their role effectively.

Further review should be undertaken of the processes in place to initiate investigations and what improvements can be made to support enhanced information gathering in earlier stages. Information sharing with government agency partners should also be enhanced.

CPA Australia would also welcome greater information sharing with professional associations as deemed appropriate by government.

¹³ [Subsection 284-75\(6\) of Schedule 1 to the Taxation Administration Act 1953](#), [ATO policy on safe harbour](#)

APPENDIX – COMPLIANCE ACTIVITIES AND OUTCOMES

	2013-14	2014-15	2015-16	2016-17	2017-18
Total registered practitioners	54,939	71,858	75,436	78,593	77,749
No. of complaints received	1,357	1,307	1,656	1,525	1,528
Finalised cases	2,338	1,200	1,651	3,267	3,006
Risk & issues management	273	339	365	432	452
Preliminary enquiries	1,435	771	977	2,229	2,288
Investigations	630	90	309	606	266
No. of sanctioned practitioners	170	45	268	425	194
Total sanctions				537	287
Written caution				414	182
Imposition of order				103	81
Suspension				3	0
Termination				17	24

Source: [TPB Annual Report 2017-18](#), [TPB Annual Report 2016-17](#), [TPB Annual Report 2015-16](#), [TPB Annual Report 2014-15](#), [TPB Annual Report 2013-14](#)

