

12 April 2019

Mr Keith James
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The Treasury
Langton Crescent
Parkes ACT 2600

Email: TPBreview@treasury.gov.au

Attention: Mr Nick Westerink

Dear Sir

Review of the Tax Practitioners Board and the Tax Agent Services Act 2009

We appreciate the opportunity to make this submission in relation to the Government's independent review (the **Review**) into the effectiveness of the Tax Practitioners Board (**TPB**) and the *Tax Agent Services Act 2009* (**TASA**). We are happy to discuss our submission with you and to provide further feedback as the Review progresses.

1. General

- 1.1. It is timely that a comprehensive post-implementation review of the operation of the TPB and TASA be undertaken given the passage of time since the regulatory framework was first introduced and became operational. This would be consistent with the Government's original intention¹.
- 1.2. We acknowledge that in the last few years (and certainly since 2009), there have been significant developments in the environment in which tax services are provided, including changes in tax laws, the expectations of regulators, the demands of clients and the wider community interest in taxation matters.
- 1.3. All of these environmental changes impact the day to day role of tax agents. Consideration should be given to whether the TASA regime and the TPB operations are reflective of the current environment.
- 1.4. We recommend that the Review include benchmarking against regulatory regimes in other jurisdictions (not necessarily limited to tax practitioner regulation).
- 1.5. The legislative regime (as it may be shaped post Review) will dictate the future functions and role of the TPB. This future role of the TPB in turn will determine the required funding, staff levels and skills mix of the TPB. In light of this, consideration should be given to the business case for, and expected outputs of, the additional TPB funding in the 2018-19 Budget². Are the targets and objectives of the additional funding still relevant to the future role of the TPB, and are the additional TPB resources being effectively actioned to pursue those targets?

¹ Explanatory Memorandum to the Tax Agent Services Bill 2008 at paragraph 6.71.

² Budget Paper No 2, 2018-19: "The Government will provide \$20.1 million over four years from 2018-19 to the Tax Practitioners Board (TPB) to assist the TPB in meeting its broadened responsibilities to ensure that tax agent services are provided to the public in accordance with appropriate professional and ethical standards. This measure will be funded by an increase in tax practitioner registration fees."

2. Interaction with other regimes

- 2.1. The Review presents an opportunity to evaluate the adequacy and extent of the regulatory framework on a holistic basis, having regard to the broad spectrum of diverse regulatory regimes (both those having the force of law and otherwise) that currently apply to various tax practitioners. This includes considering any overlaps and interactions with broader legislation such as the whistleblower protection laws³.

3. Diversity of tax agent population

- 3.1. The population of TPB registrants is extremely diverse, all the more so after the addition of Tax (financial) advisers in 2013. That diversity reaches across a number of areas including
 - (a) Skills, education and competency levels
 - (b) Different client and market segments
 - (c) A range of years in practice
 - (d) Full time focus on tax matters versus occasional work on tax issues
- 3.2. A one size fits all approach is unlikely to be appropriate and could subject different tax practitioners to under-regulation or over-regulation, create unnecessary red tape, impede the efficient and effective provision of tax services, increase compliance costs unnecessarily and not identify and/or adequately mitigate the relevant risks across the population.
- 3.3. Deloitte for example, in addition to the TASA Code of Conduct, also has extensive global and local internal risk and quality control policies and procedures, and is subject to various regulatory regimes including the Australian Professional & Ethical Standards Board (**APESB**), the Institute of Chartered Accountants Australia and New Zealand (**CAANZ**), administered by the TPB. The APESB codes includes the Non-Compliance with Laws and Regulations (**NOCLAR**) framework.
- 3.4. Consideration should be given to whether this diversity dictates different regulatory regimes for different parts of the population of TPB registrants.

4. TPB engagement

- 4.1. Following on from the above point about the diversity of TPB registrants, we submit that the engagement strategies of the TPB should be based on a differentiated strategy that is tailored to the nature and circumstances (including the maturity and sophistication) of particular tax practitioners.
- 4.2. The TPB should ensure that large agents, such as Deloitte, are allocated a specific client service team with a dedicated relationship manager or liaison point⁴. The TPB client service team should have regular strategic meetings with their assigned tax practitioner firm as a forum to discuss mutual issues and concerns, to seek and provide feedback and to promote stewardship and accountability.
- 4.3. The ATO has adopted a much more visible and public presence in many respects in recent years including at the Senate Enquiry into corporate tax avoidance and at Senate Estimates hearings. Specifically in relation to tax agents, the ATO has more recently publicly referred to its focus on tax advisors and other intermediaries.
- 4.4. Consideration should be given to the whether the TPB should be more proactive, visible and vocal in providing leadership in relation to matters affecting tax practitioner conduct.

³ As recently enacted by the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*.

⁴ Such an approach is adopted by the ATO under its key agent program, and is also adopted in other areas: it is understood that Australian Prudential Regulatory Authority (**APRA**) has appointed key contacts dealing with each of the large banks

- 4.5. Further, it is important that the ATO and TPB work together in respect of tax agents. We note that the ATO was provided with additional "Tax Avoidance Taskforce" funding in the 2019-20 Federal Budget, including for "increasing its scrutiny of specialist tax advisors and intermediaries that promote tax avoidance schemes and strategies". There is a clear need for the sharing of intelligence and knowledge whilst at the same time, ensuring there is not a duplication of roles.

5. Effectiveness of the 'safe harbour' in the *Taxation Administration Act 1953 (TAA 1953)*

- 5.1. Subsection 284-75(6) of the TAA 1953 provides a safe harbour for taxpayers who use the services of a registered tax agent or BAS agent. Broadly, such taxpayers will not incur a penalty for making a false or misleading statement as long as they provide the agent with all relevant information. To this end, the taxpayer must:
- (a) bring to the agent's attention all accurate information which they would reasonably expect to be necessary to enable the provision of the tax agent service or BAS service correctly; and
 - (b) provide accurate and complete information in response to questions asked by their agent.⁵
- 5.2. To access the safe harbour, the taxpayer bears the evidentiary burden of proving that they provided all relevant taxation information to their tax agent or BAS agent⁶.
- 5.3. In certain circumstances in order for the taxpayer to meet the evidentiary burden, a taxpayer may require documents, etc from their tax agent (or former tax agent). When faced with such a request, the tax agent will need to consider the terms of its contractual agreement with the client, its own common law rights, legal professional privilege issues and other commercial and operational matters. This can present a conflict of interest and a conflict of duty for the tax agent. The tax agent has a duty to its firm to act in the firms' interests but also has a duty to the taxpayer to act in their best interests.
- 5.4. In such a case, the regulatory framework does not adequately acknowledge the tensions and sensitivities that arise between protecting the tax practitioner's own legitimate business interest on the one hand and acting in the best interest of its client on the other. We submit that this practical matter warrants further discussion and consultation, and enhancement to the conflicts of interest guidance issued by the TPB.

6. Codification of legislative extrinsic material and / or TPB binding guidance

- 6.1. The TASA regime was aimed at regulating tax service providers in a way that provides certainty and clarity as to what is expected of them and by so doing, reduce compliance costs while improving taxpayer confidence in the industry⁷.
- 6.2. Since the introduction of the TASA and TASR, the TPB has issued a range of guidance materials setting out its view on how the laws administered by the TPB apply to practitioners. This information ranges from binding guidance to general information, and includes TPB guidelines, proposed guidelines, explanatory papers, information sheets and practice notes.⁸
- 6.3. To-date there has been no binding TPB guidance (in the form of legislative instruments) issued.

⁵ Explanatory Memorandum to the Tax Agent Services (Transitional Provisions and Consequential Amendments) Bill 2009 at paragraph 2.20. This Bill originally introduced the 'safe harbour' before it took its current form as a result of the amendments subsequently made by the *Tax Laws Amendment (2010 Measures No. 1) Act 2010*.

⁶ Subsection 284-75(7)

⁷ Explanatory Memorandum to the Tax Agent Services Bill 2008 at page 5 'General outline and financial impact'.

⁸ Tax Practitioners Board website – 'Policy and Guidance Material'.

- 6.4. A substantial number of non-binding guidance materials have been issued by the TPB to-date. Collectively, these non-binding materials explain the TPB's interpretation of the TASA and relevant professional standards and obligations of tax professionals, the TPB's position on various topics and practical guidance and assistance on particular topics including raising awareness of relevant considerations. The topics covered are extensive in range, and pertain to matters such as the code of professional conduct, complaints procedures, professional indemnity insurance, policies on continuing professional education, outsourcing and offshoring of tax services, registration requirements (including education, experience and, supervision and control) and recognition of professional associations.
- 6.5. However, these non-binding materials are caveated as being intended for information only, and neither exhaust, prescribe or limit the scope of the TPB's powers, constitute legal advice nor create additional legal rights or obligations.
- 6.6. Tax practitioners have been relying on these supplementary non-binding TPB guidance materials to clarify their obligations under the TASA and TASA. These materials have acted as *de facto* extensions to the legislation itself. Given that the sanctions for non-compliance with the TASA can have serious consequences, we submit it is unsatisfactory for tax practitioners not to be able to rely on binding guidance.
- 6.7. We submit that it would be appropriate for a stock-take of the TPB guidance materials, as well as the extrinsic materials related to the TASA and TASA, to be undertaken, as part of this Review. Where appropriate, pertinent authoritative interpretation, views and positions (whether of the TPB or Government) should be codified into the legislation, or elevated to binding status to provide the necessary protection for tax practitioners who rely on such guidance in good faith (similar to how rulings made by the Commissioner of Taxation can be binding⁹). There should also be a mechanism for tax practitioners to request a binding view from the TPB on matters unique to their facts and circumstances
- 6.8. Some examples of elements that could be codified into law include:
- (a) Clarification that the 'supervision and control' requirement¹⁰ does not require (or is not limited to) an employer-employee relationship¹¹.
 - (b) The ability of tax practitioners or taxpayers to rely on legitimate claims for legal professional privilege and/or the accountants' concession¹².

7. Additional legislative and/or TPB clarification

- 7.1. The Government and/or the TPB should provide clearer and more objective legislation and guidance on the following:

Meaning of sufficient number of registered individuals

- 7.2. In order for a company or partnership to be registered to provide regulated tax practitioner services, the TASA requires that there be a sufficient number of individuals that are registered persons to provide the relevant tax services to a competent standard and to carry out supervisory arrangements¹³.

⁹ See section 357-60 of the TAA 1953.

¹⁰ Appearing in subparagraphs 50-30(1)(c)(iii), 50-30(2)(c)(iii), 50-30(3)(c)(ii) and 50-30(4)(c)(ii) of the TASA and Item 103 in Division 2 of Part 1, Item 207 in Division 2 of Part 2 and Item 305 in Division 2 of Part 2 of Schedule 2 to the TASA.

¹¹ Currently, the meaning of 'supervision and control' is to be gleaned from extrinsic material found at paragraphs 3.42 and 4.55 of the Explanatory Memorandum to the Tax Agent Services Bill 2008, the Explanatory Statement to the TASA at page 13 and the non-binding TPB Information Sheet entitled 'Supervisory arrangements and supervision and control' at paragraph 19, which states that it is subject to change from time to time.

¹² Currently implied by way of extrinsic material: Explanatory Memorandum to the Tax Agent Services Bill 2008 at paragraphs 3.61 and 3.68.

¹³ Paragraphs 20-5(2)(c) and 20-5(3)(d) of the TASA.

- 7.3. While it is recognised that the TASA has not prescribed a particular formula¹⁴ in order to provide flexibility to address the specific circumstances of individual entities, we submit that further clarity should be provided on how to self-assess satisfaction of the sufficient number requirement¹⁵.
- 7.4. We further submit that having an optional safe harbour (such as company directors or partners with at least x% ownership of the company or partnership must be registered tax agents in their own right) would provide greater certainty for tax practitioners. Entities that do not meet the safe harbour are still able to rely on alternative bases upon which the number of registered individuals in their circumstances are to be considered sufficient. The safe harbour should be defined in a manner that is adaptable to the context of the particular practice (size, staff, maturity, governance, nature of work, etc).

Reasonable care

- 7.5. The TASA's Code of Professional Conduct requires, at Item 9, that registered tax practitioners take reasonable care in ascertaining a client's state of affairs, to the extent that such ascertainment is relevant to making a statement or doing something on behalf of the client¹⁶.
- 7.6. The extrinsic material¹⁷ and the TPB's non-binding guidance¹⁸ explain that an audit or verification of the veracity of client supplied information is not ordinarily required where this is consistent with the agreed scope of the tax services. However, further enquiries should be made where the tax practitioner identifies or ought reasonably to have identified that the information supplied was incorrect or incomplete.
- 7.7. The making of "further enquiries" in certain circumstances may be contrary to the scope of engagement and contractual obligations and responsibilities of the parties. There is a potential for tension between the reasonable care duty and the agreed scope of work (which may be limited in various ways such as the practitioner being instructed to accept certain information or the tax treatment of a certain particular, or for certain matters to be scoped out of the engagement). This contractual scope may be put in place for a number of reasons, including the level of tax knowledge or sophistication of the client or the client's willingness and/or ability to pay for the services contracted.
- 7.8. We recognise that it is important for taxpayers/clients to be afforded the appropriate protection in the interest of promoting community trust and confidence in the use of tax practitioner services. However, the level of reasonable care should be adjusted depending on the circumstances of the taxpayer particularly their level of taxation literacy (which is expected to correlate to the sophistication and size of the taxpayer's activities or business) and the scope of engagement.
- 7.9. Therefore, we submit that the guidance for tax practitioners on discharging reasonable care could be improved to make it clearer and less ambiguous, with reference to more detailed practical, real-life examples or case studies to illustrate the extent of the obligations of the tax practitioner.

¹⁴ Explanatory Memorandum to the Tax Agent Services Bill 2008 at paragraph 2.57.

¹⁵ Current TPB guidance is by way of non-binding TPB Information Sheet TPB(I) 23/2014 that addresses partnership and company registered tax (financial) advisers. It could be implied that the factors listed at paragraph 15 of TPB(I) 23/2014 are generic in nature, are of broader application and can be extended to partnership and company registered tax and BAS agents. Notwithstanding, it is not clear how the TPB would take account of those factors or indeed how the factors themselves or the outcome of taking them into account would influence or determine the sufficient number threshold.

¹⁶ Subsection 30-10(9) of the TASA.

¹⁷ Explanatory Memorandum to the Tax Agent Services Bill 2008 at paragraphs 3.50 to 3.54.

¹⁸ TPB Information Sheet TPB(I) 17/2013 'Code of Professional Conduct – Reasonable care to ascertain a client's state of affairs' at paragraphs 10 to 17.

- 7.10. The guidance should explicitly acknowledge that the tax practitioner is entitled to operate in accordance with the agreed scope of services, provided the client has had the opportunity to understand (including making the necessary enquiries of) the implications of out-of-scope matters or where the client is sophisticated or highly tax literate (i.e. similar to the sophisticated investor regime that applies under the *Corporations Act 2001* with respect to investment in financial products¹⁹).

8. Modernising the 'equivalence of relevant experience' requirement

- 8.1. The TASR provides alternative 'pathways' to qualify for registration as a tax or BAS agent, or a tax (financial) adviser. These involve a combination of formal qualifications and relevant experience. Varying levels of work experience apply depending on the level of formal qualifications attained.²⁰
- 8.2. As a result of the shifting demographics of working professionals, we are seeing the need for more flexible working arrangements and an increased focus on workplace diversity and equality in order to attract and retain talent as part of the business succession plans for tax practices.
- 8.3. We suggest that analysis be done as to the impact that the TASR work experience requirements have on parental leave, carer leave or other types of leave of absence. It may be that the work experience requirements may need to be modified or modernised to meet current social and workplace expectations.

9. Regulating the tax profession of the future

- 9.1. On 3 April 2019, the Inspector-General of Taxation released a report on its review into the future of the tax profession (**IGT Future Tax Review**)²¹. Its Terms of Reference state that the IGT Future Tax Review was tasked to focus on the opportunities, risks and challenges presented by new technological, social, policy and regulatory developments on the administration of the tax system, strategies to assist the tax profession to address these challenges and the role of the ATO and the TPB in supporting and working with the tax profession²².
- 9.2. One of the key trends underpinning the IGT Future Tax Review is the fact that rapidly evolving technological advances means that the future of the tax profession will invariably feature increased use of automation and robotics technology including artificial intelligence and machine learning capabilities to perform a wide variety of tax-related work processes and functions. As stated in the Background to the IGT Future Tax Review:

"In recent decades, technology has begun to change the way in which the ATO provides services and interacts with taxpayers and tax practitioners ...

Similarly, the business models of tax practitioners are also evolving ...

Whilst technology, when appropriately utilised, can deliver significant benefits, there are challenges that need to be addressed such as certain functions becoming redundant or significantly diminished and how the affected parties ... may need to adapt to the new environment. A more pressing concern of the tax profession is the level of dependency on ATO digital systems, their reliability and the lack of contingency plans ... privacy and data security ...

... the impending technological, social, policy and regulatory changes will have vast and lasting impacts on the tax profession, the ATO, the TPB and the wider community."

¹⁹ Refer to subsections 708(8), (10) and (11) of the *Corporations Act 2001*.

²⁰ See Schedule 2 to the TASR.

²¹ Review into the Future of the Tax Profession, Inspector-General of Taxation (accessible at: <http://igt.gov.au/publications/reports-of-reviews/future-of-tax-profession/>).

²² Review into the Future of the Tax Profession, Inspector-General of Taxation, Appendix 1: Terms of Reference (accessible at: <http://igt.gov.au/publications/reports-of-reviews/future-of-tax-profession/appendix-1-terms-of-reference/>).

9.3. The ATO has, for some time now, been gearing up for the advent of new-age technological innovation as evident from the following statements:

"We are putting the foundations in place to take advantage of innovations in automation and artificial intelligence. Our capabilities will enable the ATO to use smart technologies to deliver efficiencies while enhancing the client and staff experience. Robotic process automation can replace repetitive factual tasks, freeing tax officers for higher-value work. Virtual assistants, agents and chat-bots, such as Alex our virtual assistant, can assist users to find answers to less complex queries. Artificial intelligence including machine learning can generate insights that augment, rather than replace, human decision making."²³

"The ATO is working to accommodate increasing community reliance on ATO's digital services and an anticipated exponential growth in digital transactions over coming years."²⁴

9.4. We submit that it will be important for the TPB to design a progressive and fit-for-purpose regulatory approach going forward that accommodates and is responsive to the changing and increasingly automated and digitised environment in which tax practitioners and tax administrators operate. For example, is the current definition of tax services sufficient to deal with a world where services may be provided electronically (eg, self service undertaken by a taxpayer using a software product), services delivered via artificial intelligence, and other models. It may be that assistance may be gained from other regulators: eg, are similar issues being addressed in the context of the current / future definition of legal services.

9.5. In addition, tax practitioners require certainty in relation to the administration of the tax regime following the Full Federal Court's decision in *Pintarich*²⁵ and the associated ATO's Decision Impact Statement²⁶ concerning automated ATO decisions and correspondences. This will be important to enable tax practitioners to appropriately discharge their professional duties and meet their statutory obligations and reasonable care standards.

9.6. We further submit that there should be consultation on clarifying the division of roles and responsibilities among the ATO, the TPB and professional associations going forward, if the IGT's recommendations that certain functions of the ATO may be devolved to tax practitioners²⁷ were pursued, or if some of the disciplinary sanctions of the TPB could be implemented by the professional associations²⁸.

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We would be pleased to discuss, or provide any further clarification as necessary. The undersigned can be contacted on [REDACTED]

Yours sincerely

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David Watkins

Partner

²³ 'Tax in a changing world – change is the new black', Andrew Mills, Second Commissioner – Law Design and Practice, Australasian Tax Teachers' Association 31st Annual Conference, Perth, 17 January 2019.

²⁴ 'Working to deliver a seamless digital experience', ATO website (accessible at: <https://www.ato.gov.au/Media-centre/Media-releases/Working-to-deliver-a-seamless-digital-experience/>), 4 December 2018.

²⁵ *Pintarich v Deputy Commissioner of Taxation* 2018 ATC 20-657.

²⁶ Accessible at: <https://www.ato.gov.au/law/view/document?docid=LIT/ICD/TAD41of2017/00001>.

²⁷ Recommendation 4.2(f) of the Review into the Future of the Tax Profession, Inspector-General of Taxation.

²⁸ Recommendation 6.3(a) of the Review into the Future of the Tax Profession, Inspector-General of Taxation.