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The Treasury

TSY/AU

Review of the Tax Practitioners Board

Discussion Paper
July 2019

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Consultation Process

Request for feedback and comments

This Discussion Paper arises as a result of a review of the Tax Practitioners Board (TPB) announced by the Assistant Treasurer on 5 March 2019. Mr Keith James (former member of the Board of Taxation for 10 years and Deputy Chair for 4 years) has been appointed as Head of the review and is being assisted by Mr Neil Earle (former president of the Tax Institute of Australia) as well as staff from Treasury, the TPB and the Australian Taxation Office (ATO).

Subsequent to the announcement an initial round of consultation has occurred with various agencies including the TPB, ATO, Australian Securities and Investments Commission (ASIC), Financial Adviser Standards and Ethics Authority (FASEA), the Inspector-General of Taxation and Taxation Ombudsman (IGTO), the Administrative Appeals Tribunal (AAT) and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO). Roundtable consultations have also occurred with many of the professional associations as well as other interested groups. Further, a one hour webcast for all interested stakeholders, including tax practitioners was held on 12 April 2019.

This paper considers potential reforms to the regulation of tax practitioners in Australia and discusses the effectiveness of the TPB and the operation of the *Tax Agent Services Act 2009* (*TASA*) and the *Tax Agent Services Regulations 2009* (*TASR*).

The TPB is responsible for regulating the services provided by tax agents, business activity statement (BAS) agents and tax (financial) advisers (TFAs) (collectively referred to as tax practitioners) in Australia and ensuring that the services provided by these tax practitioners are provided to the public in accordance with appropriate standards of professional and ethical conduct.

Further consultation will occur in August 2019 and interested parties are invited to comment on the proposals outlined in this paper.

Submissions will be made public and published on Treasury's website unless otherwise requested. A request made under the *Freedom of Information Act 1982* (Cth) for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Closing date for submissions: 30 August 2019

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Opening comments

This post implementation review is unique.

Taxation post implementation reviews have their genesis in the 1999 Ralph Review and the Board of Taxation's 2002 foundation report titled *Government Consultation with the Community on the Development of Taxation Legislation*.

In that 2002 report the Board stated that post-implementation reviews should "after about two years of operation, assess new legislation to ensure that it is having the intended effect and to find out whether its implementation can be improved". This recommendation was consistent with the Board's Charter to advise on the 'quality and effectiveness of tax legislation and the processes for its development'.

In describing the post-implementation process, the 2002 report noted that "in assessing the quality and effectiveness of tax legislation, the Board would have regard to the extent to which the legislation:

- gives effect to the Government's policy intent;
- is expressed in a clear, simple, comprehensible and workable manner;
- avoids unintended consequences of a substantive nature;
- reflects actual taxpayer circumstances and commercial realities;
- results in compliance and administration costs commensurate with the legislation's significance to the tax system;
- is consistent with other tax legislation; and
- provides certainty."[1]

Three things make this review different. The *Tax Agent Services Act 2009* (*TASA*) and related regulations were the subject of extensive consultations following the introduction of self-assessment beginning in 1986-87. When finally enacted, practical compromises were made and there was a commitment that a post-implementation review would include a review of the effectiveness and/or go forward place of these compromises.

The first interim matter concerned the transitioning of the existing State Tax Agents Boards to the new national Tax Practitioners Board (TPB). Whilst the TPB was to be independent, its administration was to be part of the Australian Taxation Office (ATO).

The explanatory memorandum to the *Tax Agent Services Bill 2009* (the EM) specifically provides that;

> 5.32 In the establishment phase, it is efficient for the Board to sit within the ATO, due to the administrative obligations that would otherwise apply to it as a separate agency and because the ATO provides the most appropriate functional fit for the Board from amongst existing prescribed FMA Act agencies.
>
> 5.33 However, this arrangement is intended to be the subject of a post-implementation review to be conducted three years after commencement of the Bill — refer to paragraph 6.71 in Chapter 6 of this explanatory memorandum. The key focus of the review will be to assess whether this arrangement remains appropriate and satisfactory. The review will consider whether the independence of the Board is impaired in any way because of its continued connection with the ATO, and whether an alternative arrangement should be considered.

1 p 18

A key question for this paper is the role and powers of the ATO and whether this is an impairment (perceived or otherwise) of the TPB's independence.

The relevant paragraphs of the EM are appended to this Discussion Paper.

The second interim matter related to the taxpayer/tax agent safe harbour proposed in the 1994 *National Review of Standards of the Tax Profession*. In the intervening period the ATO developed concerns with their application. The *TASA*, and more importantly the penalty provisions in the *Taxation Administration Act* 1953, restricted the safe harbour to cases of lack of reasonable care. Taxpayers continued to be vicariously liable where the tax agent was reckless or intentionally disregarded the law. A review of this position was to be included in the future post implementation review.

Our request for submissions on this issue disappointingly drew very little response.

We remain committed to the matter and encourage responses of any nature.

Again the relevant provisions of the EM are attached at Appendix A.

Thirdly, the Terms of Reference of this review included a specific reference as to whether the TPB and surrounding arrangements are going forward 'fit for purpose'.

This future looking examination is in part an outcome of the recent reviews of the Black Economy Taskforce and the Inspector-General of Taxation and Taxation Ombudsman's (IGTO's) report on the *Future of the Tax Profession*. Both of these reviews proposed a more active role for the TPB. We also understand we should have regard to other recent reports such as the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission).

The concepts of 'fit for purpose' and one of its building blocks 'independence' underlie much of this review. We greatly appreciate the assistance we obtained from 'The Ethics Centre' in formulating our approach to this task. The Centre's advice which guides much of the preliminary views in this Discussion Paper, is reproduced here with their permission.

> In a democratic polity, like Australia, the taxation system is the practical means by which citizens fund the provision of public goods by their agent, the elected government of the day.
>
> The system - as a whole - encompasses those who levy taxes (the Parliament), those who collect taxes (the Australian Taxation Office), those who pay taxes and those who mediate the relationship between those who pay and those who collect tax.
>
> The Tax Practitioners Board (TPB) is responsible for regulating the conduct of the latter group; those who mediate the relationship between those paying and those collecting taxation. As such, the TPB forms part of the taxation system as a whole - standing alongside other elements of the system, like the ATO.
>
> The taxation system is only efficient and effective if it is trusted by all concerned to serve the public interest through means that are lawful, fair and in accordance with the highest standards of integrity.
>
> Tax practitioners play a vital role in ensuring that the system as a whole is efficient and effective. Thus the overarching purpose of the TPB is to ensure that tax practitioners operate with integrity. However, it is equally important that tax practitioners have confidence in the integrity of the system as it applies to them - especially as it has a bearing upon their conduct.

The TPB is charged with providing *independent* oversight of tax practitioners. When understood in the larger context outlined above, it is in the public interest that the TPB be (and be seen to be) independent as this is one of the preconditions for tax practitioners voluntarily submitting to its authority - rather than merely complying as a matter of necessity. Voluntary commitment rather than mere compliance is preferable because it enhances both efficiency and effectiveness by reducing the 'deadweight' costs of formal regulation and compliance. That is, it is better for all if people choose to do what is right rather than being forced to do so.

So, if independence is key to the TPB fulfilling its purpose, how might that be assured to a degree sufficient to enjoy the confidence of tax practitioners and the wider community? In particular, to what extent can this outcome be achieved even the connection between the TPB and ATO within the design of the taxation system as a whole?

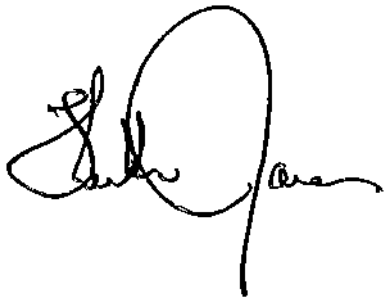
First, the Board must itself be entirely independent. It must have authority to decide all matters and do all things that fall within the scope of the TPB's remit. Ideally, it should control its own budget - once allocated. It should have the formal power of appointment of its executive and staff who should work exclusively under its direction.

Second, any staff employed by the TPB (whether directly or by secondment) must be relieved formally of any residual obligation to any other organisation. That is, the executive and staff of the TPB should formally be accountable to the Board and no other party. This accountability should be acknowledged and approved by any source of secondees, such as the Commissioner of Taxation. While the Commissioner might select and recommend a secondee, the ultimate right of acceptance must lie with the TPB.

Third, those working at the TPB must be inducted into its work by means that reinforce their *professional* obligation to serve the public interest by acting in a manner that expresses, in practical form, the independent character of the TPB's operations - including its exercise of judgement.

These are the minimum requirements that need to be met in order to merit the confidence of those subject to the TPB's authority. Equally, if met, these conditions set a foundation that a reasonable person should accept as evidence of independence of a kind and quality that should be relied on.

What follows is a consultation paper not a report. It provides an opportunity for the various participants in our taxation system to provide comment and input into what will improve an important regulatory pillar in our taxation system. I agreed to head this review because of my confidence that post implementation reviews are a unique and one-off opportunity to make meaningful improvements to the subject matter of the review. I hope this confidence is shared.



Keith James

1. Introduction/Background

1.1 Overall submissions received on the terms of reference for this review were positive. Many stakeholders commended the efforts of the TPB in engaging with the tax profession and valued its understanding of how the profession works in practice. However, the landscape of the tax profession has changed since the inception of the *Tax Agent Services Act 2009* (*TASA*) and *Tax Agent Services Regulations 2009* (*TASR*) regime.

1.2 This review will be examining whether the *TASA*, *TASR* and the TPB are meeting their objective of ensuring "that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct"[2] and remain fit for purpose. Indeed, it is worth reflecting that the TPB, *TASA,* and *TASR* have not only a role in protecting consumers but in also upholding the integrity of the tax profession and therefore the integrity of the tax system.

Previous regimes

1.3 The initial Commonwealth regime for regulating tax agents was introduced in 1943 as a consequence of the 1932-34 Royal Commission on Taxation and was contained in the tax legislation of the time. Since then the tax environment, as with most other aspects of life has dramatically changed. There is now a much larger proportion of taxpayers using tax agents and business activity statement (BAS) agents to lodge their returns and statements and to help them comply with their tax obligations. A significant part of this change was driven by the introduction of a self-assessment regime in the 1980s, but other drivers also include the expansion of the tax base to include capital gains tax (CGT), fringe benefits tax (FBT) and the goods and services tax (GST). There have also been other major reforms (such as consolidations, thin capitalisation), special concessions for various market segments, and numerous responses to the threats posed by tax avoidance activity. Overlaying all of these changes is the rapid expansion of new technologies and the gig economy.

1.4 These changes have noticeably increased the volume and complexity of the tax laws, often making it difficult to interpret and apply them without the assistance of someone such as a tax agent.

1.5 The tax practitioner regime which existed post self-assessment, included:

1.5.1 a registration process for tax agents, but not BAS agents or TFAs;

1.5.2 provisions which provided that only tax agents were entitled to supply certain tax agent services for a fee or reward;

1.5.3 separate state Tax Agents' Boards responsible for registration of tax agents; and

1.5.4 administrative penalties for taxpayers making a false or misleading statement resulting in a shortfall amount, or for late lodgement, irrespective of whether they engaged a tax agent to prepare and/or lodge the document.

1.6 Following a national review of standards for the tax profession in 1992, the need for a new legislative framework was identified in a report that issued in 1994 titled *Tax Services for the Public: The Report of the National Review of Standards for the Tax Profession*.

1.7 In addition to the above the GST applied since 1 July 2000. Whilst the GST is ultimately paid by the end consumer, the GST arrangement in Australia is that businesses collect the GST progressively as the goods or service moves through the production. To account for the GST,

2 Section 2-5 of the *Tax Agent Services Act 2009* (Cth).

businesses report to the ATO on a BAS. Often businesses employ a BAS agent to assist in the preparation and lodgement of this return. The involvement of BAS agents in the tax system requires registration with the TPB.

1.8 The legislative regime that was subsequently introduced in 2009 was intended to ensure that tax agent and BAS services provided to the public were of an appropriate ethical and professional standard. It sought to do so by:

1.8.1 requiring tax and BAS agents to be registered and to comply with a nationally consistent and enforceable professional code of conduct;

1.8.2 creating appropriate sanctions for misconduct by tax practitioners and safe harbours for taxpayers; and

1.8.3 establishing an independent national board to register tax and BAS agents and to monitor and enforce compliance with those standards.

Key elements of the *Tax Agent Services Act 2009*

1.9 The key elements identified in the *TASA* when the current regime was implemented in 2009 are set out below. Some of these elements have featured strongly in the submissions received as part of the initial consultation conducted for this review and are discussed in further detail in subsequent chapters of this Discussion Paper.

The establishment of a national Tax Practitioners Board

1.10 The TPB was created to have responsibility for registering tax and BAS agents, ensuring that agents maintain appropriate skills and knowledge, investigating complaints against agents and ensuring that unregistered entities do not hold themselves out to be agents.[3] The Board currently comprises 8 members (including one of whom is the Chair).

1.11 Subdivision 60-A of the *TASA* sets out various requirements for the establishment, functions and powers of the Board including that the Board must consist of a Chair and at least 6 other members. There is no maximum number of Board members, no stipulation as to the qualifications or backgrounds of the members[4] nor any requirements as to the overall composition of the Board.

A wide scope of application

1.12 BAS agents were to be governed the same way as tax agents, but would only be able to provide a limited range of services relating specifically to BAS[5] and advising about BAS provisions[6].

Registration requirements

1.13 Meeting the fit and proper person test, as well as minimum qualifications (including educational) and relevant experience requirements, were required in order to obtain registration as an individual. The educational qualifications and experience requirements

3 Paragraph 1.14 of the EM

4 Though the Chair cannot be a person who holds any office or appointment (other than as a Board member) under a law of the Commonwealth on a full-time basis, nor be a person engaged or appointed under the *Public Service Act 1999* (Cth) (section 60-25 *TASA*).

5 Paragraph 1.15 of the EM

6 As defined in section 995-1 of the *Income Tax Assessment Act 1997*

were less demanding for BAS agents, in recognition of the narrower scope of services they can provide.[7]

1.14 To allow for the registration of 'specialist' tax and BAS agents, the TPB was empowered to impose conditions on registration limiting the scope of the services agents could provide.[8]

1.15 The meaning of "*tax agent service*" is defined in section 90-5 of the *TASA*. This definition has captured payroll service providers, conveyancers, quantity surveyors, research and development specialists, and some software providers, to the extent that they provide tax services.

The introduction of a Code of Professional Conduct

1.16 The legislated Code of Professional Conduct (Code) was introduced to govern the ethical and professional standards of tax and BAS agents.

1.17 The Code came out of the 1994 Report referred to previously (*Tax Services for the Public)*, which recommended that any code should be legislated to enable a board to impose sanctions for breaches and thereby to enforce compliance.[9]

A range of sanctions for breaches of the Code of Professional Conduct

1.18 The TPB was given a range of administrative sanction powers where a tax or BAS agent was found to have breached the Code.

1.19 The TPB may issue a written caution to an agent, issue an order to require an agent to do certain thing, such as complete training, subject an agent to practising restrictions, require an agent to practise under supervision, or suspend or terminate an agent's registration. In addition to imposing administrative sanctions for breaches of the Code, the TPB may also apply to the Federal Court for an order to pay a pecuniary penalty for certain serious misconduct.

Safe harbour from penalties

1.20 A taxpayer who used a tax or BAS agent would benefit from a safe harbour from certain administrative penalties in certain circumstances. Under the Schedule 1 to the *Taxation Administration Act 1953*, penalties would no longer apply:

1.20.1 where a false or misleading statement is made carelessly, provided the taxpayer has taken reasonable care to comply with the tax obligations by giving their tax or BAS agent the information necessary to make the statement; and

1.20.2 where a document is not lodged on time in the approved form due to the tax or BAS agent's carelessness, provided the taxpayer gave the agent the necessary information, in sufficient time, to lodge the document on time and in the approved form.[10]

7 Paragraph 1.16 of the EM
8 Paragraph 1.17 of the EM
9 Paragraph 1.20 of the EM
10 Paragraph 1.24 of the EM

Independence of TPB from ATO

1.21 Under arrangements consistent with the *TASA* (see in particular section 60-80 of the *TASA*) the ATO provides administrative support to the Board, including staffing, accommodation, financial and other systems.

1.22 As is explained at paragraph 6.66 of the EM*,* the intent was for the Board to be a statutory body within the Treasury portfolio that would operate independently, though the administrative and secretariat functions would be provided by ATO employees. It was also recognised in the EM that *"this arrangement may change pending the outcome of the post-implementation review".*

Tax (financial) advisers (TFAs)

1.23 Up until 30 June 2014[11], financial services licensees and their authorised representatives were carved out of the tax agent services regime, by way of an exemption in the *TASR*, and were not required to register with the TPB if they provided tax advice, for a fee or reward, in the course of providing financial product advice, unless they provided a broader range of tax agent or BAS services.

1.24 From 1 July 2014, entities that gave tax advice in the course of giving advice that is usually provided by financial services licensees could be registered with the TPB and comply with the various regulatory requirements.

1.25 This was to ensure the consistent regulation of all forms of tax advice, irrespective of whether it is provided by a tax agent, a BAS agent or an entity in the financial services industry. It also sought to minimise compliance costs, achieved in part by removing legislative impediments to the TPB and ASIC sharing information.

1.26 More so than either tax agents or BAS agents, TFAs are regulated by numerous Government bodies including ASIC, FASEA for standards, AFCA (Australian Financial Complaints Authority) for complaints and a new disciplinary body has been recommended in the Financial Services Royal Commission's Final Report[12].

Current environment

1.27 The TPB has three broad functions, registration, guidance and disciplinary action[13].

1.28 There are currently approximately 43,000 registered tax agents, 20,000 registered tax financial planners and 15,000 registered BAS agents. Exact numbers as at 30 June 2019 of active practitioners are:

11 While an entity could notify to become registered from 1 July 2014, the requirement to be registered commenced on 1 January 2016 due to the operation of section 49(4) of the *Tax Laws Amendment (2013 Measures No. 3) Act 2013.*

12 Recommendation 2.10

13 Section 60-15 *TASA*

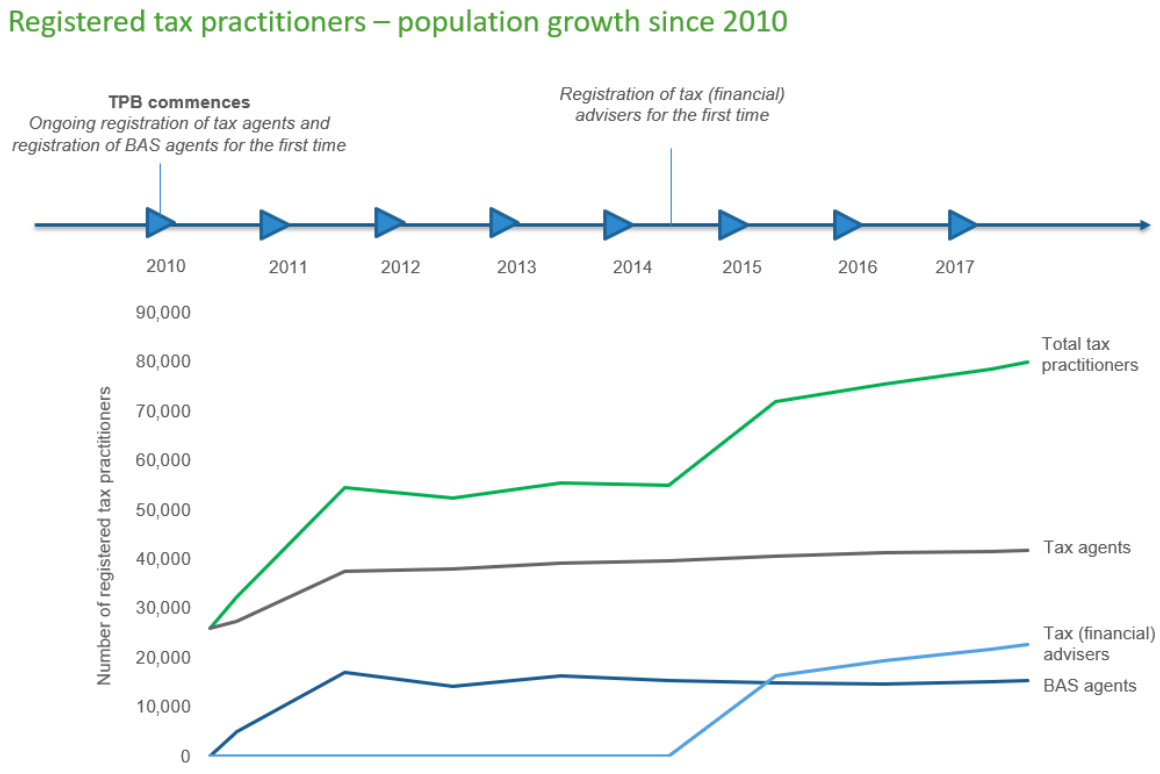
Table 1.1: Active practitioners

	1. TAX	2. BAS	3. TFA	Grand Total
Company	11849	3080	6884	21813
Individual	30223	12403	12680	55306
Partnership	778	318	55	1151
Grand Total	**42850**	**15801**	**19619**	**78270**

Source: Tax Practitioners Board

1.29 Statistics provided by the ATO indicate that almost 75% of individual/business income tax returns are prepared by tax agents.

1.30 The growth in the number of registered practitioners now requiring regulation is well illustrated by the following graph.



Source: Tax Practitioners Board

1.31 By contrast the number of employees working for the TPB has reduced from 160 in 2009-10[14] to 133 in 2018-19.[15]

1.32 From an educational/guidance perspective, in 2018-19 the TPB conducted 22 webinars, presented at 38 ATO Open Forums, and also presented at 17 industry/professional body conferences. 12 electronic newsletters were also provided and 22 new videos were published on the TPB's YouTube channel. In relation to guidance and information products, a total of 47 information products are currently on the TPB's website – 6 explanatory papers, 2

14 Tax Practitioners Board, Annual Report 2009-10 p. 48 (includes non-ongoing employees).
15 Tax Practitioners Board – this number also includes non-ongoing employees.

practice notes, 34 information sheets and 5 proposed Guidelines and during 2018–19, 2 explanatory papers and 6 Information sheets were updated and two exposure drafts were released.[16]

1.33 The following table sets out in summary format the number of disciplinary cases closed by the TPB over the last 4 years.

Table 1.2: Disciplinary cases

Type of case	2015-16	2016-17	2017-18	2018-19
Eligibility for registration	38	11	19	88
Fit and proper person	101	23	36	147
Breach of the Code (items 1-13)	689	349	412	1985
Breach of the Code (respond to requests and directions from Board)	669	1895	1869	2864
Civil penalty	144	230	87	202

Source: Tax Practitioners Board

Future of the tax profession

1.34 On 3 April 2019 the Inspector-General of Taxation and Taxation Ombudsman's (IGTO) report *The Future of the Tax Profession* was released. The review examined the challenges and opportunities presented by new and emerging technologies, along with the accompanying social, policy and regulatory impacts on the administration of the tax system and the tax profession.

1.35 Many of the issues raised in the IGTO's report have relevance to this review.

1.36 At the time of the release of the report, the IGTO also announced that they would be releasing a companion report to *The Future of the Tax Profession* report that seeks to assist tax practitioners in considering the nature of the issues and opportunities that are canvassed in the report and that may arise over the medium to long term[17].

Black Economy

1.37 The Black Economy Taskforce in its Final Report, published in October 2017 emphasised the vital role tax practitioners play in the economy and the influence they have on whether small businesses comply with the tax obligations. The policing of the profession has a flow-on effect on the behaviour of small business, which includes participation in the black economy.

16 Source: Tax Practitioners Board

17 IGTO Media Release Review into the Future of the Tax Profession

Whole of Government approach to intermediaries

1.38 As is recognised above, there are numerous Government agencies and authorities that all have some influence in this sector. As well as the TPB they include the ATO, ASIC, FASEA, AFCA and possibly a new disciplinary body as recommended by the Financial Services Royal Commission.

1.38.1 On 4 February 2019, Commissioner Hayne released the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Final Report. While the TPB is not specifically mentioned in the Final Report, a number of findings and recommendations will impact on the role of the TPB as a regulator of tax (financial) advisers, and the role of the TPB as a regulator more generally.

1.39 In February 2019 the Treasurer announced a capability review of the Australian Prudential Regulatory Authority (APRA) with the report released by the Treasurer on 17 July 2019. The importance of this capability review is that it formed part of the Government's response to the Financial Services Royal Commission with recommendation 6.13 of the Royal Commission's report calling for capability reviews of both APRA and ASIC to occur at least every four years. In preparing the Final Report for this review, some consideration of the TPB undergoing a capability review may be appropriate given the regulatory nature of the TPB.

1.40 This review will examine whether there is scope for improving the current regulatory regime for tax practitioners.

Purpose of the review

1.41 As part of its establishment phase, it was considered efficient for the TPB to sit within the ATO due to the administrative obligations that would otherwise apply to it as a separate agency. However, as envisaged in the EM and as noted above, it was intended that there would be a post-implementation review to assess whether this arrangement remains appropriate and satisfactory.

1.42 Furthermore, the role of tax practitioners and new entrants into the profession is evolving. Technological advancements have both changed the landscape for tax practitioners and created new opportunities to assist taxpayers in complying with their tax obligations. Given the tax system has changed considerably since the *TASA* was introduced, there is a need to reconsider the current regulatory framework of the tax profession and the current structure of the TPB.

1.43 The review will also provide an opportunity for the public to make submissions for the purpose of evaluating the current and future suitability and effectiveness of the legislative and governance framework, the regulation of the sector and identify possible improvements.

1.43.1 Several submissions were marked as confidential and have not been published on the Review's webpage. The points made in each submission were considered regardless of whether the submission was confidential or not. Finally, for those submissions made by individuals in their capacity as an impacted tax agent, BAS agent or TFA, the Review has taken the step of deleting the submitters name and contact details (and agent number where provided).

1.44 The Terms of reference set out the scope of the review and are attached as Appendix B.

Approach of the Discussion Paper

1.45 This Discussion Paper has been structured based on feedback received during consultations and submissions received. At the same time the paper is forward looking to engage with the community for further submissions and targeted consultations on the issues identified for this Discussion Paper.

1.46 The approach of this Discussion Paper has been to review the current position, seek views and options from both the TPB and the ATO, consider all submissions made, and form, from the independent review's perspective, preliminary views. These preliminary views are the focus of this Discussion Paper and are accompanied by consultation questions.

1.47 It is important to note that the views of the TPB and the ATO are being provided on a preliminary basis and are for the purpose of informing the Discussion Paper and assisting with the consultation process. Further, their views are necessarily subject to modification following the feedback received on the Discussion Paper.

2. Whole of Government interactions

Current Position

2.1 The current regulatory regime for entities that provide tax and financial services is complex. In addition to the TPB, tax practitioners and their clients may need to interact with a number of other government organisations:

Table 2.1: Responsibilities of Government bodies

Organisation	Role
ATO	To contribute to the economic and social wellbeing of Australians by fostering willing participation in, and protecting the integrity of, the tax and superannuation systems.[18]
ASIC	To enforce and regulate company and financial services law to protect Australian consumers, investors and creditors.[19]
APRA	To maintain the safety and soundness of financial institutions, such that the community can have confidence that they will meet their financial commitments under all reasonable circumstances. APRA is tasked with protecting the interests of depositors, policy holders and superannuation fund members.[20]
FASEA	Responsible for setting the education, training and ethical standard of licensed financial advisers in Australia.[21]
Code Monitoring Bodies	To be registered by ASIC and will operate compliance schemes to monitor and enforce compliance with FASEA's code of ethics.[22]
IGTO	To provide independent advice on the administration of the tax system to government and to improve the administration of the tax laws for the benefit of all taxpayers.[23]
AFCA	A recently (2018) established single external dispute resolution scheme for consumer and small business complaints dealing with complaints about financial firms. This includes financial advisers as well as other entity types such as banks and insurance companies.
New disciplinary body	A recommendation of the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Final Report, which would have the power to impose disciplinary sanctions on financial advisers.[24]

2.2 The current legislative provisions allow for information exchange between the TPB and a number of other organisations including the ATO.[25] The *TASA* allows the TPB to request information from any other entity, including the ATO, in the process of conducting

18 ATO Corporate Plan 2018-19, p. 2.
19 https://asic.gov.au/about-asic/what-we-do/our-role/ (accessed on 2 July 2019).
20 https://www.apra.gov.au/about-apra (accessed on 25 July 2019).
21 https://www.fasea.gov.au/ (accessed on 2 July 2019).
22 https://asic.gov.au/regulatory-resources/financial-services/professional-standards-for-financial-advisers-reforms/ (accessed on 2 July 2019).
23 https://www.ato.gov.au/About-ATO/Commitments-and-reporting/Our-scrutineers/Inspector-General-of-Taxation/ (accessed on 2 July 2019).
24 Hayne, Final Report of the Royal Commissioner into Misconduct in the Banking, Superannuation and Financial Services Industry, p. 215.
25 Division 355 of Schedule 1 to the *Taxation Administration Act 1953* and Subdivision 70-E of the *TASA*.

investigations and the ATO may refer matters to the TPB for investigation. That said, it was the view of the Black Economy Taskforce that the agencies could communicate better.[26]

2.3 The Financial Services Royal Commission has also made some helpful comments as regards to the sharing of information between Government agencies.[27] This is further discussed below.

2.4 A Memorandum of Understanding (MOU) currently exists between the TPB and ATO and there's also an MOU between the TPB and ASIC. Both MOUs are designed to facilitate the flow of information between each agency.

2.5 The TPB is also required to provide information to law enforcement agencies.

2.6 In Chapter 5 we discuss tax intermediaries such as conveyancers, payroll providers, digital service providers, quantity surveyors, research and development advisers who are all currently required to register with the TPB and whether other Government agencies are better placed to regulate some of these entities.

2.7 The TPB's specific information sharing obligations are outlined in the table below:

Table 2.2: sharing of information and information requests under the *TASA*

Organisation	Role
ATO	The TPB can disclose official information to the Commissioner of Taxation if it is for the purpose of administering a taxation law.[28] When the TPB makes a decision about an application for registration or renewal as a tax agent, BAS agent or tax (financial) adviser, the TPB must notify the ATO of its decision.[29] If the TPB conducts a formal investigation, against any tax practitioner, and makes a decision that there has or has not been a breach, the TPB must notify the ATO of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding. [30]
ASIC	The TPB can disclose official information to ASIC if it is for the purpose of ASIC performing any of its functions or exercising any of its powers.[31] When the TPB makes a decision about an application for registration or renewal as a tax (financial) adviser, the TPB must notify ASIC of its decision.[32] If the TPB conducts a formal investigation, against a tax (financial) adviser or a tax agent in relation to providing a tax (financial) advice service, and makes a decision that there has or has not been a breach, the TPB must notify the ASIC of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding. [33]
Code Monitoring Bodies	The TPB can disclose official information to a monitoring body for a compliance scheme if it is for the purpose of the monitoring body monitoring or enforcing compliance with the Code of Ethics under the scheme.[34] If the TPB conducts a formal investigation, against any tax practitioner that is a person covered by a compliance scheme who provides a tax (financial) advice service, and makes a decision that there has or has not been a breach, the TPB must notify the relevant code

26 Treasury, October 2017, Black economy taskforce Final Report at p164
27 Above n 24, pp. 461 – 464
28 See subsection 70-40(3) of the *TASA*
29 See paragraph 20-30(2)(a) of the *TASA*
30 See paragraphs 60-125(8)(c) and (d) of the *TASA*
31 See subsection 70-40(3A) of the *TASA*
32 See paragraph 20-30(2)(b) of the *TASA*
33 See paragraphs 60-125(8)(c) and (d) of the *TASA*
34 See subsection 70-40(3AA) of the *TASA*

Organisation	Role
	monitoring body of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding. [35]
Inspector-General of Taxation and Taxation Ombudsman	The TPB can disclose official information to the Inspector-General of Taxation and if it is for the purpose of investigating or reporting under, or otherwise administering: (a) the *Inspector-General of Taxation Act 2003*; or (b) provisions of the *Ombudsman Act 1976*, to the extent that they are applied by the *Inspector-General of Taxation Act 2003.*[36]
Authorised law enforcement agencies	The TPB can disclose official information to an authorised law enforcement agency if: (a) the record is made for, or the disclosure is to, an authorised law enforcement agency officer; a (b) the record or disclosure is for the purpose of: (i) investigating a *serious offence; or (ii) enforcing a law, the contravention of which is a serious offence; or (iii) the making, or proposed or possible making, of a *proceeds of crime order.[37]
Recognised professional associations	If the TPB conducts a formal investigation, against a member of a recognised professional association, and makes a decision that there has or has not been a breach, the TPB must notify the relevant recognised professional association of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding. [38]

Views of the TPB

2.8 The TPB is of the view that the flow of information between the TPB and other key stakeholders, including the ATO, ASIC and the professional associations, should be strengthened to ensure the appropriate and timely flow of information.

2.9 While the TPB is currently reviewing and amending its current memorandum of understanding arrangements, a legislative mandate to ensure that, through strong information sharing powers and resource sharing, more efficient and effective alignment of compliance strategies and actions across related regulators are achieved. As an example, having the TPB listed explicitly in the *Australian Securities and Investments Commission Act 2001* as an organisation that ASIC can share certain information with.

2.10 The sharing of information point was a key observation of the Financial Services Royal Commission which recommended that a law change was required to oblige APRA and ASIC to co-operate with the other, share information to the maximum extent practicable and notify the other whenever it forms the belief that a breach may have occurred. The starting premise is that joint responsibility and co-operation necessitates substantial commonality of information.

2.11 The TPB recognises that to achieve a more efficiently and timely flow of information may require law changes beyond the *TASA*.

35 See paragraphs 60-125(8)(c) and (d) of the *TASA*
36 See subsection 70-40(3B) of the *TASA*
37 See subsection 70-40(4) of the *TASA*.
38 See paragraphs 60-125(8)(c) and (d) of the *TASA*

2.12 In addition, the TPB notes that since 1 July 2019, new arrangements to better protect individuals who disclose information to eligible recipients, such as the ATO, on tax avoidance behaviour and other tax issues began. Under these arrangements, individuals will now be better protected under the law when they disclose tax avoidance behaviour and other tax issues to the TPB about an entity (includes an individual) they are, or have been, in a relationship with. Under the new laws, as contained in the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* the TPB is not considered an 'eligible recipient' and therefore is unable to receive information from an eligible whistleblower and an eligible recipient (such as the ATO) if consent is not provided by the whistleblower. Given the role of the TPB in regulating the tax profession and protecting consumers of tax services, this outcome is anomalous and requires a legislative amendment to allow the TPB to be in receipt of such information is critical.

Views of the ATO

2.13 The ATO supports the free flow of information between the ATO, TPB and other Government agencies.

Views of submissions

2.14 Many stakeholders observed that the regulatory burden on TFAs is particularly onerous. For this reason, TFAs will be discussed separately in Chapter 10.

2.15 To minimise regulatory overlap, it has also been suggested the work be done to develop a uniform code of conduct that would apply across all professions. Alternatively, steps could be taken to align aspects of the *TASA*'s Code of Professional Conduct with the code developed by FASEA. During consultation stakeholders emphasised the importance of a code being developed in close consultation with the relevant profession. This will be discussed further in Chapter 6.

2.16 There is an existing legislative regime that provides for the sharing of information between the TPB and other government agencies. However, stakeholder feedback has suggested that government agencies could work more effectively together to make use of these arrangements. Supporting this, the Financial Services Royal Commission recommended a law change was required to oblige APRA and ASIC to co-operate with each other, share information to the maximum extent practicable and notify the other whether it forms the belief that a breach may have occurred. The premise underlying this recommendation is that joint responsibility and co-operation necessitates substantial commonality of information.

2.17 Stakeholders also identified a lack of community awareness of the TPB. Enhancing communication with tax practitioners and consumers of tax services is important in demystifying the co-regulatory regime. This topic will be separately discussed in Chapter 4.

Our preliminary views

2.18 Table 2.1 above highlights the breadth of the regulatory regime and the duplication in the system, in particular for TFAs. This places both a regulatory and compliance burden on tax practitioners, and creates multiple entry points for consumers of tax services. This is discussed further in Chapter 10 in relation to TFAs.

2.19 Consistent with the Government's Regulator Performance Framework, it is imperative that regulators do not unnecessarily impede the efficient operation of regulated entities. Further,

communication with regulated entities needs to be clear and effective, and compliance and monitoring approaches should be streamlined and coordinated. [39]

2.20 Effective information sharing between government organisations is needed to reduce the number of government interactions for practitioners and consumers, and to focus compliance and monitoring activity.

2.21 Once the Government's Modernising Business Registers (MBR) program has been implemented, the possibility of incorporating the registration of tax practitioners on the new system could be explored.[40]

2.22 While Commissioner Hayne's comments were made in the context of the relationship between ASIC and APRA, there is a lot in the substance of his comments that applies just as validly to the relationship between the ATO and the TPB. As Table 2.2 above indicates, the *TASA* and tax legislation broadly permit the exchange of information between the TPB and ATO and TPB and ASIC, however the review has identified that the administrative arrangements facilitating the frequency of exchange, ensuring two way information sharing and use of this information could operate more effectively.

2.23 Strengthening the information sharing arrangements, perhaps by force of legislation, should strengthen the relationship between the agencies. In our view the model suggested by Commissioner Hayne of mandatory, rather than discretionary sharing of information[41] is worth considering.

Consultation points

2.1 We invite submissions on our preliminary views.

2.2 Could the sharing of information between the TPB and other Government agencies also be improved?

39 The Government's Regulator Performance Framework, pp. 4-5.

40 The Government announced as part of the 2018-19 Budget that it is modernising business registers to support businesses in an evolving digital economy. It is to be administered by the Australian Business Register (ABR) within the ATO. Only registrations administered by ASIC and the ABR will be in the initial scope of the process.

41 Ibid at 462

3. TPB governance

Independence of the TPB from the ATO

Current Position

3.1 Since the TPB was established in 2009, the ATO has provided staffing to provide administrative assistance to the Board (section 60-80 of the *TASA* and Regulation 11 of the *TASR*) and also funding for the purpose of allowing the Board to perform its functions and exercise its powers (Regulation 11 of the *TASR*).

3.2 Furthermore, TPB staff are co-located with ATO staff in the same ATO premises.

3.3 In addition to the above legislative arrangement, the Commissioner of Taxation is the *accountable authority* for the performance of the TPB in terms of the *Public Governance, Performance and Accountability Act 2013* (*PGPA Act*).[42]

3.4 As such, for the purposes of the *PGPA Act*, the TPB is considered to be part of the ATO and the Commissioner of Taxation is the authority responsible under the *PGPA Act* for accounting to the Government for the activities of the TPB. Board members are also considered to be ATO officials for the purposes of the *PGPA Act*.

3.5 The importance of the TPB having the requisite degree of independence from the ATO was well recognised when the TPB was initially established, as is recognised at paragraphs 5.29 to 5.33 of the EM.[43] It is also clear from the EM that the current arrangements were always envisaged as part of a transition phase and that the post-implementation review was to have particular emphasis on the governance arrangements[44].

3.6 The funding arrangement for the TPB is governed by Regulation 11 of the *TASR* which requires the funding to be allocated "*as agreed between the Commissioner and the Board, for the purpose of allowing the Board to perform its functions and exercise its powers under the Act.*"

3.7 It is noted that a review of the *PGPA Act* was run by the Department of Finance and two independent reviewers in 2017 - 2018. The Final Report of the review was tabled in Parliament on 19 September 2018 and a ministerial statement, in response to the Final Report was tabled in the Parliament on 5 April 2019. On 2 April 2019 the Government provided their response to the independent review accepting in principle 48 out of 52 recommendations that are within its area of sole responsibility and supported the remaining recommendations.

42 Section 7 of Schedule 1 of the *Public Governance and Accountability Rule 2014* (Cth).
43 Excerpt from the EM included as Appendix A.
44 Paragraphs 5.33 and 6.71 of the EM

Views of the TPB

3.8 The TPB is of the view that its funding allocation should be determined directly by the Government, based on TPB resource bids, and allocated to the TPB directly via a 'special account', rather than as an allocated proportion of a broader ATO budget.

3.9 In addition to a special account, the *PGPA Act* should be amended to allow independent statutory authority holders, such as the Chair of the Board, to certify the accuracy of the TPB's performance reporting. The result of this is that the TPB Chair, rather than the Commissioner of Taxation can sign off on key governance documents including the annual report, annual performance statement, corporate plan, regulator performance framework reporting and the cost recovery implementation statement. This aligns with the public submission the TPB made as part of the *PGPA Act* review last year.[45] The Final Report for the *PGPA Act* review was released in September 2018 and it recommended that the *PGPA Act* or Rule should be amended to allow independent statutory office holders, who are not accountable authorities, to certify the accuracy of their performance reporting. It is understood that Government has accepted this recommendation.

3.10 The above changes would further strengthen the TPB being, and being seen to be, independent from the ATO.

3.11 The TPB recognises the importance of the TPB being, and being seen to be, independent of the ATO. The TPB is strongly of the view that concerns raised regarding its independence are a matter of perception rather than reality. Particularly in relation to decision making, the TPB's independence is strongly supported by three key factors:

- 3.11.1 TPB staff, including the Secretary/CEO, act under the direction of the Board and apply the policy guidance determined by the Board itself.
- 3.11.2 All appellable decision making, such as the termination of registration or imposition of other administrative sanctions are decisions that can currently only be made by a committee of at least three Board members.
- 3.11.3 All Board members being appointed directly by the Minister.

Views of the ATO

3.12 The ATO has a similar view to the TPB that the Chair of the TPB should become separately accountable under the *PGPA Act* and that the issue of independence seems to be one more of perception than reality.

3.13 Acknowledging the unique nature of the TPB as an independent statutory body and the responsibilities of its respective board, the ATO considers that the TPB should be permitted to sign off its own annual performance statements to enhance the community's view of the independence of the TPB.

3.14 This is consistent with the ATO's submission to the review of the *PGPA Act*, which recommended that the *PGPA Act* or Rule should be amended to allow independent statutory

45 TPB Submission to review of the PGPA Act

office holders, who are not accountable authorities, to certify the accuracy of their performance reporting.

3.15 The ATO has identified that the Board's inability to delegate certain decisions to TPB staff members impedes the efficiency of TPB decision making.

3.15.1 Currently the Board cannot delegate 'reviewable decisions'[46] to TPB staff (for example, a decision rejecting registration or renewal). Such decisions must be made by at least three Board members.

3.15.2 The ATO considers that the Board could be provided with the flexibility to delegate certain reviewable decisions to TPB staff.

Views of submissions

3.16 Many of the submissions have raised this issue of independence, noting the importance not only of the TPB being independent but also of being seen to be independent. Stakeholders see this as a crucial component of the integrity of the tax system.

3.17 That said, it is also important to note that overall submissions were supportive of the way the TPB has been operating. Put another way, while the current system is seen as operating effectively, many think it could be improved if the TPB were to have a greater level of independence and be better resourced.

3.18 From 2010, the commencement of the TPB, until 1 July 2018 the application fees had not changed. The 2018-19 Budget announced an increase in application fees to offset the additional funding for the TPB in addition to its broadened responsibilities.

3.19 Several submissions have expressed a level of dissatisfaction with the current TPB application fees. To pursue the Chair of the TPB as an *accountable authority* would require a distinct government funding commitment and the establishment of a funding model with potential changes to application/registration fees so that charges are consistent with the Australian Government Charging Framework.

Our preliminary views

3.20 Set out in the *Opening Comments* are the observations made by The Ethics Centre regarding the importance of the TPB being, and being seen to be independent. It is worth repeating some of those observations here:

- The TPB must be entirely independent and should control its own budget
- It should also have the formal power of appointment of its executive and staff who should work exclusively under the Board's direction
- Any staff (whether employed directly or by secondment) should not have any residual obligation to any other organisation

46 Certain decisions made under the *TASA* are subject to review in the Administrative Appeals Tribunal.

- The TPB should have an appropriate means of induction for its staff such that they understand the importance of being independent

3.21 In our view the current situation does not meet the requirements set out by The Ethics Centre. Currently Board members and the CEO are paid by the ATO; the MOU between the TPB and ATO has not been updated since 2010; the ATO has ultimate responsibility for the TPB's budget as the *accountable authority* under the *PGPA Act*, and the secondment arrangements need to be improved.

3.22 Based on this, as well as submissions and consultation we see that there are 3 possible options to address the issue of independence:

3.22.1 Retain the status quo. The current arrangements have the advantage of significant savings in infrastructure costs with the TPB able to use the same premises and systems as the ATO. Working in the same building also helps to foster a close working relationship. Using ATO staff as secondees also ensures a reliable pool of staff who will already have a lot of the necessary expertise and technical knowledge.

3.22.2 Establish the Chair of the TPB as the relevant *accountable authority* and develop a model such that the TPB employs its own staff, is located in its own premises, and is responsible for its own budget and reporting. This would be a similar arrangement to how the IGTO has been set up. This model would satisfy the requirements set out by The Ethics Centre.

3.22.3 Establish the Chair of the TPB as the relevant *accountable authority* responsible for its own budget and reporting. However the majority of the staff would be ATO secondees and the ATO and the TPB would operate under a "shared services arrangement". This model would also satisfy the requirements set out by The Ethics Centre and is our preferred option and is discussed further below.

Our preferred option

3.23 Whilst we think that both of the latter two options would overcome the current issues, we think the better approach is the third option as it retains the benefits of the current system as well providing the TPB with independence; an issue that dominates many of the submissions.

3.24 To address the perception issues that have been identified by many stakeholders, and assuming any enabling legislation can be developed within the current public sector framework, one solution might be to make the position of the CEO a statutory appointment that is made either by the Board or by the relevant Minister.

3.25 Similarly it might be appropriate that those staff of the TPB who report directly to the CEO and are responsible for decisions regarding sanctions and litigation are also employees of the TPB rather than ATO secondees working for the TPB. This would ensure that all decisions that may be made by the TPB and that are appellable to either the AAT or a Court are made by employees of the TPB who are clearly independent of the ATO.

3.26 Making the Chair of the Board of the TPB an *accountable authority* under the *PGPA Act* would enable this to occur but would come with other responsibilities for the TPB including additional commitments regarding the administration and compliance with the *PGPA Act.*

3.27 One of the biggest advantages of having the staff of the TPB located in ATO offices is the significant savings that are made in infrastructure costs. If the TPB were to become an *accountable authority* it does not necessarily follow that these should increase. An option might be to have an arrangement that would allow the TPB to continue to use ATO facilities and equipment through the Government's Shared Services Program.

3.28 Similarly, as currently occurs, it may well be appropriate for the TPB to continue to be staffed by ATO secondees in order to assist with obtaining staff who have the necessary skills.

3.28.1 Currently the arrangement by which staff are seconded from the ATO to the TPB is governed by an MOU. The review has been advised that this MOU is currently in the process of being re-drafted.

3.28.2 It states in the MOU that all employee related matters are handled in accordance with the ATO's Agency Agreement and related policies and procedures.

3.28.3 Unlike secondment arrangements that the ATO has with other agencies there is no specific right for the TPB to terminate the secondment.

3.28.4 Of note is that the MOU is not a legal agreement and does not create legally binding obligations on either the ATO or the TPB.

3.28.5 In addition to the MOU the Commissioner of Taxation issued a direction to all ATO secondees to the TPB on 27 October 2010 that remains current. That direction states that:

I direct that all ATO employees made available to the Board should at all times carry out all reasonable and lawful directions of the Board, as conveyed by the Chair or a Board member designated by the Chair.

3.28.6 Providing transparency in the staffing arrangements and formalising the rights of the TPB with respect to its staff may assist to alleviate the perception raised during consultation that the TPB's staff lacked independence from the ATO.

3.28.7 Staffing arrangements could be formalised by requiring ATO secondees to have a signed Secondment Agreement. Alternatively, it might be that they take leave without pay from the ATO while on secondment.

3.29 Another advantage that co-location provides is that it encourages and facilitates a close working relationship allowing both agencies to continue to collaborate and consult effectively. Our view is that a close working relationship between the TPB and ATO is essential for the tax practitioner profession to be appropriately regulated.

3.30 While it will be necessary to ensure that any changes that do occur if the Chair of the TPB does become an *accountable authority* are consistent with the Australian Government Charging

Framework, it is not the function of this review to consider those issues. The time and place for that to occur is after the Government has considered the recommendations arising from this review.

Consultation points

3.1 We invite submissions on our preliminary views regarding the level of independence the TPB should have from the ATO.

Membership of the Board

Current position

3.31 Currently there are 8 part-time members, one of whom is the Chair.

3.32 Section 60-10 of the *TASA* requires that there must be at least 7 members of the Board, one of whom is the Chair. There are no stipulations in either the *TASA* or the *TASR* as to whether the Chair or the members are full-time or part-time, nor are there any stipulations as to the experience necessary to be a Board member.

Views of the TPB

3.33 The TPB does not yet express a view on this matter.

Views of the ATO

3.34 The ATO is of the view that the *TASA* should mandate the composition of the Board to include a balanced stakeholder group of tax professionals, taxpayers, and independent members. The ATO also is of the view that it should not be a member of the Board.

Views of submissions

3.35 It has been suggested that there should be a member of the Board to represent consumer advocates. This would align with one of the key objectives of the TPB and the *TASA* which is to provide consumer protection and protect taxpayers who are seeking taxation services.

3.36 The Australian Business Software Industry Association in their submission indicated that the membership of the Board should include at least one member with a technology based background.

3.37 Similarly other submissions have suggested there should be BAS agent representation.

Our preliminary views

3.38 Traditionally members of the Board have generally had experience working in the tax industry, be that as an accountant, tax agent, BAS agent, tax (financial) adviser, solicitor or barrister. As has been recognised in the IGTO's report *The Future of the Tax Profession* which was released on 3 April 2019, services in the gig economy provided by digital service providers (DSPs) "have

permeated the tax profession by providing tax advice and compliance assistance".[47] It will be important that the TPB has access to the necessary expertise to ensure it is equipped to cope with these rapidly evolving changes to the industry.

3.39 One means of addressing this is to have a member of the Board with relevant information technology expertise and perhaps some experience with introducing innovation and change to work practices.

3.40 As part of their governance arrangements, through the *Corporations Act 2001*, the FASEA board must be comprised of certain individuals with specific backgrounds, qualifications and experience, however it is a standards setting board. Such a model may not be appropriate for the TPB Board.

3.41 Having a Board member as a community member also has a lot of merit. Other Boards such as the Dental Board of Australia and the Victorian Board of the Medical Board of Australia have adopted such a model and have members who are community members outside the profession. A further example is the Queensland Legal Practice Committee who have what they term as two "lay people" who have a high level of experience and knowledge of consumer protection, business, public administration or another relevant area.

3.42 Perhaps the same result could be achieved by having a Board member with a cross section of tax and business experience. There has been positive feedback that a model that has "*peers judging peers"* is desirable.

3.43 If the TPB were to become an *accountable authority* under the *PGPA Act* would having an ATO officer as a member of the Board help to facilitate the close working relationship between the two Government bodies?

3.44 In the next topic, *Community Awareness,* we discuss raising the TPB's profile in the community. Having an appropriate breadth of Board representation may assist in strengthening the TPB's profile in, and engagement with, emerging sectors.

Consultation points

3.2 We invite submissions on our preliminary views regarding membership of the Board.

47 Inspector-General of Taxation, April 2019, *The Future of the Tax Profession*, p. 130.

Object of the *TASA*

Current position

3.45 One of the key regulatory roles of the TPB is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct.[48] This is set out in section 2-5 of the *TASA* which states:

> *The object of this Act is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct. This is to be achieved by (among other things):*
>
> *(a) establishing a national Board to register tax agents, BAS agents and tax (financial) advisers; and*
>
> *(b) introducing a Code of Professional Conduct for registered tax agents, BAS agents and tax (financial) advisers; and*
>
> *(c) providing for sanctions to discipline registered tax agents, BAS agents and tax (financial) advisers.*

Views of the TPB

3.46 The TPB is of the view that the objects of the *TASA* should be reviewed, given that the objects were developed over 10 years ago when the TPB was in its formative stage.

3.47 In particular, the objects of the *TASA* would benefit from being updated to cover the following three inter-related areas. These areas are to support and protect:

- the public, including consumers of tax services;
- tax advisers acting lawfully and ethically;
- community confidence in the integrity of the tax system.

Views of the ATO

3.48 The ATO and the TPB have separate roles and accountabilities, as noted above (see Table 2.1), however their roles are somewhat interdependent, in that the ATO are concerned with protecting the integrity of the tax and superannuation systems, and the TPB are concerned with the integrity of the tax profession who the ATO have observed to have a key role in protecting the integrity of the tax system. A tax profession that is up to date with the law and provides a high level of service to the public has a positive effect on the integrity of the tax system. One of the contributors towards the individuals (not in business) and small business tax gaps is the role of some tax agents and promoters of tax schemes play which has led to growing concerns about the integrity of the tax system. Ensuring that there are appropriate sanctions and powers for the TPB to adequately address these concerns is considered elsewhere in this Discussion Paper but the concerns also raise the broader issue as to whether

48 Section 2-5 of the *TASA*.

it should be clearly and specifically recognised that one of the purposes or objects of the Act is to uphold the integrity of the tax system.

Views of submissions

3.49 There were no submissions that raised any material concerns about the current purpose of the *TASA*.

Our preliminary view

3.50 The manner in which section 2-5 of the *TASA* has been phrased with terminology that calls for:

- *"establishing a national Board …"*
- *"introducing a Code of Professional Conduct …"*

makes it clear that this provision was intended as a transitional element. Now that both the Board and the Code have been established and operating for over 9 years it is worth reviewing whether the object of the *TASA* needs updating.

3.51 One aspect that in our view is unambiguously clear is that it was always intended that as well as the *TASA* providing consumer protection to clients of tax practitioners it should also be ensuring that the integrity of the tax system is upheld. This is reinforced when reference is made to the 1932 Royal Commission, the 1994 review and the EM[49].

3.52 If one were to join the dots between the standards required in the Code of Professional Conduct[50] and comments made in the EM, it is our view that the integrity of the tax system as an objective of the *TASA* is evident. Nonetheless it may be beneficial if it was made expressly clear that the integrity of the tax system is also an important purpose of the *TASA*. Such an approach is consistent with the views set out by The Ethics Centre.

3.53 We agree with the views expressed by both the TPB and the ATO.

Consultation point

3.3 We invite submissions on our preliminary views regarding whether the object of the *TASA* as stated at section 2-5 should be amended? If so how?

49 See page 5 of the *EM* where the observation is made that the introduction of civil penalties and injunctions *"will benefit agents and the integrity of the tax system"*.

50 See Chapter 6 for a detailed discussion about the Code.

4. Community awareness

TPB visibility

Views of the TPB

4.1 The community heavily relies on the services of tax professionals, with approximately 73% of individual taxpayers choosing to use a tax professional to lodge their tax return each year and over 95% of all businesses using tax professionals to perform some or all their tax functions. This reflects a high degree of trust within the community of the tax profession. However, while reliant and trusting of the tax profession, consumers of tax services are largely unaware of their rights when using a registered tax professional or the risks associated with using an unregistered tax professional.

4.2 Given the resource and funding limitations, the TPB's approach in supporting consumers has been based on educating and regulating tax practitioners (for example, webinars, presentations, website content and information products). The rationale for this approach has been that by supporting tax practitioners in meeting their education and registration requirements the consumer is being protected. With the TPB moving to more targeted and purposeful regulatory activities, the TPB is expanding its support to consumers through communications directly targeting consumers.

4.3 The TPB welcomes views, as part of this review, on how it may improve its visibility and reach in the community.

Views of the ATO

4.4 The ATO has suggested that the *TASA* could mandate the display of the registration number on all public facing material, including correspondence and digital platforms. In addition to enabling consumers of tax agent services to verify the practitioner's registration, this may also assist in enhancing the TPB's visibility.

Views of submissions

4.5 Numerous submissions suggested that many consumers of tax agent services are not familiar with either the TPB or the importance of ensuring that any entity they use to assist them with their tax affairs is registered with the TPB. Considering the co-regulatory environment tax practitioners find themselves in (see Chapter 2), the specific role and purpose of the TPB needs to be clearly defined and promoted.

4.6 Feedback from consultation was generally positive when it came to the TPB's engagement with professional associations, although some submissions did indicate that there could be additional consultation.

4.7 Submissions commented that there was also scope for greater transparency in TPB's processes, particularly with respect to its complaints processes. Some stakeholders observed that on occasion they were not aware of whether the TPB had taken action with respect to information provided on tax practitioner conduct. While it may not be appropriate for the TPB to comment on its investigations, considering the TPB's role in ensuring practitioners comply with the Code of Professional Conduct, the public needs to be confident in the TPB's

processes. Transparency in these processes will go a long way in bringing about this confidence.

Our preliminary views

4.8 Having the TPB more visible serves to assist tax practitioners in understanding their obligations under the *TASA* regime and signals to consumers of tax agent services that there is recourse when these services are not provided in accordance with the Code of Professional Conduct. Increasing visibility of the TPB will also assist with the problems surrounding unregistered practitioners (see discussion at Chapter 8).

4.9 The TPB could engage in a targeted education programme, directed at both consumers of tax agent services and tax practitioners. It may be efficient for the TPB to leverage their relationship with professional associations in understanding key points of uncertainty and the most appropriate forums to engage the profession.

4.10 It may also assist consumers of tax agent services if the TPB focus on clarifying its interaction with federal and state consumer bodies, and complaints bodies such as the IGTO.

Consultation point

4.1 We invite submissions on our preliminary views regarding community awareness of the TPB.

Public register

Current position

4.11 The TPB Register is a public register containing the registration details of registered and deregistered tax practitioners. One of the TPB's primary tools in protecting consumers of tax agent services is by publishing information on the TPB's Register.

4.12 Currently, the TPB Register includes details on the tax practitioner's registration status, including periods of effect and reasons for sanctions, disqualification and termination. The reasons currently included on the Register are however fairly general in nature. For example:

Reason: Individual no longer meets registration requirements.

No explanation is provided as to why the individual does not meet the registration requirements.

Views of the TPB

4.13 The TPB has indicated that it may be beneficial for consumers of tax agent services if the TPB Register provided additional information on registered and unregistered tax practitioners. This could include publishing a wider range of decisions and outcomes on the TPB Register, including more details of reasons for sanctions and termination, publication of cease and desist notices to unregistered tax practitioners, and publication of details relating to rejections of renewal applications. Additionally, the TPB suggests removing the time limits on how long certain information appears on the Register.

4.14 The *TASA* could also be amended to require company and partnerships to provide details on their firm governance structures. This information could be made available via the TPB Register.

Views of the ATO

4.15 The ATO believes that improved public visibility of practitioner terminations and sanctions (currently only visible for 12 months) should be able to occur.

4.16 The ATO has advised that the TPB Register does not currently provide full transparency on disbarment and sanctions. The *TASA* does not allow the publication of reasons for termination or professional affiliations, nor does it provide a mechanism to make clients aware that their tax agent has been terminated. The ATO supports changes to the *TASA* to allow for publication of this information on the TPB Register.

4.17 The ATO supports the requirement for firms to provide details on their firm governance structures. The ATO considers that information of actual governance and control structures ought to be provided by firms irrespective of their legal structure. This would assist the TPB to look through firm structures when undertaking compliance activity, enabling it to appropriately target the controlling minds of these firms.

Views of submissions

4.18 Only a few submissions made reference to the public register with one commenting on the number of searches made on the public register (1.7 million searches in 2017-18 and 1.72 million searches in 2018-19) and another submission noting that consumers may not know to search the public register for details of the tax practitioner they are intending to engage.

4.19 A further submission noted that the TPB's register should be included in the Modernising Business Registers program.

Our preliminary view

4.20 Subject to working through any privacy issues, there is a lot of merit in providing additional information on the TPB register concerning any sanctions imposed on practitioners.

Consultation points

4.2 We invite submissions on our preliminary views regarding the public register.

4.3 Does there need to be greater visibility over firm governance arrangements and the use of supervisory agents, so that it is clear to the TPB and the public who is accountable for the delivery of tax agent services?

4.4 What sort of governance rules should tax practitioner firms be subject to?

5. Registration, education and qualifications

Qualifications and experience requirements

Current position

5.1 Any entity that provides tax agent services (including BAS services and tax (financial) advice services) for a fee or other reward, must be registered with the TPB. Registration ensures that tax practitioners have the necessary qualifications and experience to provide tax agent services, meet the fit and proper purpose requirements and have appropriate professional indemnity insurance cover to protect consumers.

5.2 Currently, tax practitioner registration and status details appear on the TPB Public Register. As discussed in Chapter 2 of this paper, there may be merit in providing a centralised point for government registrations via the Modern Business Register. Please refer to Chapter 2 for further discussion on this topic.

Individuals

5.3 For individuals seeking registration as a tax practitioner, there are currently a number of entry pathways. It is worth noting that as these entry pathways are contained in the *TASR* any required modifications would be more easily achieved, compared to a change to the *TASA*.

Table 5.1: Tax agent registration as per the *Tax Agent Services Regulations 2009* (*TASR*)

	Primary qualification	Board approved courses			Relevant experience
		Australian taxation law	Commercial law	Basic accountancy principles	
201 Tertiary qualifications in accountancy	Degree or post-graduate award	✓	✓	✗	12 months in past 5 years
202 Tertiary qualifications in another discipline	Degree or post-graduate award	May be required	May be required	May be required	12 months in past 5 years
203 Diploma or higher award in accountancy	Diploma or higher award	✓	✓	✗	2 years in past 5 years
204 Tertiary qualifications in law	Academic qualifications to be an Australian legal practitioner	✓	✗	✓	12 months in past 5 years
205 Work experience	✗	✓	✓	✓	8 years in past 10 years
206 Membership of a professional association	Voting member of a recognised tax agent association	✗	✗	✗	8 years in past 10 years

Table 5.2: BAS agent registration (as per the *TASR*)

	Primary qualification	Board approved course GST/BAS taxation principles	Voting member of a recognised BAS or tax agent association	Relevant experience
101 Tertiary qualifications in accountancy	At least Certificate IV Financial Services in bookkeeping or accounting	✓	✗	1,400 hours in past 4 years
102 Membership of a professional association	At least Certificate IV Financial Services in bookkeeping or accounting	✓	✓	1,000 hours in past 4 years

Table 5.3: Tax (financial) adviser registration (as per the *TASR*)

	Primary qualification	Board approved courses		Relevant experience
		Australian taxation law	Commercial law	
301 Tertiary qualifications	Degree or post-graduate award in a relevant discipline	✓	✓	Equivalent of 12 months in the past 5 years
302 Diploma or higher award	Diploma or higher award in a relevant discipline	✓	✓	Equivalent of 18 months in the past 5 years
303 Work experience	✗	✓	✓	Equivalent of 3 years in the past 5 years
304 Membership of professional association	Voting member of a recognised tax (financial) adviser or tax agent association	✗	✗	Equivalent of 6 years in the past 8 years

Companies and partnerships

5.4 The eligibility requirements for registration as a tax practitioner or company or partnership are contained in the *TASA*. Generally, a company or a partnership seeking registration, including renewal of registration, as a tax practitioner, must satisfy the TPB that:

5.4.1 each director or individual partner is at least 18 years of age;
5.4.2 each director or individual partner is a fit and proper person;
5.4.3 the company or partnership maintains, or be able to maintain once registered, professional indemnity (PI) insurance that meets the TPB's requirements;
5.4.4 the company or partnership as a sufficient number of registered individual tax agents to provide tax agent services and supervision on behalf of the entity;
5.4.5 the company is not under external administration;
5.4.6 the company has not been convicted of a serious offence involving fraud or dishonesty during the previous five years; and
5.4.7 if there is a company partner in the partnership:

- each director of the company partner must be at least 18 years of age;
- each director of the company partner must be a fit and proper person;

- the company partner must not be under external administration; and
- the company partner must not have been convicted of a serious taxation offence or an offence involving fraud or dishonesty during the previous five years.

Views of the TPB

5.5 The TPB is of the view that while the current registration framework works well generally, amendments to the framework would be appropriate to reflect contemporary practices and ensure:

5.5.1 Better alignment with existing government approaches to lift standards and ensuring consistency across different professions. For example, new education standards apply to new and existing financial advisers to have an approved bachelor degree qualification – the question that should be considered is whether there should be a similar lifting of educational requirements for tax and BAS agents.

5.5.2 Sufficient flexibility for the qualification requirements to reasonably respond to new tax intermediaries that may form part of the regulated population, for example, payroll service providers who may have educational qualifications that do not necessarily fit within the structure as contained in the *TASR*.

5.5.3 Greater flexibility to allow the TPB to determine what is, and how much, relevant experience is required. This allows the TPB to take into account special circumstances, such as a career breaks or maternity leave, non-traditional tax intermediaries (such as payroll providers) and partial retirees.

5.6 In addition to the registration requirements, a review of the current period of registration would be appropriate. Under the *TASA*, an entity is registered for a period of at least 3 years. There is no discernible policy basis for this 3-year period and the TPB suggests that in the interests of the tax practitioners, the TPB and Government, it would be beneficial if the registration period was converted to an annual basis. This approach would align with most other requirements affecting tax practitioners, including professional indemnity insurance and association membership. This annual registration would replace the current TPB administrative 'Annual Declaration' process.

Views of the ATO

5.7 The ATO supports proposals to ensure there are appropriate professional qualifications and experience that would enable tax intermediaries to fulfil their role as a registered tax practitioner.

Views of submissions

5.8 The submissions identified a possible disconnect between the qualifications and experience requirements and contemporary tax practitioner practices. There are some tax practitioners with many years of experience who intuitively you would expect should be able to obtain registration but yet are unable to without doing further training. Some submissions have suggested changes in the tax practitioner landscape warrant a review of the TPB approved courses.

5.9 Some submissions also expressed a need to increase the minimum education standards for tax practitioners. This would align with the new requirements for financial advisers, set out

by FASEA. FASEA's new requirements require a FASEA approved degree, completion of a Financial Adviser Exam and 40 hours of continuing professional development.

5.10 A number of submissions have also highlighted the impact of part-time working arrangements, carer responsibilities and long term leave on the necessary experience requirements. Flexibility in these requirements is required to ensure that these situations do not present barriers to becoming a tax practitioner.

Our preliminary views

5.11 We agree with the views expressed by the TPB at [5.5]. There is a need for the relevant experience requirements to reflect the modern landscape. There is a growing number of specialist practitioners and a move away from traditional 'tax return work' towards tax advice work. This transition is also occurring in a highly digitised environment.

5.12 The introduction of Single Touch Payroll has highlighted the need for some payroll service providers to become registered with the TPB. However, what is evident from the existing eligibility framework in that it does not naturally cater for payroll service providers who have varying levels of qualification, which may now include the recently released Diploma of Payroll.

5.13 In light of the lifting of standards in the financial adviser profession, which now mandates that all individual financial advisers have a baseline educational qualification, the appropriateness of individuals becoming registered through their voting membership with a TPB recognised professional association needs to be considered. For example, registration through item 206 in Table 5.1, item 102 in Table 5.2 and item 304 in Table 5.3.

5.14 We also share the IGTO's view, as expressed in Recommendation 6.2 of *The Future of the Tax Profession Report* that there should be periodic review of the educational requirements by the TPB in consultation with practitioners, professional associations, tertiary institutions and the ATO.

Consultation points

5.1 We invite submissions on our preliminary views.

5.2 Is the period of time required for relevant experience appropriate? Should they be increased or decreased?

5.3 Should the TPB be given the flexibility to determine what, and how much time is required, for experience to be relevant.

5.4 Are the eligibility requirements for a company or partnership to become registered appropriate?

5.5 Should the registration period be converted to an annual period (rather than every three years)?

5.6 Should the primary educational qualification requirement for a tax agent be increased to a degree level qualification?

5.7 Should the primary educational qualification for a BAS agent be increased to a diploma level qualification?

Tax intermediaries

Current position

5.15 In addition to the introduction of BAS agents in 2010 and TFAs in 2014 to the tax agent services regime, there has been an ongoing expansion of the professionals considered to be 'tax intermediaries' and providers of 'tax agent services'.

5.16 The TPB's regulatory reach has expanded to include payroll service providers, conveyancers, quantity surveyors and research and development specialists. This list of tax intermediaries is not finite and will continue to grow as new tax initiatives are introduced.

5.16.1 In recent years, some registered tax agents have also registered as Digital Service Providers with the ATO to enable them to design and build their own software products either as a practice management tool and/or as a means for the clients to interact with them directly. In these circumstances the TPB regulation is restricted to their role as a tax agent and does not extend to their role as a Digital Service Provider.

5.16.2 On the other hand there are entities that provide a digital service and who in a different capacity also lodge online tax returns with the ATO. These digital service providers do need to abide by the TPB's Code of Professional Conduct and do need to be registered.

5.17 The requirement to be registered with the TPB is contained in the *TASA*. The definition of a tax agent service as defined in section 90-5 of the *TASA* is very broad and does not draw a distinction between entities that solely provide tax agent services and entities for which tax agent services form a small portion of their offered services.

5.18 Currently employees of tax advisers are not required to have their own individual registration. This is discussed further below under Individual Registration.

Views of the TPB

5.19 The TPB is of the view that generally registration under the *TASA* should be:

5.19.1 mandated for traditional tax advisers, such as tax agents and BAS agents, that provide advice for a fee or reward;

5.19.2 required by advisers who substantially deal in tax advice (tax advice concerns any matter arising from tax laws administered by the ATO), that provide advice for a fee or reward; and

5.19.3 excluded on a 'de minimis' basis for those professions that have marginal and simple tax advice interactions.

5.20 Consideration as to whether an entity is subject to other regulation for their tax advice is also appropriate.

Views of the ATO

5.21 The ATO considers that TPB's view is sensible and notes that the approach to tax intermediary registration should be future proofed (see discussion at Chapter 12). However, TPB regulation should not extend to those intermediaries where the services they provide is to act solely as a conduit between the ATO and the entity or individual providing the tax

agent service. That is, some digital service providers should be excluded from regulation under the TPB.

Views of submissions

5.22 Submissions have indicated that this broad definition has unnecessarily captured some tax practitioners, particularly conveyancers and payroll service providers.

Our preliminary views

5.23 Many of these tax intermediaries are either regulated or monitored by, or have existing arrangements with, other government agencies which mitigates the need for the TPB's involvement. For example:

5.23.1 Digital service providers build products that enable tax professionals, businesses, superannuation funds and individuals to more easily interact with the ATO. The products of digital service providers must comply with the service specifications, messaging standards and security and authentication policies published by the ATO, and must complete testing and provide relevant evidence demonstrating their compliance prior to interacting with any ATO digital services. These digital service providers are not seeking access to the ATO's portal.

5.23.2 Where an entity that is registered with the ATO as a digital service provider also provides, or markets themselves as providing a tax agent service and lodge returns online they ought to be registered with the TPB and be subject to the Code of Professional Conduct (see Chapter 6).

5.23.3 Rights of consumers in the provision of goods and services are codified in the Australian Consumer Law and is regulated by the Australian Competition and Consumer Commission, as well as state-based fair trading bodies.

5.24 On the other hand quantity surveyors, novated lease providers and salary sacrifice advisers would seem to actively market or advertise themselves as providing tax services without being regulated by any other Government agency and as such should continue to be regulated by the TPB.

5.25 Tax lawyers, insofar as they are not preparing or lodging a return or a statement in the nature of a return, have a specific exemption from needing to be a registered tax practitioner.

5.26 However, consultation has to date suggested that there are relatively few other tax intermediaries that currently fall into this category. Considering this, it may be appropriate for the TPB to publish a determination that excludes certain tax intermediaries from registration.

5.27 It is therefore important for this review to consider whether the right balance has been struck in protecting consumers of tax agent services and protecting the integrity of the tax system.

5.28 We are confident in the way that the ATO currently administers digital service providers and their requirements for access to ATO systems.

Consultation points

5.8 We invite submissions on our preliminary views regarding tax intermediaries.

Tax (financial) advisers

5.29 The registration requirements for TFAs and the interaction of the *TASA* and FASEA regimes will be considered in Chapter 10 of this Discussion Paper.

Fit and proper person

Current position

5.30 For an individual to be eligible to register as a tax practitioner, the TPB must be satisfied that they are a fit and proper person. For partnerships and companies, the TPB must be satisfied that each partner or director is a fit and proper person.

5.31 The existing criteria for determining whether an individual is a fit and proper person are set out in sections 20-15 and 20-45 of the *TASA*. Considerations the TPB must take into account include any bankruptcy, criminal history and tax compliance.

5.32 The fit and proper person requirement is a common assessment mechanism adopted by other regulators and professional associations. The fit and proper person requirement for both ASIC and APRA provide that the relevant person has no conflict of interest in performing their duties, or if they do have a conflict, that it will not create a material risk that the person will fail to properly perform their role.

View of the TPB

5.33 The TPB is of the view that it would be appropriate to review the *TASA*'s fit and proper person test and in particular, whether this requirement should be strengthened to ensure that the consumer protection objective underpinning the *TASA* is achieved.

5.34 In particular, the TPB is of the view that there should be modifications made to the fit and proper test to include:

5.34.1 Incorporating the matter of conflicts of interest as part of its consideration as to whether an individual is a fit and proper person including a specific reference to ensuring all personal tax obligations are up to date.

5.34.2 Bolstering the management of personal income tax obligations consideration to include a consideration of the management of the income tax obligations of an individual and the individual's associated entities

5.34.3 Whether a company or partnership has appropriate governance arrangements in place

5.34.4 Removing the five-year period referred to in section 20-15 of the *TASA* and either increase, or remove entirely, the timeframe within which matters can be taken into consideration

5.34.5 Any other relevant matters that the Board considers appropriate.

5.35 This above approach draws upon the current fit and proper test in the *TASA* as well as the approach of other regulators, including ASIC and APRA, who have a statutory power to set fit and proper requirements.

View of the ATO

5.36 The ATO has identified a number of potential reforms to the fit and proper person test:

5.36.1 The *TASA* does not have a mechanism to treat close associates of egregious tax practitioners as the tax practitioner. This is to be contrasted with the tax and corporations legislation, which provide for the actions of close associates. The ATO has suggested that fit and proper person test could be amended to include consideration of the actions undertaken by close associates of the registered tax practitioner in certain circumstances, akin to the related party provisions in the *Corporations Act 2001*.

5.36.2 The *TASA* allows serious previous criminal convictions and imprisonment to be withheld in an application for registration as a tax practitioner. The *TASA* could mandate the disclosure of spent convictions and relevant information to be considered for the fit and proper person test.

5.36.3 The *TASA* applies a 'shall register' regime, so that if a behaviour is not listed in the *TASA*, the TPB has limited discretion to reject an application for registration. Moving to a 'may register' approach may provide the TPB with great flexibility and discretion in registering practitioners in instances involving complex behaviours that are difficult to define, such as illegal phoenixing.

5.36.4 Lastly, moving from a three year to a one year registration cycle would provide a more timely review of a practitioner's fit and proper conduct.

View of submissions

5.37 Submissions have suggested that the fit and proper person test be expanded, with one stakeholder suggesting the TPB audit this requirement as it is currently a declaration made as part of the registration application process.

5.38 Submissions received did not identify particular ways to strengthen or broaden the fit and proper person requirement in the *TASA* regime.

Our preliminary views

5.39 Guidance could be taken from the fit and proper person requirements for other government agencies. The fit and proper person requirement under the *TASA* could be expanded to require consideration of conflicts of interest, disqualification from managing corporations, or whether the individual was involved in the business of a terminated or suspected tax practitioner.

5.40 There may also be scope to adjust the five-year time period built into the fit and proper person requirement under the *TASA*.

5.41 As is noted in Chapter 3, it might also be appropriate for the criteria to be expanded to include upholding the integrity of the tax system. While this is already inferred in paragraph 20-15(a) of the *TASA*[51] there may be value in making this more explicit.

5.42 Picking up on the discussion Chapter 7 (and the case examples in Appendix C) on supervisory agents, there may be scope for the TPB to consider the associates of a tax practitioner in determining whether they are a fit and proper person. In particular, the fit and proper

51 The Board must have regard to "*whether the individual is of good fame, integrity and character*"

person test could consider whether the tax practitioner operates a practice with, or under the direction of, a deregistered or terminated tax practitioner.

Consultation point

5.9 We invite submissions on our preliminary views regarding being a fit and proper person.

Tax clinics

Current position

5.43 The tax clinics are a relatively new phenomena in the Australian tax environment. The Curtin Tax Clinic opened on 2 July 2018 offering members of the public access to pro bono tax assistance which is provided by University students under the supervision of a tax practitioner. Since then a further 9 clinics have also either recently started or are in the process of opening after an announcement by the Government in late 2018 that they would fund a pilot of 10 clinics for 12 months. The service is intended for individuals and small businesses who do not have a tax agent.

5.44 Tax clinics are permitted to advertise their services as the Commissioner of Taxation has approved the clinics as a scheme by notice published in the Gazette, as required in paragraph 50-10(1)(e) of the *TASA*.

5.45 This scheme, although run by universities, might be described as providing a similar service to the Tax Help Program that was run by the ATO when the *TASA* was established. That program used the services of retired tax agents, retired ATO officers and university students who were allowed to advertise that they provided tax services even though they were unregistered.[52] The Tax Help Program is still operating though the point should be made that the Tax Help Program is aimed at assisting people with lodging their tax returns. The tax clinics also provide this assistance but in addition provide tax advice for non-complex issues.

5.46 Under the provisions of the *TASA*, in particular sections 20-1 and 50-5, you need to be registered as a tax agent if you provide "tax agent services for a fee or to engage in other conduct connected with providing such services". As the services are provided pro bono the TPB's view is that there is no need for the clinics to be registered. We note that other submissions have different views and consider that tax clinics should be registered based on the second limb of the requirement in section 20-1.

View of the TPB

5.47 Under the *TASA*, as these Tax Clinics do not provide tax services for a 'fee or reward', there is no requirement to be registered with the TPB. The TPB also notes that these tax clinics are currently operating under a 12-month trial basis.

View of the ATO

5.48 The ATO has been publicly supportive of the tax clinics and the service they provide for unrepresented and low income taxpayers. The ATO has no formal position on whether tax

52 See example 4.9 at paragraph 4.37 in the EM.

clinics should be required to register under the *TASA* regime, however, the ATO acknowledges the benefits of Tax Clinics being registered by a professional body, including the TPB.

Views of submissions

5.49 It has been suggested that the eligibility criteria for registration as a tax agent in the *TASA* and *TASR* be amended so that universities and not-for-profit organisations that run tax clinics are able to register. This would require the creation of a new eligibility pathway for registration.

Our preliminary views

5.50 Tax clinics do not need to register because they do not provide a tax service for a "fee or reward". The exemption provided by the Commissioner then allows them to advertise or market the provision of tax services.

5.51 However, because they do not register they are unable to access the ATO's Tax Agent portal. This lack of access hampers the provision of the services they provide as there are significant advantages that come with being registered including access to the ATO's Tax Agent Portal.

5.52 Consultation reveals that access to the tax agent portal is the driving reason behind suggestions to include tax clinics in the tax practitioner regime. However, access to the portal is a matter to be determined by the ATO. It would appear burdensome and unnecessarily bureaucratic to require a volunteer-run tax clinic to register as a tax practitioner and meet the relevant entry requirements to access an ATO system. Tax clinics should continue to work with the ATO so that the portal issue can be considered as part of the pilot evaluation.

5.53 Some stakeholders observed that excluding tax clinics from registration allows them to operate outside of the Code of Professional Conduct. However, the tax clinics are able to apply for registration if they meet the eligibility criteria. Further, the TPB has advised that 4 of the 10 tax clinics now have an individual who works for the clinic registered with the TPB.

Consultation points

5.10 Should the eligibility criteria for registration be amended so that universities and not-for-profit organisations that run tax clinics are able to register?

5.11 Should the TPB be able to gazette for the purpose of advertising, instead of the Commissioner?

6. Code of Professional Conduct

A dynamic code

Current position

6.1 The Code of Professional Conduct is set out in Part 3 of the *TASA*. It is inextricably linked with the object of the *TASA* in ensuring *"that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct".*[53]

6.2 The Code regulates the personal and professional conduct of tax practitioners. In doing this it ensures that the duties owed by tax practitioners provide confidence to consumers,[54] as well as broader responsibilities providing confidence to the community and the tax system as a whole.

6.3 The Code consists of a list of core principles which are grouped into five categories:

- honesty and integrity
- independence
- confidentiality
- competence
- other responsibilities.

6.4 Section 30-10 of the *TASA* contains the Code consisting of the following 14 items, listed under 5 key principles:

Honesty and integrity

(1) You must act honestly and with integrity.

(2) You must comply with the taxation laws in the conduct of your personal affairs.

(3) If:

(a) you receive money or other property from or on behalf of a client, and

(b) you hold the money or other property on trust;

you must account to your client for the money or other property.

Independence

(4) You must act lawfully in the best interests of your client.

(5) You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax agent or BAS agent or tax (financial) adviser.

53 Section 2-5 *TASA*
54 Paragraph 3.10 of the EM

Confidentiality

(6) Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission.

Competence

(7) You must ensure that a tax agent service that you provide, or that is provided on your behalf, is provided competently.

(8) You must maintain knowledge and skills relevant to the tax agent services that you provide.

(9) You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing you are doing on behalf of a client.

(10) You must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client.

Other responsibilities

(11) You must not knowingly obstruct the proper administration of the taxation laws.

(12) You must advise your client of the client's rights and obligations under the taxation laws that are materially related to the tax agent services you provide.

(13) You must maintain professional indemnity insurance that meets the Board's requirements.

(14) You must respond to requests and directions from the Board in a timely, responsible and reasonable manner.

Views of the TPB

6.5 The TPB is of the view that the Code should become more dynamic in nature by providing the Board with the power to amend and update the Code. This would allow the TPB to deal with any emerging and/or best practice behaviours, such as those in relation to operating in a digital environment or the use of engagement letters.

Views of the ATO

6.6 The ATO is also of the view that the Code should become more dynamic in nature and supports the Board being given the power to amend and update the Code as required.

6.7 The ATO considers the Code of Professional Conduct should be linked to a professional association's code, such that a breach by a tax practitioner of its professional association's code could result in a breach of the *TASA* Code of Professional Conduct. Linking the codes would provide the TPB with a more complete picture of a tax practitioner's conduct during the registration or renewal process. Further information on the relationship between the TPB and the professional associations is at Chapter 11.

Views of submissions

6.8 Some submissions have noted that tax agents, in the provision of their tax advice may, either intentionally or inadvertently provide legal documents and/or services which is likely to breach legal professional standards if the tax agent is not a registered legal practitioner.

Our preliminary views

6.9 It is worth reiterating the words of The Ethics Centre[55] that "*The taxation system is only efficient and effective if it is trusted by all concerned to serve the public interest through means that are lawful, fair and in accordance with the highest standards of integrity.*

Tax practitioners play a vital role in ensuring that the system as a whole is efficient and effective. Thus the overarching purpose of the TPB is to ensure that tax practitioners operate with integrity. However, it is equally important that tax practitioners have confidence in the integrity of the system as it applies to them - especially as it has a bearing upon their conduct."

6.10 We agree with that statement and believe it is best captured, at least in part, by making the Code a more dynamic instrument that can adjust to changes in a more contemporary manner than is permitted when it is enshrined in the Act. Currently any changes to the Code require legislative change. This can be time consuming and is not conducive to creating a proactive regime where changes to the environment can be promptly adapted to by the regulator.

6.11 To ensure appropriate controls are in place (including Parliamentary oversight), such changes could be made by giving the TPB a legislative instrument power. This process would necessarily incorporate a consultation process occurring with the profession.

6.12 This legislative instrument making power could be utilised by the Board to address emerging or existing behaviours and practices that may not have been contemplated when the Code was developed in 2009. For example, this could include:

6.12.1 matters relating to those digital service providers who lodge tax returns online and have received a code from the ATO allowing them access to the ATO portal[56];

6.12.2 providing legal services, such as the drafting of legal documents or matters relating to the maintenance of legal professional privilege;

6.12.3 the appropriateness of using a contingency fee or guaranteed refund arrangements;

6.12.4 ensuring that companies and partnerships have appropriate corporate governance arrangements on place;

6.12.5 maintenance of a trust accounts for client monies;

6.12.6 cybersecurity requirements; and

6.12.7 mandating letters of engagement.

6.13 All tax agents are required to be covered by appropriate professional indemnity insurance and the setting of the premium is likely to factor in tax agents providing what some may deem as "unqualified" legal advice however the explicit noting of this in the code/legislative

55 Set out in full in our *Opening Comments*

56 See [5.16] and [5.23] where digital service providers are also discussed.

instrument and further education/guidance by the TPB will assist in ensuring tax practitioners do not breach State and Territory legal practice rules.

6.14 Having a dynamic code will allow the TPB to appropriately monitor and respond to the evolving digitisation of the profession and the increased prevalence of digital service providers.

6.15 Contingency fees are generally structured on a percentage of the tax saving arising from a tax scheme. They are often associated with the black economy. The Code could be an appropriate means to address such behaviour, though some might suggest such behaviour is already addressed by principles 1 (acting with integrity) and 11 (acting in accordance with the proper administration of the tax law).

Consultation point

6.1 We invite submissions on our preliminary views regarding making the Code a more dynamic instrument.

Legal professional privilege (LPP)

Current position

6.16 LPP, also referred to as client legal privilege, is a doctrine of the common law and a matter of statute.[57] It provides that, in both civil and criminal cases, confidential communications between a lawyer and her or his client, which have been made for the dominant purpose of seeking or being furnished with legal advice or for the dominant purpose of preparing for actual or contemplated litigation, need not be disclosed in evidence or otherwise revealed. The ATO's formal information gathering powers are subject to LPP.

6.17 LPP applies only to some communications with lawyers acting in the capacity as a lawyer. LPP does not apply to tax advice provided by a tax practitioner acting as such.[58] The privilege belongs to the client. In practice, the claim will often be made by someone else on behalf of the client. Unless that someone else is a tax practitioner, the regulatory environment under which such claims are made is beyond the scope of this Review.

Views of the TPB

6.18 The TPB does not yet express a view on this issue at this stage.

Views of the ATO

6.19 The ATO has expressed concerns that non-genuine LPP claims are being made by some tax practitioners to frustrate investigations.[59] The ATO has advised that it is seeing an increasing number of cases involving blanket LPP claims. In two current cases, 13,000 and 19,000 documents respectively are being withheld. It is both the delay in identifying, and

57 In the form of the uniform *Evidence Acts*.

58 Unless the communication is privileged as per [6.16]. There is also an administrative concession afforded by the Commissioner of Taxation in appropriate cases to advice provided by appropriately qualified accountants. This is commonly known as the 'Accountant's Concession'.

59 The ATO has emphasised that it sees LPP as an important part of the legal system and it completely respects taxpayers making the LPP claims they are entitled to.

unwillingness to identify, which documents are subject to LPP that concerns the ATO. This is not a matter of abrogating LPP in ATO investigations.

Our preliminary views

6.20 Although it is clear that fully dealing with this issue is outside the parameters of this review, to the extent a claim is made on behalf of a client by a tax practitioner, it may be that the regulation of tax practitioners can assist in addressing some of what is currently being seen.

6.21 One issue could be whether maintaining a claim for privilege is within the professional expertise of a particular practitioner. For example, where a tax practitioner reasonably makes an LPP claim on behalf of a client at an access visit without notice, and the tax practitioner lacks the professional expertise to maintain that claim, it would be appropriate for the tax practitioner to obtain advice from a qualified Australian legal practitioner on the maintenance of that claim. Amendments could be made to the TPB Code of Conduct to require such tax practitioners who make a claim for LPP on behalf of their client to obtain advice from a qualified Australian legal practitioner on the maintenance of that claim.

6.22 To deal with the key issue the ATO is seeing, of LPP claims not being particularised in a timely manner, the Code of Professional Conduct could also require tax practitioners who make a claim for LPP on behalf of their client to particularise[60] such claim within a reasonable time.

Consultation points

6.2 We invite submissions on our preliminary views regarding LPP.

6.3 What barriers are there to the timely resolution of LPP claims and how might they be overcome?

6.4 If registered tax practitioners who are not lawyers were to be able to maintain a claim for LPP how should the Code of Professional Conduct operate?

60 These particulars could include, for example: the author of the communication; all of the recipients of the communication; date and time; form; why it is said that the communication is privileged; title or subject of the document; nature of the document (whether it is a letter of advice); high level subject matter; details of any prior disclosure of the document or communication containing the information; any purposes of the information; the name of the privilege owner of the information. In order to avoid waiver of privilege through the provision of particulars, no description of a document or type of document would be required where such description would itself breach privilege.

7. Sanctions

Current position

7.1 As stated earlier, one of the key regulatory roles of the TPB is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct.[61] As was identified in the Black Economy Taskforce's Final Report, "[t]he self-assessment tax system relies on honest and reputable tax agents and other practitioners advising correctly on the tax law." [62]

7.2 The actions of egregious taxpayers undermine the integrity of the tax system and compound non-compliance in the profession. Some taxpayers may be attracted to the better deals being offered by egregious tax practitioners, which may encourage other practitioners to falsify claims in order to compete.

7.3 In July 2018 the ATO released its analysis of the Tax Gap for individuals. The ATO's estimate of the net income tax gap for individuals not in business in 2014-2015 is $8.7 billion. Results from this analysis also indicate that the error rate for agent-prepared returns is 78%[63], which is considerably higher than self-preparer returns at 57%.

7.4 The *TASA* provides that the TPB can apply the following sanctions against registered tax practitioners:

7.5.1 termination of registration for not meeting an ongoing registration requirement;

7.5.2 imposition of an administrative sanction for a breach of the Code of Professional Conduct; and

7.5.3 application to the Federal Court of Australia for a civil penalty or injunctive relief.

7.5 In relation to unregistered tax practitioners, the only compliance action available to the TPB under the *TASA* is to apply to the Federal Court of Australia for the imposition of a civil penalty and injunctive relief.

7.6 For the 2018-19 period, the TPB has provided the following breakdown of sanctions imposed by the TPB:

Type of Sanction	Percentage
Termination of registration	11%
Suspension of Registration	1%
Orders	15%
Written Cautions	73%
Total	**100%**

7.7 In comparison, ASIC's enforcement data suggests that ASIC is able to apply a broader range of sanctions:[64]

61 Section 2-5 of the *TASA*.

62 Above n26, p. 163.

63 Details on the methodology applied by the ATO in estimating the gap can be found on the ATO's website at: Individuals not in business income tax gap

64 ASIC submission response to *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* Interim Report, p13.

Type of sanction	Percentage
Administrative outcomes People/companies removed or restricted from providing financial services/directing companies	58%
Enforceable undertakings and other negotiated outcomes Undertakings given to ASIC (and accepted by ASIC which are enforceable in a court. They are generally accepted by ASIC as an alternative to civil or administrative action	9%
Criminal actions People convicted	7%
Civil actions Civil proceedings	9%
Infringement notices Infringement notices issued	17%

7.8 On 15 July 2019 the TPB issued a Media release[65] stating that *"it is currently investigating more than 350 tax practitioners who are suspected of high-risk behaviour"*. This behaviour includes the over-claiming of work-related expenses on behalf of clients and egregious conduct considered to be black economy behaviour.

7.9 With the exception of promotor penalties, the penalties regime administered by the ATO does not currently apply to tax practitioners. Where a taxpayer or their tax adviser makes a false or misleading statement to the ATO, penalties may be applied only to the taxpayer (there is a safe harbour protection available to taxpayers in certain circumstances, which is discussed at Chapter 9). Where the ATO identifies an egregious tax practitioner, it can refer the conduct to the TPB for investigation. It is also open to the taxpayer to make a civil claim against their tax practitioner.

7.10 The *TASA* requires that a formal investigation must be conducted before the TPB can impose administrative sanctions, utilise its information gathering powers or apply to the Federal Court for the imposition of a civil penalty. The TPB must provide written notice upon commencing an investigation and have a six-month timeframe to complete the investigation.

7.11 Currently civil penalties are aimed at the more serious behaviours, but are rarely used by the TPB. The TPB have advised that the imposition of these penalties is slow and costly as it requires the TPB to make an application to the Federal Court of Australia. Between the inception of the *TASA* civil penalties regime in 2010 and to date the Federal Court has only imposed 13 civil penalties. This includes one penalty applied to an agent for a making a false or misleading statement, with the remaining 12 penalties applying in instances of running an unregistered practice.

7.12 The ATO obtains a wealth of information on tax practitioner behaviours through its compliance programme. In 2017-18, there was a 48% increase in ATO referrals to the TPB (120 in total) as a result of the ATO's increased focus on work-related expense claims.[66] This trend is expected to continue with the ATO's increased compliance activity in this area.[67]

7.13 The ATO may make an application to the Federal Court of Australia to apply the promotor penalty scheme to egregious tax practitioners. The Federal Court can then impose civil penalties, grant injunctive relief and seek enforceable undertakings. The ATO advise that the administration of this scheme requires considerable compliance resources.

65 TPB Media Release hyperlink
66 TPB 2017-18 Annual Report, page 40.
67 Ibid

Black Economy Taskforce

7.14 The Black Economy Taskforce found that more visible action should be taken against egregious tax practitioners who wilfully or recklessly prepare false tax statements.[68] In particular, the Taskforce found that insufficient action is being taken by the TPB against egregious tax agents, and that the Government should consider whether the TPB is sufficiently resourced and has the necessary powers to properly police the profession.[69]

7.15 The Taskforce also recommended that the ATO and TPB need to better communicate when investigating egregious tax practitioners. This issue of information sharing between the TPB and ATO is addressed in Chapter 2.

Inspector-General's report "Future of the Tax Profession"

7.16 In its report in "The Future of the Tax Profession", the IGTO stated that the range of sanctions and penalties that the TPB may impost to deal with misconduct should be reconsidered.[70] The IGTO suggested the TPB be afforded a broader range of sanctions, from a mere caution to more serious pecuniary or civil penalties in instances of serious fraud.

7.17 The IGTO also recommended that the TPB should be empowered to release information to professional associations in appropriate cases, to enable the latter to undertake disciplinary action against its members. The relationship between the TPB and the professional associations is discussed in Chapter 11.

Views of the TPB

7.18 The TPB has suggested that the available suite of sanctions is insufficient in targeting and changing particular tax agent behaviours and that the sanction powers available to the TPB need to reflect a more contemporary and agile sanctions regime. Any new sanctions regime needs to be graduated to deal with the particular mischief, whether the particular mischief is indicative of a broader risk or a more general deterrence to restore community confidence. Additional new sanction powers could include infringement notices, enforceable undertakings, interim and immediate suspensions, lifetime bans, practice reviews and external intervention orders. Reference to the *Regulatory Powers (Standard Provisions) Act 2014* would be instructive if additional new sanctions such as infringement notices and enforceable undertakings were being contemplated.

7.19 In addition to sanction types, the TPB is of the view that the current investigation powers in the *TASA* could be improved. In particular, the 6-month timeframe to conduct a formal investigation can create difficulties. The TPB is of the view that the 6-month timeframe should be extended and/or amended to allow the TPB to extend an investigation, even if the reasons for extension are within the TPB's control, for example, due to the complexity of matters raised in the investigation. This decision to extend would also be a reviewable decision. Currently, the *TASA* only allows a one-off extension due to matters that are outside of the TPB's control. As an alternative, the formal information gathering powers under the

68 Above n26, p163
69 Ibid, p. 164.
70 Above n 47, p. 132.

TASA could be amended such that they are not triggered by the commencement of a formal investigation.

7.20 In addition to the above, the TPB is of the view that it would be desirable to amend the *TASA* so that the Board is not required to commence a formal investigation to enliven its powers to apply a sanction for a breach of the Code of Professional Conduct. Often there is a great deal of sufficient information available to impose a sanction without an investigation. Currently the TPB is forced to add delay and time by instituting a formal investigation simply because this is what the current legislation requires. Common law procedural fairness/natural justice requirements would still have to be met.

7.21 The TPB's views in the 'Public Register' section also further enhance the TPB's views regarding sanctions.

Views of the ATO

7.22 The ATO is also supportive of a broader range of sanctions. As mentioned above, the ATO believes that part of the "individual's tax gap" is attributable to poor behaviour by some tax practitioners. A more responsive and agile range of sanctions should help to address this issue.

7.23 When considering what matters may enhance the regulatory environment that tax practitioners operate under, the ATO is uniquely placed to identify poor tax practitioner conduct. The administrative penalties framework in the TAA 1953 provides an existing legislative framework that could be used to address the actions of indifferent or reckless tax practitioners. This is considered in more detail in Chapter 9 on Safe Harbours and the examples in Box 9.1 at the end of Chapter 9.

7.24 The TPB and the ATO have each highlighted an integrity concern in the investigation process that they see as a significant problem. Higher risk tax practitioners are able to circumvent the investigation process and avoid disciplinary action through voluntarily deregistering before a formal investigation commences. A case example of Agent C is provided at the end of this Discussion Paper.

7.25 The *TASA* also does not have a mechanism to treat close associates of a tax practitioner in the same way as a practitioner. The ATO has highlighted instances where certain persons closely associated with a de-registered or unregistered tax practitioner operate as a proxy of the de-registered or unregistered practitioner (note that unregistered practitioners are discussed further in Chapter 8). By contrast, the income tax and corporations legislation have provisions to treat the use of associates. A case example of a "shadow agent" is provided at the end of this Discussion Paper.

Views of submissions

7.26 Submissions were supportive of the TPB needing the necessary resources and tools to enforce the Code of Professional Conduct and undertake its monitoring and compliance functions.

7.26.1 Numerous submissions emphasised the need for the TPB to be adequately resourced to undertake compliance activities and enforce sanctions, with many considering the TPB currently lacked those resources.

7.26.2 Submissions called for a broader range of sanctions including monetary penalties to address a scale of tax practitioner conduct, from more minor behaviour to egregious conduct.

Our preliminary views

7.27 This review seeks to pick up on the Black Economy Taskforce's recommendation that the Government increase the capacity of the TPB to take sufficient effective action against egregious tax practitioners, and whether more resources and powers are necessary.

7.28 This review also provides the ideal opportunity for reform in this area. It is clear from submissions as well as from consultation with the TPB and ATO that change is necessary. The TPB should be equipped with an agile sanctions regime to respond to emerging issues in the profession.

7.29 This review has identified a number of possible additional sanction tools, which are detailed below for consideration and discussion:

7.29.1 **QA audits - Internal control weaknesses:** Many referrals to the TPB result from internal control weaknesses in a tax practice. It may be beneficial if the TPB were able to order that a tax practice undertake a QA Audit where such control weaknesses appeared to exist. Such an audit may be issued as part of another order, or as an interim sanction.

7.29.2 **Enforceable undertakings:** It may be desirable for the TPB to have an effective alternative to civil penalties or administrative sanctions, which could be used to head-off more serious behaviours. A system of enforceable undertakings would allow undertakings to be given to, and accepted by, the TPB and be enforceable in a court. ASIC have had this sanction available to them and it has been used in around 9%[71] of their finalised actions.

7.29.3 **Interim suspensions:** Where there is a risk of immediate harm to the public and/or tax system it might be useful if the TPB had the power to issue an interim suspension as a prelude to a full investigation process. This proposal bears similarities to the Legal Profession Uniform Law (NSW) which allows the NSW Bar Association, prior to making a decision, to suspend a legal practitioner's practising certificate where it is considered the immediate suspension of the certificate is warranted in the public interest on the basis of the seriousness of the alleged conduct.

7.29.4 **External intervention:** Often practices run into difficulties due to a significant event (for example, illness of the practitioner). When an agent is de-registered or terminated there is no formal legislated process about protecting clients. Unlike the legal profession, the *TASA* does not provide for the TPB to take action and intervene in such cases to protect consumers. Intervention would involve the TPB stepping (through the use of an appointed panel member) into the relevant practice and managing it. This would be to assist it to recover, or to take steps to wind it up. Such intervention would primarily protect consumers but may also assist a practitioner in regulatory difficulties, by allowing some value to be recovered for the practice in an orderly run off of clients through a managed winding up. Taxpayers would have the option of moving to another tax agent of their choice.

7.29.5 **Transparency of unregistered agents:** A register of identified unregistered practitioners might be an appropriate safeguard for the community. What safeguards may be needed here? Unregistered agents are discussed in more detail in Chapter 8.

7.29.6 **Deregistered agents:** A broadened suite of sanctions should, where appropriate, be made available to the TPB to address the behaviour of deregistered agents (that is,

71 Above n 64

those agents who do not renew their registration or do not meet the renewal requirements). This would address the concerns raised above where tax practitioners are voluntarily de-registering or not renewing their registration to avoid TPB compliance action, then subsequently entering the profession as an employee. Similarly to the observation above, the ability to be able to publish the names of de-registered agents might be a further appropriate safeguard.

7.29.7 **Administrative sanctions and Infringement notices:** The TPB's deterrent effect is limited by the fact that it cannot rapidly impose administrative sanctions, unlike ASIC which has had such powers since 2004. The review has identified two instances that may warrant administrative sanctions:

1. There has been an alleged lower level breach of the Code of Professional Conduct by the tax practitioner.
2. The tax practitioner has been either reckless or shown intentional disregard in applying the tax law, in preparing a return for a taxpayer (which has resulted in a tax shortfall).

With respect to the first instance, it may be beneficial if the TPB was able to take quick action by issuing infringement notices for certain breaches of the Code of Professional Conduct. Infringement notices could also be issued against unregistered agents. Where the behaviour continues the TPB may then pursue more serious sanctions. It would be envisaged, given the lower level of any breach of the Code that the tax practitioner, on payment of the infringement notice would not then have their name publicised by the TPB for this lower level of sanction.

Administrative/constitutional law principles require that an option be provided to challenge the infringement notice. That would be decided by a court and a loss in court would result in a conviction.

A response to the second instance is detailed in Chapter 9 on safe harbours.

7.29.8 **Permanent disbarment from the tax profession:** The TPB cannot ban even the most egregious tax practitioners from working in the tax profession in another capacity, that is, other than as a registered tax practitioner. On de-registering an agent the TPB may only prohibit them from re-applying to become registered for up to five years, per section 40-25 of the *TASA*. Further, a tax practitioner's termination appears on the public TPB Register for a maximum of 12 months only. After 12 months, a potential employer may not be able to discover that the particular individual had their registration terminated. Permanent disbarment from the profession would prevent certain terminated or de-registered practitioners from being employed in the profession, paid or otherwise, and prohibit registered practitioners from engaging them.

7.30 Analysis of ATO data[72] shows that it takes the TPB on average 41 weeks to action an ATO referral and come to a decision. While this could be seen as a significant period of time for a practitioner to be subject to review and investigation, the legislative process underlying the investigation and the gathering of information does not facilitate a quick resolution.

7.31 In order for the TPB to be able to able to utilise an agile sanctions regime, it needs to be adequately resourced.

7.32 The formality involved in the TPB conducting an investigation appears inefficient and improvements could be made to the investigatory process.

72 ATO data from 2009 to 2018 as at 16/7/2018

7.33 Limitations on the TPB in formally gathering information prior to commencing and notifying a tax practitioner of an investigation could be removed. Similarly, the six-month timeframe to conduct an investigation is onerous. Having the option to extend the timeframe would allow the TPB to devote sufficient time and resources to investigations into serious and complex matters. This would need to be balanced by the benefits that were seen in having a timeframe, namely minimising uncertainty for the tax practitioner who is the subject of the investigation.[73]

7.34 These changes would allow the TPB to be more agile in conducting investigations into alleged contraventions of the Code of Professional Conduct.

7.35 Lastly, the observation needs to be made that there have been some significant changes since 2010. We have outlined the levels of egregious conduct that in our view merit strengthening the sanctions available. Also, administrative law has developed since 2010. In preliminary discussions we've held advice has been received that there might be wider opportunities to impose sanctions than there were in 2010. This is discussed further in Chapter 9 dealing with safe harbours.

Consultation points

7.1 We invite submissions on our preliminary views.

7.2 Should the TPB be able to demand information before formally commencing an investigation?

73 Paragraph 5.114 of the EM

8. Unregistered agents

Current position

8.1 This chapter deals with unregistered agents, namely those who have never been registered; as compared to those who have been de-registered.

8.2 As was noted in the previous chapter, in relation to unregistered tax practitioners the only compliance action currently available to the TPB under the *TASA* is to apply to the Federal Court of Australia for the imposition of a civil penalty and injunctive relief.

8.3 Currently unregistered agents are regulated by the TPB on the basis that the TPB is the regulator of the tax profession. This is reinforced by the fact that the *TASA* legislation enables the TPB to apply for civil penalties against unregistered tax practitioners.

8.4 The IGTO notes in his report that a risk for the TPB is that new technology enables more people to provide unregistered tax agent services, noting that the TPB needs to determine the extent of the risk including by collaboration with the ATO, ASIC and Australian Competition and Consumer Commission[74].

8.5 Whilst there are current civil penalties for unregistered tax practitioners, and a number (12) have been prosecuted there is still the requirement to identify that the individual has been operating as an unregistered practitioner. As the industry evolves and with digital services improvements, the ability to be able to adequately identify unregistered tax practitioners will also need to be reviewed.

Views of the TPB

8.6 Taking into account the restrictions in the *TASA* and available funding, the TPB's existing regulation of unregistered tax practitioners has been limited. Appropriate law change and appropriate funding allocation would enhance the TPB's effectiveness to regulate the unregistered population. Currently under the *TASA*, the only compliance action available to the TPB to deal with unregistered tax practitioner behaviour is to apply to the Federal Court of Australia for the imposition of a civil penalty and/or injunctive relief. As this process is time consuming and costly, it is not appropriate for this to be the only remedy for a range of unregistered tax practitioner behaviour, much of which is very high risk that poses a threat to the profession, the Commonwealth and the public.

8.7 Noting that the object of the *TASA* is to protect consumers of tax services, the TPB is of the view that it is important that the *TASA* allows the TPB to address inappropriate behaviour quickly and to publish the details of individuals and entities who should be registered with the TPB but are not and are therefore operating illegally. This could be achieved through the TPB being able to issue infringement notices and enforceable undertakings, which would then be published on a register, searchable by the public. As an example, ASIC have an Enforceable Undertakings Register on their website.

Views of the ATO

8.8 The ATO holds similar views as to those of the TPB outlined above.

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74 Above n47 at page vii. See also Recommendation 6.3(b) at p133.

8.9 The ATO has also advised that there is a problem where the controlling mind of a tax firm is often not the registered agent on record. This leads to situations where people, who are unable to themselves register with the TPB, employ registered tax practitioners to conduct their tax agent services activities.

Views of submissions

8.10 Some submissions contend that the TPB's compliance is too focused on registered tax practitioners, rather than stopping businesses using unregistered practitioners. A suggestion provided is that the TPB educate the public on using an appropriately certified tax practitioner. This may be supported by a requirement for tax practitioners to publicly display their registration details, as discussed in Chapter 4.

8.11 Other submissions highlighted the limited sanction tools available to the TPB to take action against unregistered agents and called for a greater set of remedies or penalties be made available to the TPB.

8.12 A recent (26 June 2019) publicly made observation[75] indicated that unregistered agents may escape the eye of the ATO or TPB by utilising the unregistered agent's bank details rather than the individual's bank account details, yet lodge a tax return as the individual self-preparer. A suggestion was made that the ATO put in place a mechanism to check the stated account details against the name of the taxpayer and raise questions where a mis-match occurs. There may be valid reasons for mis-matches but a pattern of several tax refunds destined for a bank account where the details vary from the individual's name may point to an unregistered tax agent.

8.13 Submissions drew attention to the correlation between unregistered agents and narrow registration requirements. The issues of specialised registrations and individual registration discussed at Chapter 5 should be considered in this regard.

Our preliminary views

8.14 It may assist identifying the controlling mind of a tax firm if the *TASA* was amended to require tax firms, irrespective of their legal structure, to provide details to the TPB of its actual governance and control structures. This information could be made available via the TPB Register (see discussion in Chapter 4).

8.15 To complement this and the discussion on permanent disbarment in Chapter 7, the Code of Professional Conduct could be strengthened to prohibit tax practitioners from employing, paid or otherwise, individuals who have been either suspended or permanently disbarred from the tax profession. This prohibition should be able to be determined by the Board and the Board should be able to specify the terms based on the factual circumstances of each case.

8.16 As is noted in Chapters 4 and 7, the ability to provide additional information on registered and unregistered tax practitioners, such as being able to publish names and associated entities of unregistered tax agents provides trust to the system, allowing registered tax agents to operate knowing there is a level playing field.

8.17 Similar to some state fair trading organisations (responsible for enforcing the *Australian Consumer Law*), the publication of a name and where known, various trading names provides assistance to the public.

75 https://www.accountantsdaily.com.au/business/13195-stop-making-excuses-ato-called-to-stop-unregistered-agents

8.18 Enforceable undertakings for unregistered agents could be named on the TPB register providing greater visibility for the community.

Consultation point

8.1 We invite submissions on our preliminary views.

9. Safe Harbour

Current position

9.1 The *Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009* introduced safe harbours for taxpayers who use the services of a tax or BAS agent. The safe harbour exemptions sought to protect consumers of tax agent or BAS agent services and reduce some of the uncertainty in the self-assessment regime, while maintaining the integrity of the tax system. The safe harbour provisions are administered by the ATO and not the TPB.

9.2 The EM flagged that a review into the operation of the *TASA* would be undertaken within three years of implementation, with particular emphasis on the 'safe harbour' from penalties.[76]

9.3 Under the safe harbour provisions, a taxpayer is not liable to certain administrative penalties, collectable by the ATO, if they provide all relevant tax information to their tax or BAS agent and the agent:

9.3.1 does not take reasonable care and makes a false or misleading statement to the ATO that results in a shortfall amount;[77] or

9.3.2 fails to lodge a document by the due date.[78]

9.4 However, the safe harbour protections do not apply where the penalty arises from recklessness or intentional disregard of the tax law by the agent. The safe harbour provisions also do not provide any protections to vulnerable taxpayers in circumstances where their agent has without their knowledge structured their affairs into a tax avoidance or evasion scheme. A case example is provided at the end of this Discussion Paper.

9.5 The case example at the end of this paper also highlights an instance where possible new administrative penalties (discussed below) could apply.

9.6 The base penalty imposed on taxpayers for false or misleading statements is a percentage of the shortfall amount. The percentage used is determined by the behaviour that led to the shortfall amount: 25% of the shortfall for a failure to take reasonable care, 50% of the shortfall for recklessness and 75% for intentional disregard.

9.7 In practice, this means that a taxpayer may only have recourse to the safe harbour protection when the behaviour of their tax or BAS agent is less culpable and the penalty they are liable to pay is smaller. The policy rationale underlying this approach is to ensure that taxpayers retain primary responsibility for complying with their tax obligations.

9.8 Taxpayers bear the express onus of proving that they provided all relevant tax information to their agent. In practice, there also appears to be a requirement for taxpayers to prove the elements of the agent's culpability. This burden seems to run counter to the concept of consumer protection.

9.9 There is also a level of individual responsibility on taxpayers who engage an agent that the current safe harbour regime promotes. Taxpayers hold a certain level of control over the

76 Paragraph 6.71 of the EM.
77 Subsection 284-75(6) of Schedule 1 to the TAA 1953.
78 Subsection 286-75(1A) of Schedule 1 to the TAA 1953.

preparation of a return. They provide their agent with the information used to complete the return and can direct an agent to make changes prior to the return being submitted.

9.10 It is fundamental to the integrity of the self-assessment regime that taxpayers maintain a level of individual responsibility in preparing their returns. Considering that the ATO also has the power to remit a taxpayer's shortfall penalties, it may be appropriate to maintain a narrow scope for the safe harbour protection.

9.11 On the other hand, tax obligations can be complex and difficult to comply with. This means not every taxpayer will necessarily understand them, which may lead to instances where the taxpayer has placed a large degree of reliance on the tax agent's conduct. When reliance has resulted in a shortfall penalty being imposed, it is the taxpayer who generally pays the penalty and may need to sue the agent to recover their loss.[79] This does not appear to be the optimal model to address negligence by the tax practitioner.

9.12 Additionally, our research has demonstrated that the Australian tax system might benefit from learning about effective administrative penalty tools in other countries. For example the Canada Revenue Authority (CRA) administers a third party civil penalties regime which includes the imposition of penalties on tax practitioners arising from their culpable conduct in preparing or planning taxpayer's affairs. The Canadian system imposes a range of penalties for varying degrees and types of culpable conduct including dishonest conduct, recklessness or, wanton disregard of the law. The amount of the penalty varies from fixed amounts, to amounts calculated with reference to the taxpayer's tax liability or the gross compensation, entitlement or fees earned by the tax practitioner for providing the service owing to the fault. The CRA has the burden of proving the applicability of these penalties on the balance of probabilities, with the benefit of the doubt going to the third party. The Canadian system provides reasonable safeguards for honest mistakes or bona fide actions of the practitioner.

Views of the TPB

9.13 The TPB does not yet express a view on this issue at this stage.

Views of the ATO

9.14 The current administrative penalty regime administered by the ATO creates a liability on the relevant taxpayer, even if the penalty is due to the tax practitioner's fault. While the taxpayer may seek a reduction of all or part of their penalty, the current law does not operate to apply and collect these penalties from the practitioner, where the penalised behaviour may have occurred.

9.15 The ATO has proposed that the administrative penalties framework (or something similar) could be used to apply administrative penalties on tax practitioners, where the taxpayer has a tax shortfall owing to the tax practitioner's fault. This is proposed to apply in instances where the tax practitioner's conduct is more culpable than a failure to take reasonable care.

9.16 The objective criteria for conduct warranting an administrative penalty would be set out in the tax law. The tax practitioner's penalty would be subject to a remission regime and be contestable by access to objection rights for internal review, merits review by a Tribunal, and judicial review by the Federal Court.

9.17 Any new penalties should be designed in a way that protects ethical and complying industry professionals, and only addresses the types of tax practitioner behaviours that are

79 This was recognised in the EM at paragraph 3.15 where it was noted that taxpayers retain a cause of action both at common law and under section 52 of the *Trade Practices Act 1974* to recover damages from their agent.

identifiably reckless or demonstrate intentional disregard to taxation laws. This may include any person whether registered or unregistered, who is acting in the capacity of or providing tax agent services.

9.18 An appropriate amount of the tax agent's penalty will need to be set. For example, depending on the type of unacceptable tax agent behaviour the base penalty amount could be computed with reference to a fixed amount or with reference to any shortfall amount (or part of it) incurred by the taxpayer to be treated as if it was incurred by the agent. The latter approach could be limited with a cap on the maximum amount of taxpayer's shortfall that can be attributed to the agent. Further details are provided in Box 9.1 (at the end of this chapter) which has been provided by the ATO on the possible ways to design such penalties.

9.19 In order for the new regime to be effective it is envisaged it would encompass the kinds of unacceptable tax agent behaviours that can be readily identified in real time. Accordingly, the new penalties regime is intended to be targeted at low risk and easily identifiable examples of improper agent behaviours that adversely impact taxpayers. For example this may include:

9.19.1 incidents where tax agents' behaviours led to the over claiming of work-related expenses;

9.19.2 incidents where the tax agent fails to lodge tax returns despite having received instructions from taxpayers to do so.

Views of submissions

9.20 Feedback from consultation suggested that most taxpayers did not know about or understand the safe harbour protection, and in any event the provisions are difficult to enliven.

9.21 Indeed the small amount of feedback provided was a surprise as the provisions were not without controversy when they were introduced. It is noted that none of the submissions had suggestions on how the safe harbour could be improved.

9.22 One submission did however highlight the tension between agents and taxpayers that the safe harbour exemption creates. Where under the previous regime (pre-2010) both the taxpayer and the agent had a mutual interest in demonstrating that the agent took reasonable care in preparing a return, the safe harbour regime places an impetus on taxpayers to demonstrate their agent failed to take reasonable care. This may lead to perverse outcomes: often the same agent who prepared a return will represent a taxpayer through a dispute process with the ATO. However, if the taxpayer engages a new agent to represent them in a dispute, the agent whose behaviour is in question is unable to respond to any material led against them.

9.22.1 Such a tension may then result in taxpayers and agents being less likely to cooperate with each other if the agent feels that the information provided to the taxpayer could be used against them.

9.23 Further feedback is sought on how well the current safe harbour regime balances the interests of consumers of tax agent services and the integrity of the tax system.

Our preliminary views

9.24 It is fundamental to the self-assessment system that taxpayers, as consumers of tax agent services, can be confident in relying on the expertise of their registered tax or BAS agent. The premise of the safe harbour protection was that taxpayers should not be vicariously liable for penalties imposed as a result of the actions of their tax agent. Further, it allows agents to

operate their practice without clients questioning their every step, which strengthens the relationship between agent and client.

9.25 An obvious method to further enhance consumer protection would be to remove the restriction of the safe harbour not applying in instances of recklessness or intentional disregard by the relevant agent. This is based on the premise that penalties ought to follow the penalised conduct. However, this approach would need to ensure that taxpayers cannot abrogate individual responsibility by simply engaging an agent.

9.26 Any extension of the safe harbour regime to instances of recklessness or intentional disregard by the relevant agent opens the question of whether the penalty should shift to the agent where the safe harbour test is satisfied. The ATO's proposal at Box 9.1 and diagrams A and B explores some possible administration options.

9.27 The review sees some merit in the ATO's proposal to impose an administrative penalty upon egregious tax practitioners. This seems a much more direct way of addressing the issue than the current avenue which requires a taxpayer to sue their agent under the common law action of negligence. The review considers that, as part of this proposal, a tax practitioner's registration could be terminated for penalties of a certain quantum.

9.28 Preliminary advice has been obtained that suggests that where the agent's conduct contributed or resulted in a shortfall penalty arising for their client, there does not appear to be any Constitutional limitations that would prevent such a policy proposal being implemented in some form.

Consultation points

9.1 We invite submissions on our preliminary views.

9.2 If an administrative penalty upon tax agents was introduced, what should be the necessary elements of such a penalty? What sort of information should be required to demonstrate recklessness or intentional disregard?

Box 9.1: Possible ATO action – New administrative penalty regime

In the interest of public consultation this table is designed to conceptually illustrate the Australian Tax Office's reform idea of how new administrative penalties framework could be used to enable the ATO to administer penalties on tax agents, where the taxpayer has a tax shortfall owing to the tax agent recklessness or intentional disregard.

Consistent with the ideas expressed in Chapter 9, the following diagrams have been prepared by the Australian Tax Office for discussion purposes only and are based on the following underlying assumptions:

(i) There will be objective criteria for conduct warranting an administrative penalty set out in the tax law. Similar to the current administration of shortfall penalties in Division 284 of Schedule 1 to the TAA 1953, the ATO would be responsible for administering the new penalty regime.

(ii) The tax agent's penalty will subject to appropriate protections. It will be contestable by access to objection rights for internal review, merits review by a Tribunal, and judicial review by the Federal Court.

(iii) It is envisaged that in order to be effective both design options will need to provide fair outcomes, such that there are proper protections in place to address situations where, both the taxpayer and tax agent are at fault (even if of varying degrees), only one party is at fault and no one is at fault.

(iv) In each scenario the amount of the penalty need not be exactly the same amount of shortfall penalty that the taxpayer would otherwise have incurred. Rather it is envisaged that an appropriate amount for the agent's penalty could be set in various ways, computed by reference:
   a. to a fixed set amount eg. $1000, OR
   b. to any appropriate shortfall amount (or part of it) incurred by the taxpayer, which then the legislation may treat as imputed to the agent for this purpose. Moreover, it is also possible to design a cap on the maximum amount of the taxpayer's shortfall that can be attributed to the agent.

(v) False and misleading penalties in Division 284 TAA are used in the diagrams by way of an example only, to facilitate discussion.

Diagram A envisages how a side-by-side penalty regime may operate whereby an administrative penalty is also applied to the tax agent.

Diagram B envisages how the current safe harbour scheme could be extended to include agents that demonstrate recklessness or intentional disregard, and be used to apply a corresponding penalty to the tax agent.

DIAGRAM A

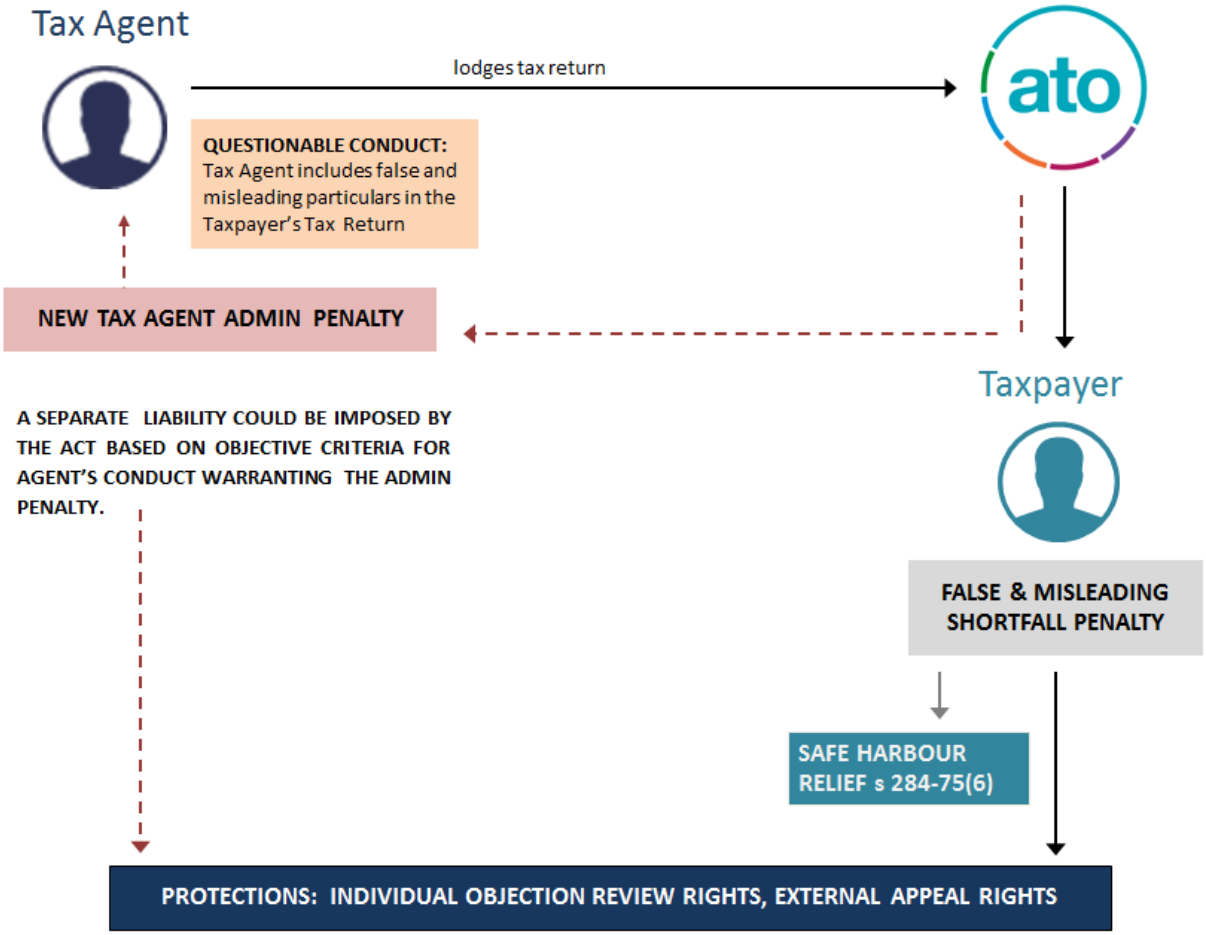
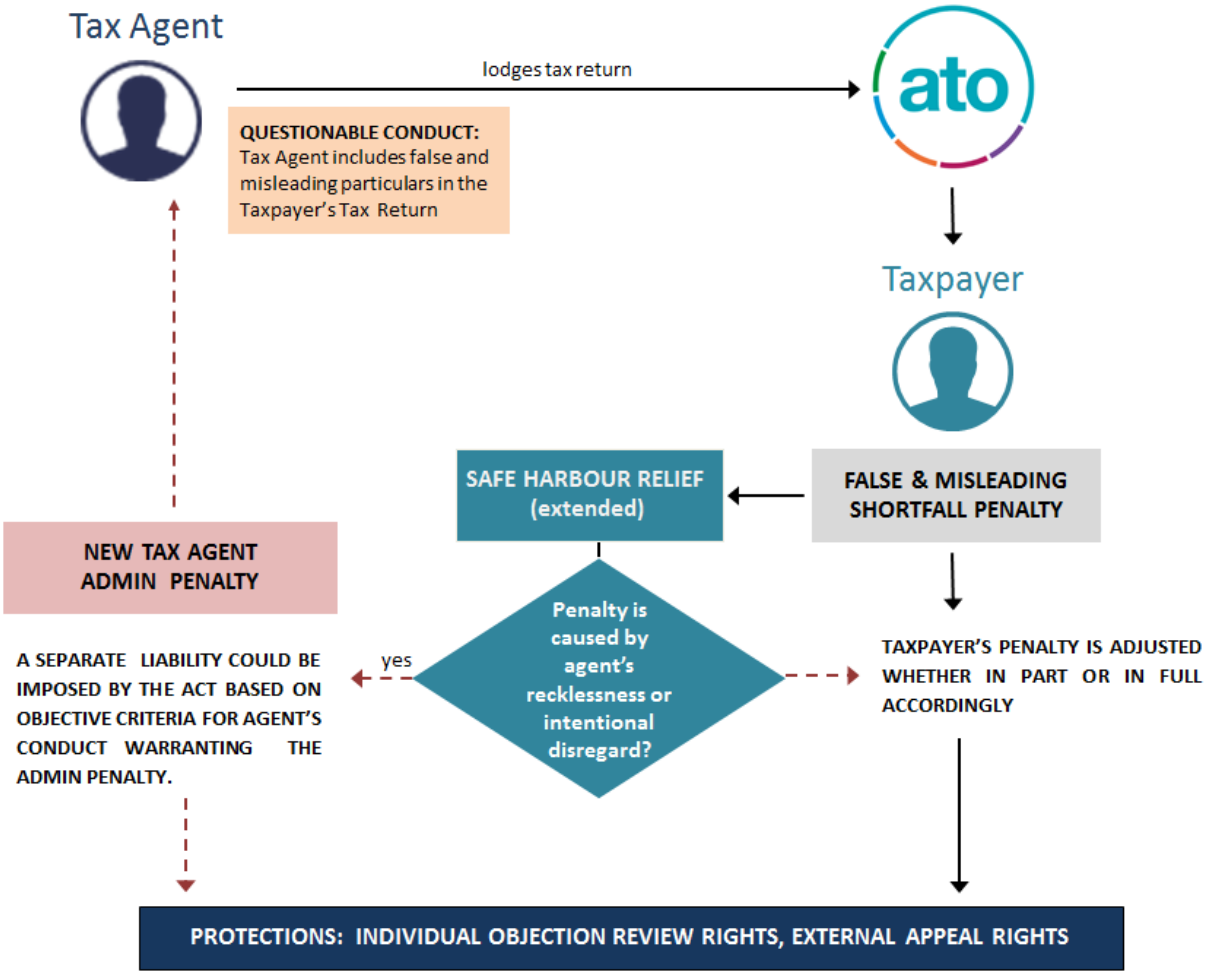

Tax Agent
lodges tax return
ato
QUESTIONABLE CONDUCT:
Tax Agent includes false and misleading particulars in the Taxpayer's Tax Return
NEW TAX AGENT ADMIN PENALTY
Taxpayer
A SEPARATE LIABILITY COULD BE IMPOSED BY THE ACT BASED ON OBJECTIVE CRITERIA FOR AGENT'S CONDUCT WARRANTING THE ADMIN PENALTY.
FALSE & MISLEADING SHORTFALL PENALTY
SAFE HARBOUR RELIEF s 284-75(6)
PROTECTIONS: INDIVIDUAL OBJECTION REVIEW RIGHTS, EXTERNAL APPEAL RIGHTS

DIAGRAM B


Tax Agent
lodges tax return
ato
QUESTIONABLE CONDUCT:
Tax Agent includes false and misleading particulars in the Taxpayer's Tax Return
Taxpayer
SAFE HARBOUR RELIEF (extended)
FALSE & MISLEADING SHORTFALL PENALTY
NEW TAX AGENT ADMIN PENALTY
Penalty is caused by agent's recklessness or intentional disregard?
yes
A SEPARATE LIABILITY COULD BE IMPOSED BY THE ACT BASED ON OBJECTIVE CRITERIA FOR AGENT'S CONDUCT WARRANTING THE ADMIN PENALTY.
TAXPAYER'S PENALTY IS ADJUSTED WHETHER IN PART OR IN FULL ACCORDINGLY
PROTECTIONS: INDIVIDUAL OBJECTION REVIEW RIGHTS, EXTERNAL APPEAL RIGHTS

10. Tax (Financial) Advisers

Current position

10.1 From 1 July 2014, entities that gave tax advice in the course of giving financial product advice (as that term is defined in section 766B of the *Corporations Act 2001*) could be registered with the TPB as TFAs.[80] Since March 2015 all natural persons who provide personal advice on investment products and life insurance to retail clients (financial advisers) have been required to be registered with ASIC on the Financial Advisers Register. As such, those financial advisers who are also tax (financial) advisers have to register with both ASIC and the TPB, incurring registration[81] fees payable to government regulators twice.

10.2 The rationale for introducing not only TFAs within the TPB's regulatory regime but also conveyancers, quantity surveyors, research and development advisers and others is that they are all, at least to some degree, providers of a "tax agent service", "BAS service" or "tax (financial) advice service".[82]

10.3 TFAs are not permitted to prepare or lodge tax returns or a statement in the nature of a return or represent their clients with the ATO. While the provision of financial advice often also encapsulates providing tax advice, the level of tax advice provided by a TFA will inevitably differ from incidental in some cases to significant or substantial in other cases.

10.4 While all financial advisers must be listed on the Financial Advisers Register, the legal obligation to register the financial adviser falls on the AFSL (Australian Financial Services Licensee) who authorises the financial adviser. The AFSL is also responsible for ensuring the financial adviser is adequately trained and competent. In addition, most of the conduct obligations in the *Corporations Act* fall on the AFSL, rather than the individual financial adviser. In effect the AFSL is responsible for those financial advisers it appoints to act under the AFSL. (However, some specific conduct obligations in Part 7.7A of the *Corporations Act* fall on the individual adviser.)

10.5 The system used by the TPB is not quite the same. A tax practitioner must pay an application fee and the individual must go through an assessment process by the TPB. The eligibility assessment is performed by the regulator for tax practitioners whereas the AFSL undertakes their own assessment of the financial adviser.

10.6 In April 2017 FASEA was established. FASEA is responsible for setting education, training and ethical standards for financial advisers in Australia. Given its requirements differ, and at times conflict with those of the TPB, this review is ideally placed to suggest ways to reduce the regulatory duplication. We understand that the TPB and FASEA have worked closely to ensure that the requirements of both regimes are as aligned as possible.

80 These entities were required to be registered from 1 January 2016.

81 The term used by ASIC for the payment of a fee for a financial adviser to be on the FAR is a fee for appointing.

82 As these terms are defined in sections 90-5, 90-10 and 90-15 respectively of the *TASA*.

Views of the TPB

10.7 The TPB supports any steps taken to reduce the regulatory burden on tax practitioners. One option that could be considered is that if a financial adviser needs to be registered with the TPB, the licensing/registration with ASIC could serve as a substitute for meeting TPB registration requirements. Further, the application of a 'de minimis' exclusion would exclude some financial advisers who provide tax advice at the margins or simple tax advice.

10.8 Those financial advisers who are registered with the TPB will be subject to the Code of Professional Conduct and where a regulatory issue arises, the TPB and ASIC (and any other relevant regulators, such as the code monitoring bodies), through strong information sharing provisions, would be able to determine who is best placed to take action and sanction appropriately.

Views of the ATO

10.9 The ATO has not provided any views regarding the regulation of TFAs.

Views of submissions

10.10 Many of the submissions received as part of this review observed that the bringing of TFAs within the TPB regulatory regime has created a significant regulatory burden. In addition to the ATO and TPB, FASEA, ASIC and AFCA all have roles to play. One submission noted that some of their members are subject to four existing Codes of Ethics and that will become five with FASEA's Code of Ethics commencing on 1 January 2020. The recommendation in the Financial Services Royal Commission[83] for a new disciplinary body may well add further complexity.

10.11 Any new model needs to be more streamlined, less complex and without the duplication of the current regime.

Our preliminary views

10.12 It is important that any new model or process for disciplining TFAs is aligned with the recommendations in the Final Report of the Financial Services Royal Commission. It is worth restating some of the observations made by Commissioner Hayne when he considers the key features necessary in a *"new approach to discipline"*[84] for financial advisers. As Commissioner Hayne notes, the system should have the following features:

- *First, each financial adviser should be individually registered.*
- *Second, only those who are registered should be permitted to give financial advice.*
- *Third, there should be a single, central disciplinary body with the power to impose disciplinary sanctions on financial advisers – the most serious sanction being cancellation of registration.*

83 Recommendation 2.10.

84 Financial Services Royal Commission Report, p212

- *Fourth, there should be a system of mandatory notifications, requiring AFSL holders to report particular information about the conduct of financial advisers to the disciplinary body.*

- *Fifth, there should be a system of voluntary notifications, enabling AFSL holders, industry associations and clients to report information about the conduct of financial advisers to the disciplinary body.*[85]

10.13 A similar approach should not only apply to TFAs but also tax agents and BAS agents. As Commissioner Hayne notes, such a system will *"ensure that financial advisers* [or in the case of this review, tax practitioners] *who fail to adhere to the standards expected of them would face consequences that extend beyond their employment with or appointment by a particular licensee, and affect their capacity to provide financial advice* [or tax advice in our case] *more generally".*

10.14 Based on the submissions and consultations, there are 7 possible options worth considering:

Option 1	The status quo remains. This means that ASIC is responsible for the regulation of financial advice and any financial advisers that provide tax advice as part of their financial services for a fee or reward must be registered with the TPB as a TFA and therefore are subject to the TPB regulatory regime.
Option 2	ASIC operates as a 'one stop shop' for the regulation of financial advice and tax advice. The TPB would have no direct role in the regulation of financial advisers.
Option 3	ASIC and the TPB operate as co-regulators of financial advisers and ASIC is responsible for the imposition of sanctions for tax related matters. TPB registration as a TFA automatically attaches to all financial advisers, who can then 'opt out' of the TPB regime if they do not provide tax advice.
Option 4	ASIC and the TPB operate as co-regulators of financial advisers and the TPB is responsible for the imposition of sanctions for tax related matter. TPB registration as a TFA automatically attaches to all financial advisers, who can then 'opt out' of the TPB regime if they do not provide tax advice.
Option 5	ASIC and the TPB operate as co-regulators of financial advisers and ASIC is responsible for the imposition of sanctions for tax related matter. TPB registration as a TFA attaches to all financial advisers that 'opt in' to the TPB regime if they provide tax advice.
Option 6	ASIC and the TPB operate as co-regulators of financial advisers and the TPB is responsible for the imposition of sanctions for tax related matter. TPB registration as a TFA attaches to all financial advisers that 'opt in' to the TPB regime if they provide tax advice.
Option 7	This would allow financial advisers that provide incidental tax advice to not have to be registered with the TPB. At the same time there are reciprocal arrangements that permit tax advisers/accountants to provide incidental

85 Ibid, p199 and repeated at p212

financial advice which in effect restores the concession that was previously available to accountants that are registered tax practitioners

Whichever of the 7 options (or indeed some other option) is ultimately decided upon, it will need to be aligned with the recommendations made by Commissioner Hayne.

10.15 Further comments about the above options are as follows:

10.15.1 Option 1 reflects the current position and fails to achieve a more streamlined, less complex model and a reduction in regulatory burden. In our view, this is not a viable option.

10.15.2 Option 2 removes the TPB from being directly involved in the regulation of financial advisers that also provide tax advice. That function would instead sit with ASIC.

10.15.3 Option 3 is similar to Option 1, but for the following:

- the existing ASIC criteria and requirements set by FASEA would serve as a substitute to the TPB's requirements;
- all financial advisers would automatically be registered with the TPB and would be able to opt out of TPB registration as a TFA if they were not required to be registered; and
- the TPB would be responsible for investigating conduct to determine if there is a breach, including a breach of the *TASA*'s Code of Professional Conduct; and
- where a breach is found by the TPB, ASIC would be responsible for the imposition of any sanctions

10.15.4 Option 4 is similar to Option 3, however, where a breach is found by the TPB, the TPB would impose the relevant sanction

10.15.5 Option 5 is similar to Option 3, however, a financial adviser would be eligible to register with the TPB simply by opting into the TPB regime. As with Option 3, the existing ASIC criteria and requirements set by FASEA would serve as a substitute to the TPB's current registration requirements.

10.15.6 Option 6 is similar to Option 5, however, where a breach is found by the TPB, the TPB would impose the relevant sanction.

10.15.7 Option 7 would allow financial advisers to provide incidental tax advice without needing to be registered with the TPB. In addition, this option would bring back the accountants' exemption and allow accountants to provide basic self-managed super fund advice and services without having to operate in the AFSL environment.

10.16 Table 10.1 below also summarises the key elements of Options 1 to 6.

Table 10.1 – options for consideration

	Organisation responsible for the registration of entities that provide tax advice	Organisation responsible for determining if there is a tax related breach	Organisation responsible for imposing tax related sanctions	Does the TPB Code of Professional Conduct apply?	Will the term 'TFA' still exist?
Option 1	TPB	TPB	TPB	Yes	Yes
Option 2	ASIC	ASIC	ASIC	No	No
Option 3	TPB (via opt out)	TPB	ASIC	Yes	Yes
Option 4	TPB (via opt out)	TPB	TPB	Yes	Yes
Option 5	TPB (via opt in)	TPB	ASIC	Yes	Yes
Option 6	TPB (via opt in)	TPB	TPB	Yes	Yes

10.17 Most of the options, in particular Options 3 to 6 would require close consultation between ASIC and the TPB regarding the registration requirements and the disciplinary framework. Similarly, close consultation between FASEA and the TPB would be needed when setting the appropriate standards such that the provision of tax advice was taken into consideration.

10.18 In order for these Options to be feasible, a number of requirements need to be satisfied:

10.18.1 There would need to be legislative and other arrangements in place to ensure that timely, effective and efficient sharing of information between the TPB, ASIC and FASEA. It is noted that any changes would most likely rely on complementary changes to the *Corporations Act 2001*, not just the *TASA*.

10.18.2 In relation to the handling of disciplinary matters, it is vital that ASIC and the TPB develop clear guidance on how matters will be referred, investigated (perhaps even jointly) and resolved.

10.19 As is discussed in the next chapter, a co-regulatory scheme that includes code monitoring bodies from the professional associations might also be worthwhile.

Consultation points

10.1 We invite submissions on our preliminary views.

10.2 Are there any other suggestions to reduce the regulatory burden on TFAs whilst maintaining community confidence?

11. Relationship with the Professional Associations

Better exchange of information

Current position

11.1 The primary consultative mechanisms for the TPB are the TPB Consultative Forum and TPB Financial Adviser Forum. Those forums ensure that the views and experiences of members have an opportunity to be heard.

11.2 In addition to being an important channel for consultation, voting members of a recognised professional association have an additional pathway to seek registration with the TPB. The TPB recognises a number of professional associations for this purpose; however, it is important to note that the TPB's recognition of a professional association does not give a professional association the ability to actually provide tax agent services for a fee.

11.3 On the basis of the eligibility requirements set out in the *TASR*, in order to gain recognition a professional association must assure the TPB that it requires high educational, ethical and professional standards of its members and that it has appropriate governance arrangements.

11.4 Under the *TASA*, if the TPB conducts a formal investigation, against a member of a recognised professional association, and makes a decision that there has or has not been a breach, the TPB must notify the relevant recognised professional association of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding. [86] Further, the *TASA* also allows the TPB to request information from other entities, including professional associations in the process of conducting investigations and the ATO may refer matters to the TPB for investigation.[87]

11.5 The TPB has an annual declaration process for recognised professional associations to help ensure that all recognised associations continue to meet the ongoing eligibility requirements for recognition, as noted in Schedule 1 to the *TASR*.

11.6 In 2017 FASEA was established and with that began a program to raise the education, training and ethical standards of financial advisers. A Code of Ethics addressing the values of trustworthiness, competence, honesty, fairness and diligence is to be introduced in January 2020. It will be expected that all financial advisers must act at all times, in a manner that is demonstrably consistent with the 12 standards in the areas of ethical behaviour, client care, quality process and professional commitment. Advisers will be monitored by an ASIC approved code monitoring scheme.

Views of the TPB

11.7 Professional associations will continue to be key stakeholders for the TPB, including the TPB liaison and consultation, provision of policy guidance and comment and capability development, for example.

86 See paragraphs 60-125(8)(c) and (d) of the *TASA*
87 See section 60-100 of the *TASA*

11.8 In light of the lifting of education standards in the financial adviser profession, the TPB is of the view that the role of recognised professional associations in providing their voting members with an additional avenue for registration should be reviewed to see if it is still appropriate for this avenue to exist. If this pathway for recognition of professional associations was to be removed, the TPB is of the view that the current liaison and cooperation with professional associations would continue and indeed expand. For example, there could be improved sharing of intelligence and risk assessments, coordination of investigations/sanctions, and a joint approach to the conduct of practice reviews. Therefore, any form of 'recognition' would be for the purposes of the TPB's regulatory and compliance activities, rather than its registration function.

Views of the ATO

11.9 The ATO supports reforms to allow for expanded exchange of official information between the TPB and professional associations, as well as the ATO and other regulators, before and during investigations by the TPB.

Views of submissions

11.10 The submissions highlighted that the TPB is committed to consulting and working with key stakeholders, particularly the relevant professional associations, to ensure that their experiences inform the TPB's decision-making and operations.

11.11 Given the role of the TPB and the role of professional associations, a number of the submissions commented on the need for better exchange of information between the TPB and the recognised professional associations to ensure that tax practitioners are being appropriately regulated.

Our preliminary views

11.12 The information sharing requirements that currently exist should be modified and improved to require better 'two way' sharing of information and earlier sharing of information to allow the TPB and the professional associations to address concerning behaviour earlier.

11.13 Allowing the TPB to be able to approve programs of the professional associations might also help to apply a consistent approach.

11.14 The TPB should cease to be a regulator of the professional bodies and this would then allow the professional bodies to take on a co-regulatory function with the TPB.

11.15 A similar scheme to that used by ASIC and FASEA of having code monitoring bodies to assist with regulating financial planners might also be appropriate for tax practitioners.

Consultation points

11.1 We invite submissions on our preliminary views.

11.2 What role should the TPB and professional associations have?

11.3 How can this role be better supported? What sort of information needs to be shared, and when?

11.4 Should the TPB recognise professional associations for the purpose of monitoring compliance with CPD requirements for their members?

12. Future Landscape

The tax profession of the future

Current position

12.1 Technological changes and new providers of services and products are expected to continue to increase and evolve at a rapid rate. This will necessarily impact the way services are provided and how tax practitioners, taxpayers and regulators interact.

12.2 Some tax practitioners hold a view that the increased sophistication and automation of accounting software, digitisation and the streamlining of services, such as Single Touch Payroll and simplified BAS, may reduce the need for tax practitioner services. However, while some of the traditional practitioner tasks are being automated, many taxpayers still rely on tax practitioners to ensure they comply with complex tax laws.

12.3 Tax practitioners add value by interpreting and applying the tax laws to the specific circumstances of their clients' business. Further, the use of software and automation is providing opportunities for tax practitioners to bring added value to clients. Technology can free up practitioners to focus on higher-level analysis, advising and streamlining movement of financial information to make a client's business more responsive, efficient and productive.

12.4 Shifts in tax practitioner business models and workforce are expected and some tax practitioners (particularly those whose clients are individual taxpayers with simple tax affairs) may suffer some revenue loss. However, it is also expected that clients will increasingly look for tax practitioners to provide a higher level of advice and representation when dealing with the ATO and less routine processing.

12.5 The ATO's Tax Practitioner Landscape Report – Edition 7 March 2018, supports this shift in how tax practitioners operate as well as the needs of taxpayers. The ATO's report, which compares 2013 and 2018 figures, observes that with the exception of micro businesses, there has been a significant increase in the number of clients linked to tax agents. The drivers for this include amalgamation of firms and clients seeking more sophisticated offerings of larger firms. Also, the medium tier tax agent is showing itself as the average style of practice.

12.6 This was also identified by the IGTO, which found that firms are exploring options such as offshoring or merging with other practices to offer a broader range of services, including wealth management and business strategy advice as their clients increasingly integrate broader personal and professional aspects into their businesses.

Views of the TPB

12.7 The TPB is of the view that to ensure the ongoing effectiveness of the tax practitioner profession and the tax agent services regime, it is important that the changing nature of the tax profession is recognised and taken into consideration. This requires a legislative framework that is flexible and capable of being contemporary so that it can meet changing needs.

Views of the ATO

12.8 As has been noted in the IGTO's report the Commissioner of Taxation has previously made various public statements recognising the importance of DSPs as being "*critical to our success and to modern tax administration*".[88]

12.9 The ATO has observed that since the inception of the *TASA*, there has been a significant shift in the way tax agent services are provided. This has included changes in business models, offshoring and digital service delivery, such that it is difficult to identify who is providing the advice and where they are providing it from.

12.10 Rapid changes are also highly likely to amplify threats and vulnerabilities that may be exploited in intermediaries' technology systems. The ATO has examples of organised attacks on intermediaries to obtain taxpayer data that is then used for fraud and crime against the tax and super system.

12.11 The ATO considers that there needs to be more concerted engagement with individuals, lower tier intermediaries and small and micro businesses to better understand and implement information and cyber security, and to provide simple information on security measures to protect clients' personal information.

12.12 The ATO has suggested a number of ideas to address cyber security risks and contemporise the delivery of tax agent service:

12.12.1 the creation and implementation of information and cyber security governance and assurance standards, in collaboration with the TPB and professional associations;

12.12.2 mandatory notification by TPB registered entities to inform the ATO of data breaches, to support the ATO fraud prevention efforts on affected accounts;

12.12.3 guidelines and regulations for the removal of registration if the practitioner is considered to be repeatedly or systematically negligent in the areas of information and cyber security (for example, multiple data breaches without implementing a mitigation strategy); and

12.12.4 mandated 'know your client' requirements for agents to prevent fraudulent refunds being created by identity theft and fraud – potentially through use of channels such as the ATO app or myGov to authenticate and connect parties.

Views of submissions

12.13 Submissions have called for a strategic approach to be taken in reviewing the future of the tax profession. The review needs to identify what the profession will look like, not just what it currently looks like, before considering what changes should be made to the existing regulatory framework. This includes a tax profession where many functions previously undertaken by practitioners may have become automated.

12.14 One submission suggested that at least one member of the TPB Board should have a technology background and an understanding of the ATO's Digital Agenda as a means of ensuring the TPB adapts to the digital evolution (see further discussion at Chapter 3).

88 n47 at 127

Our preliminary views

12.15 This review, some 10 years after the *TASA* was initially introduced, is probably overdue. Going forward, reviews should occur more frequently. Particularly reviews of the *TASR* if the Code of Professional Conduct is to be moved from the *TASA* to the *TASR*.

12.16 As noted by the IGTO in their report into "The Future of the Tax Profession", the TPB plays a significant role in the tax system through the regulation of tax practitioners. This role may need to expand to keep up with future developments in the profession and with the ever expanding range of services in the gig economy.

12.17 It is imperative that this review identifies risks and issues emerging from these developments and canvasses improvements to the *TASA* regime that will enable the TPB to effectively regulate the evolving profession.

12.18 This paper has considered emerging technologies and the wider range of specialised tax professionals, the TPB's ability to monitor and address compliance risks, the appropriateness of qualification and education requirements, and the TPB's role in a co-regulatory regime that may be subject to further change following the Financial Services Royal Commission report.

12.19 It may assist the TPB in addressing these risks if some of the ideas proposed by the ATO were provided for in the Code of Professional Conduct. Code requirements for the management and mandatory notification of data breaches, and mandated know your client requirements, may incentivise the profession to raise their standard of technological knowledge.

12.20 Further public consultation will occur on this Discussion Paper and the review invites submissions on these or any other issues that will impact the future of the tax profession.

Consultation points

12.1 We invite submissions on our preliminary views.

12.2 Should the review examine the definition of 'tax agent service' to flexibly encompass contemporary and future service delivery models not focused on a human providing services? What are some possible ways of defining 'tax agent service'?

12.3 Should the scope of the *TASA* be reviewed so that it can effectively regulate globalised delivery of tax agent services in Australia?

12.4 Should the new disciplinary body recommended by Commissioner Hayne also include the TPB?

12.5 What other issues should be considered?

APPENDIX A

Extract from Explanatory Memorandum circulated with *Tax Agent Services Bill 2008*, paragraphs 5.28 to 5.32, pages 96-97.

5.28 The Board has responsibility for regulating the provision of tax agent services in all Australian states and territories by reference to the Code and the system for the registration of tax agents and BAS agents and conduct of investigations set out in the Bill.

5.29 The Board is a statutory authority that falls within the portfolio responsibilities of the Treasurer. It is not itself a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA Act) and is not a body regulated by the *Commonwealth Authorities and Companies Act 1997* (ie, the Board is neither a prescribed FMA Act agency nor a Commonwealth Authorities and Companies Act body) but is formally part of the ATO, a prescribed FMA Act agency.

5.30 To ensure that the Board has the requisite degree of independence from the ATO, it will be funded via a Special Account (under section 20 of the FMA Act) through the annual appropriation to the ATO. As such, the Board's annual appropriation will be quarantined within the ATO's funding. The Commissioner of Taxation (Commissioner) will provide resources to the Board within the limits of the Special Account.

5.31 In this way the Board will operate with decision-making independence from the ATO, but will rely on the ATO for administrative support. The Board will have available to it the resources necessary to perform its functions up to the amount of its Budget as determined by the Finance Minister. The exact nature of the service relationship and arrangements between the Board and the ATO will be determined through agreements between the two parties. Such agreements are likely to cover a number of issues including resourcing, technical support and legal support.

5.32 In the establishment phase, it is efficient for the Board to sit within the ATO, due to the administrative obligations that would otherwise apply to it as a separate agency and because the ATO provides the most appropriate functional fit for the Board from amongst existing prescribed FMA Act agencies.

APPENDIX B

The terms of reference indicated that the review should:

1. Examine if the legislative framework is operating as intended and continues to be fit for purpose and meet the objectives of the Act.
2. Examine if the governance framework is operating as intended and continues to be fit for purpose.
3. Consider the appropriateness of the Tax Practitioners Board's governance arrangements.
4. Consider whether the tax agent services legislation supports the Tax Practitioners Board in responding to known and emerging issues.
5. Examine whether the powers and the functions of the Tax Practitioners Board are sufficient to enable the objects of the legislative framework to be met.
6. Consider any other matters that may enhance the regulatory environment that tax practitioners operate under, including the interaction with the regulation of relevant related professional activities.

APPENDIX C

The following examples have been provided by the ATO.

Case example: Agent C (Reference paragraph 7.24)

Agent C was identified in mid to late 2015 with various taxpayers complaining to the TPB, ATO and the State Police about the agent allegedly misappropriating money they had paid them to pay their tax debts.

In some cases the agent appears to have never remitted money to the ATO, in others they applied money paid to them by one client to the income tax account of an unrelated client.

The ATO referred the case to the TPB in December 2015.

However Agent C did not renew their registration (they cancelled it with effect from May 2016).

The Agent had transferred their clients to a new practice of their spouse.

In July 2017 the TPB advised they had finalised their investigation as No Further Action because Agent C was no longer a registered Agent.

The State Police have requested additional support from the ATO to continue their investigations, which is still ongoing.

Case example: Shadow agent (Reference paragraph 7.25)

Person A had previously been charged as an unregistered preparer.

They were a director of a tax agent company that had its registration terminated due to breaches of the TASA.

Following the termination of the company, Person A's son (the supervising agent), registered another company and obtained a tax agent registration.

Person A became an employee of the new company.

The ATO investigated the new company, which exhibited the same poor compliance behaviour (unsubstantiated and excessive work related expense claims) as seen in the original company.

Case example: Safe harbour limitations (Reference paragraph 9.4)

Agent Y was selected for audit based on a high risk profile under ATO risk models. The audit uncovered issues relating to net rental losses. The agent was found to be dealing predominately with taxpayers who were new to the tax system. Clients weren't aware of the amounts being claimed by their tax agent.

Analysis of over 1,000 of Y's clients since 1 July 2016 revealed claims of over $40 million in net rental losses, and over $1 million in car expenses, with 64% of claims likely to be false.

A test auto-amend strategy was applied to over 100 affected tax payers, removing rental losses and car expenses while imposing a 50% recklessness penalty. Clients responded back, advising they:

- *never owned a rental property or held a logbook;*
- *cannot read English well (some clients were refugees);*
- *were not aware that their tax agent had claimed rental losses & car expenses in their income tax returns;*

- *had been charged a fee equal to 10% of their refund.*

In this situation the safe harbour regime cannot apply. The taxpayers were liable to penalties of 50% of their tax shortfall amount.