



THE TAX INSTITUTE

11 September 2019

Mr Keith James
Chair – Review of the Tax Practitioners Board
c/- Mr Nick Westerink
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: TPBreview@treasury.gov.au

Dear Mr James,

Review of the Tax Practitioners Board – Discussion Paper

The Tax Institute welcomes the opportunity to make a submission to Treasury in relation to the *Review of the Tax Practitioners Board (Review)* in response to the August Discussion Paper (**Discussion Paper**). This review is an extremely important review given the role of the Tax Practitioners Board (**TPB**) to govern and regulate the tax profession.

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members. Shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and tax administration.

As a professional association dedicated to supporting the tax profession, we are uniquely positioned to provide input into this Review and look forward to contributing to this Review.

For further information, please refer to Appendix A.

Summary

Our submission below addresses our main concerns in relation to the Discussion Paper. In particular:

- The TPB should be wholly independent from the ATO;
- Any changes to the Code of Professional Conduct should be principles-based as much as possible, subject to parliamentary scrutiny and made by way of a Legislative Instrument at a minimum; and
- The TPB needs to have sufficient resources to carry out all of its functions discussed below.

Key Issues

1. Sharing of Information between the TPB and Other Government Bodies / Key Stakeholders

The Tax Institute agrees with the preliminary view of the Review that effective information sharing between government organisations is needed (refer to paragraph 2.20 of the Discussion Paper) and supports the sharing of information between government agencies, in particular the TPB and the Australian Taxation Office (**ATO**) for the purpose of identifying breaches of the *Tax Agent Services Act 2009* (Cth) (**TASA**) and the Code of Professional Conduct (**Code**).

We consider that the information shared should only be in relation to the performance of the tax agent's duties, on the basis that the TPB's remit is to regulate the performance of registered agents. Information regarding the activity of unregistered agents should also be shared. It may be perceived that the TPB may share information with an organisation such as the ATO which may reveal information regarding a taxpayer's circumstances that a taxpayer has disclosed to the TPB in the context of making a complaint about a registered practitioner and which is information the taxpayer has not disclosed to the ATO. If this information is disclosed, it may be considered a breach of confidentiality by the disclosing party. If such a perception exists, this may limit the kind of information a person may disclose to the TPB, thus impacting on the TPB's ability to perform its role if it is unable to obtain complete information about a potentially ill-performing agent. Consumers need to have confidence that only information relevant to a registered agent's performance can be shared by the TPB with the ATO (and other Government Bodies).

In light of the above, while we consider the TPB should maintain its independence from the ATO (see further below), we would expect that appropriate levels of information should be shared with the ATO. If it is considered that there is unlikely to be appropriate levels of information shared between the bodies if the TPB becomes more 'independent' of the ATO, information sharing may have to be made mandatory. Our observations of the working relationship between the TPB and ATO as it currently stands are that there is sufficient mutual sharing of information.

2. Independence of the TPB from the ATO

In The Tax Institute's view, there is an overarching principle that not only must the TPB **be** independent from the ATO, it must also **be seen to be** independent from the ATO. The TPB must also operate in an impartial and unprejudiced manner.

The Tax Institute agrees the Chair of the TPB should be its own accountable authority. Ultimately the way the independence of the TPB, both real and perceived, can be achieved is to pick up upon elements of the view held by The Ethics Centre as set out on pages 7 and 8 of the Discussion Paper. The Ethics Centre comments note the following:

- The TPB is responsible for regulating 'those who mediate the relationship between those paying and those collecting taxation' ie between taxpayers and the ATO;
- The overarching purpose of the TPB is to ensure practitioners operate with integrity;
- The TPB is charged with providing independent oversight of tax practitioners;
- 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';

- To assure independence of the TPB is achieved such that both tax practitioners and the wider community have confidence in the TPB, the following are required:
 - The TPB must be entirely independent (decide all matters that fall within its remit, control its own budget, power to appoint its own executive and staff);
 - Any staff employed must be formally relieved of any residual obligation to another organisation meaning all staff are accountable to the TPB. With respect to ATO secondees in particular, 'This accountability should be acknowledged and approved by any source of secondees, such as the Commissioner of Taxation.'
 - Staff working at the TPB 'must be inducted into its work by means that reinforce their professional obligation to serve the public interest' and must act in a manner that shows the TPB is independent.

We support the factors The Ethics Centre states are required for the TPB to achieve both real and perceived independence. Bearing these elements in mind, we make the following comments. Seconding ATO staff to the TPB contributes to the perception of a lack of independence from the ATO. We acknowledge that ATO secondees bring a wealth of experience. However, they should not hold 'decision-maker' roles. In our view, so long as the secondment arrangements clearly evidence that the ATO secondees become employees of the TPB and are free from any obligations they may otherwise owe the ATO, this should address any perception issues.

We understand that Option 3 contained at paragraph 3.22.3 of the Discussion Paper is the preferred option of the Review. However, this option still retains a strong connection to the ATO and therefore does not go far enough. Seconded employees from the ATO in senior roles at the TPB should be full-time employees of the TPB and should not have a replacement role with the ATO.

We note that Option 2 at paragraph 3.22.2 of the Discussion Paper better achieves the desired outcome of the TPB's real and perceived independence from the ATO. This Option should ideally be adopted and qualified only by maintaining the use of seconded staff from the ATO in the form noted above. The Inspector-General of Taxation's office operates as an independent body from the ATO. This is an appropriate model to follow to make the TPB more independent, both real and perceived, from the ATO. We understand that there will be pressures arising from cost efficiencies that will work against adoption of Option 2. If it is determined that sharing of ATO resources should be maintained, arrangements should be put in place so that the ATO is not in a position to unduly influence how the TPB uses those resources.

3. Membership of the TPB

In The Tax Institute's view, no ATO officer should be a member of the TPB's board. (Any desirable input from the ATO should be obtainable in ways which do not jeopardise perceptions of TPB independence.) It would be useful if there were guidelines regarding the diversity of membership of the TPB's board. However, we do not support prescriptive guidelines on the membership of the TPB's board being formulated.

One suggestion would be that the guidelines indicate that members of the board should come from a diverse cross-section of the community with representatives from government (except for the ATO), business, the profession, academia, consumer groups, retired judges and practitioners, and representatives from both large and small businesses. The composition of the TPB's board should change as the profile of the stakeholders in the profession changes over time, particularly as new stakeholders emerge, provided selected representatives are capable of fulfilling the remit of the board.

4. Object of the TASA

The object of the TASA sets out clearly that it is to ensure the provision of tax agent services to the public 'in accordance with appropriate standards of professional and ethical conduct'. The Act is to achieve this by regulating registration of tax agents, establishing the TPB, introducing the Code and provide sanctions for the discipline of registered agents.

The Review holds a preliminary view 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' (see paragraph 3.51). To support this assertion, reference is made to the Explanatory Memorandum for the *Tax Agent Service Bill 2008* (Cth) (EM). One of the policy objectives of the government action taken in introducing the regulatory framework for agents in 2009 was 'for the system – to strengthen the integrity of the tax system and the tax industry' (refer to the objectives at paragraph 6.25 of the EM).

The Review suggests that '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', even though the Review accepts this objective is already evident.

The object of a piece of legislation needs to be clear and certain. We are concerned that inclusion of such a broad statement in the TASA will be misinterpreted, as became evident in the Roundtable discussions hosted by the Review and the TPB. In this regard, should the review determine that the object of the TASA needs to be amended, the object should remain clear.

The Review needs to be clear about why the object of the TASA should be amended (or rather, expanded) to take account of the objective of strengthening the integrity of the tax system and the tax industry. It also needs to be very clear about the precise role and function of the TPB.

In our view, what is really meant is that the TPB has a role to ensure agents operate with integrity in the system (per the comments of The Ethics Centre) rather than having a role to ensure integrity in the much broader tax system itself. If the TPB can provide this assurance to the public (by way of how they administer registration, deregistration and discipline of agents), then in turn consumers of tax services can have confidence in the providers of those services and consequently one of the major stakeholders (tax practitioners) in the tax system. This should provide integrity around the provision of tax services and those who provide those systems.

This should not be misconstrued as attributing a responsibility to the TPB for the 'integrity of the tax system'. The TPB's role is clear as the regulator of tax practitioners (both registered and practitioners that are required to be registered) contributing to integrity in the tax system by way of their regulation of tax practitioners.

Care needs to be taken by the Review regarding any recommendation made to amend the object of the TASA to ensure it does not extend outside the boundary of the Government's objectives for this regime.

In this regard, the suggested amendments to the object of the TASA by the TPB contained at paragraph 3.47 are much too broad and fall outside the Government's objectives for this regime.

5. TPB visibility

The TPB should be more visible to the public as the place where the public can go to for recourse regarding concerns they have in relation to the actions of a tax agent or an unregistered person providing tax agent (or BAS agent or Tax (financial) adviser) services. Reference could be made on the ATO website or the IGT's website (or both) to the TPB's website so that taxpayers become more aware of the TPB and understand it is a place for recourse in respect of inappropriate or unprofessional tax agent behaviour.

In our view, while the TPB could do more to 'market' itself, it is more important that the TPB are performing their role well rather than the TPB being well-known in the public domain. Though, we consider that members of the public need to be able to seek out the assistance of the TPB as needed which should be achievable if knowledge of the TPB is made prevalent in the way suggested above.

6. TPB Public Register

Care should be taken regarding how much information is included on the TPB Public Register about a registered agent. It should be sufficient for the public to know that an agent has been deregistered without the complete details for their deregistration being published, particularly as the agent concerned may dispute the facts or findings behind their deregistration. There will be some transparency in certain cases if the deregistered agent has taken steps to dispute the TPB's decision via the Administrative Appeals Tribunal or Federal Court as these disputes will become a matter of public record. We note that some criminal offenders are not subject to this transparency.

If it is considered that more information should be published on the TPB Public Register, care will need to be taken to determine what information is relevant to be disclosed in this matter, how long the information remains available in the public domain and not to 'over-disclose' unnecessary information.

We note that comparative information regarding Code breaches under the TASA are recorded in the TPB's Annual Report (refer to Appendix D of the TPB's 2017-18 Annual Report¹ for an example). This is the most appropriate place for disclosure of the disciplinary action the TPB has taken. Additionally, the TPB could separately publish this information on a page on their website.

The role of the TPB is to administer registration, deregistration and the discipline/sanctioning of agents. The TPB should be acting in such a way that the public can have confidence in the TPB's administration. Therefore, it should not be necessary that all the details as to why an agent may have been deregistered be published. The public should have confidence that the TPB will have followed due process and taken its action on a sound basis. Publishing of this additional detail may lead to the public second guessing the actions of the TPB based on information contained in the TPB Public Register.

In the event the Review is looking for guidance on what recommendations it may make in relation to the TPB Public Register, some guidance may possibly be gained from the register operated under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

¹ https://www.tpb.gov.au/sites/default/files/tpb_annual_report_2017-18.pdf?v=1540762073

7. Qualifications and Experience Requirements

General

Professional tax advisers (and BAS agents and tax (financial) advisers) should have appropriate levels of qualifications and experience to enable them to satisfy minimum professional and ethical standards.

Requiring annual registration will create an unnecessary compliance burden on registered agents, particularly having regard to the fee level. Three-year re-registration is appropriate and the TPB Public Register could show whether an agent has lodged their annual declaration and when their next annual declaration is due (in addition to when their registration is due for renewal).

The current qualification and experience requirements for tax agent registration broadly follow the approach introduced in 1988. More flexibility needs to be introduced in the qualifications and experience requirements to respond to the increasing flexibility in work practices which is quite different from the traditional 'full-time' work model. These requirements should take account of substantive breaks in careers (due to periods of a career break, sabbatical or maternity leave) and the rise of regular part-time work. Based on members' experiences, the current requirements make it next to impossible for the TPB to register part-time employees or employees who have had lengthy breaks in their careers. In addition, the balance of education (perhaps completed >10 years ago) and experience also needs to be revisited.

Please refer to page 6 in our first submission to the Review for further details regarding this issue (see **Appendix B**).

'Flexibility' could also be introduced into the qualification and experience requirements to recognise practitioners whose main or sole focus is on providing advice rather than preparing tax returns. This would also accommodate the inherent changes in the profession as the focus of work moves away from traditional 'bread and butter' work of preparing tax returns. Please refer to page 7 in our first submission to the Review for further details regarding this issue (see **Appendix B**).

Conditional Registration

We also refer you to our comments on page 5 of our first submission to the review in relation to the changing profile of the profession and the increasing number of specialisations within the tax profession. This impacts on how the TPB should be providing conditional registrations. In the case of registered agents applying for a conditional registration, the qualification and experience requirements should be tied to the specialisation for which the agent has been registered. We note the TPB takes this into account². In our view, it is important that this be strictly managed.

Continuing Professional Education

It is the Institute's view that it is very important Continuing Professional Education (CPE) requirements be maintained. In respect of CPE for agents with conditional registration, we note there is information regarding requirements to ensure agents with conditional registration meet the CPE requirements relevant to their specialisation. This information is contained in *Explanatory Paper TPB 04/2012 Continuing professional education policy requirements for registered tax and BAS agents from 30 June 2014*. This may need to be expanded to reflect the increased number of specialisations.

² <https://www.tpb.gov.au/imposing-conditions-registration-tax-agent>

BAS agents

To the extent registered BAS agents are providing incidental 'tax agent services' together with their BAS services, there should not be any need for the BAS agent to also register as a tax agent, particularly where they are a member of a Recognised Tax Agent Association (as opposed to a Recognised BAS Agent Association) and required to meet the CPE requirements of that association. A BAS agent should have appropriate processes in place to identify the circumstances where they may be requested to act beyond their skill set and should refer a client to a registered tax agent or suitable competent legal practitioner. (We note that registered BAS agents are subject to the Code, including clauses 7 and 8.)

8. Tax intermediaries

There needs to be a clear delineation regarding what tax-related services a person may provide without needing to be registered with the TPB and when they do need to register with the TPB. While there is information on the TPB website³ regarding what is a 'tax agent service', it may be useful if this information was included in a more formal piece of guidance such as a Practice Note.

We note that where an intermediary relies on interacting with the ATO in order to make their living, this will have a determinative impact on whether they need to register with the TPB as the ATO will only provide credentials to appropriate tax professionals (for example access to the ATO Online Services' for agents). This safeguard is already in place in the system to help prevent unauthorised intermediaries from acting on behalf of taxpayers.

9. Fit and Proper person

The 'fit and proper person' requirement is a fundamental requirement to obtain and maintain registration with the TPB. We consider that elements of this requirement will change over time though the fundamentals should not change. While the fundamentals are already enshrined in the TASA at section 20-15, it may limit the future applicability of the requirement if further detail is enshrined in the law.

10. Tax Clinics

Tax Clinics are currently in a trial phase. At this stage, we do not consider that the clinics need to be registered as they are not charging a fee for their service. They can continue to operate on a model that relies on a tax agent's existing registration (ie being a person to takes ultimate responsibility for the tax services provided by the clinic) which we understand is a model generally adopted.

However, this will need to be revisited if they become a permanent stakeholder in the tax system. For now, a 'watching brief' should be maintained. The ATO is the appropriate government body to watch over the clinics for the time being.

11. A dynamic Code of Professional Conduct

In The Tax Institute's view, the Code should be dynamic. It could also be made more specific, for example the word 'competence' could be defined. The Code should be principles-based and codify the standards of behaviour expected of a registered agent.

³ <https://www.tpb.gov.au/tax-agent-services>

However, the method by which the Code should be changed should be subject to Parliamentary scrutiny. The Code is contained in section 30-10 of the TASA. Therefore, to amend the Code would require amendment of the TASA, a piece of legislation. While we accept that the Parliamentary process to amend legislation can be slow and is ultimately subject to the priorities of the government of the day, it is necessary that changes to the Code which govern the behavioural expectations of registered agents should only be able to be amended by a formal process, at a minimum by way of a Legislative Instrument, and have been subject to a public consultation process⁴. It is important that all proposed changes to the Code pass through a collaborative consultation process with key stakeholders (including professional associations) to determine whether a legislative amendment is required or whether a Legislative Instrument or non-legislative guidance from the TPB will be sufficient.

If at a time the TPB believes a part of the Code is not fit for purpose, we would strongly encourage the TPB to raise concerns it may have with the Code or suggested changes for the Code with the relevant Minister to start the formal process for change. Separately, the TPB could use a Legislative Instrument to provide further explanation of aspects of the Code or address emerging behaviours and practices if it felt the other means through which it provides interpretive guidance was not sufficient (refer to paragraph 6.12).

Separately on a specific point regarding the behaviours and practices set out in paragraph 6.12, the items listed are misrepresentative as the Code is about standards of behaviour, as noted above. In particular, the reference to legal services in subparagraph 6.12.2 is inappropriate as these services are regulated by the State law societies and are therefore external to the domain of the services the TPB should be regulating.

12. Legal Professional Privilege (LPP)

A separate Code item is not required for LPP.

The main issues are whether (non-lawyer) tax agents are qualified to assess LPP in respect of documents and whether the privilege is that of the agent or (more probably) of the client to whom the agent may have related duties. These are covered by the 'Competence' Code items (Items 7 - 10).

It is recommended that the TPB issue a guidance note explaining that non-lawyer tax agents do not have the necessary qualifications to assess whether LPP exists, and the implications of LPP in practice when a tax agent and a lawyer work together in providing services to a client.

13. Sanctions

The Tax Institute considers that it would be useful for the TPB to be able to obtain information prior to formally commencing an investigation. This would enhance the TPB's investigation process by improving efficiency in its process. This would also assist the agent being reviewed in that it will frequently save time and costs in relation to the investigation for both the agent and the TPB.

If a request for information prior to an investigation is made by the TPB and only minimal information is provided, the TPB could then follow up with a formal request for information after the investigation commences.

⁴ Refer to https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation which contains guidance regarding consultation concerning legislative instruments.

We acknowledge that the sanction powers currently available to the TPB offer a 'lighter touch' (written cautions and orders) or are a more heavy-handed (suspension and termination of registration). The Discussion Paper proposes a number of 'medium-touch' sanctions at paragraph 7.29. A broader range of powers available to the TPB will allow the TPB to pitch sanctions at an appropriate level according to the extent of the breach of the Code.

Of the sanctions proposed at paragraph 7.29, The Tax Institute supports adoption of enforceable undertakings and administrative sanctions and infringements and QA audits conducted by the TPB. To properly administer these powers, proper safeguards would need to be put in place. We do not support inclusion of a temporary suspension, at least not without mandatory safeguards to prevent it having an adverse effect on the suspended agent's clients who are reliant on the agent to meet their compliance obligations.

The TPB would need to be properly resourced to be able to administer a broader range of sanctions.

14. Unregistered agents

As noted above, the TPB should be acting in such a way that the public can have confidence in the TPB's administration of registered agents and those unlawfully providing services for which they should be registered with the TPB. As the public need to have assurance that the TPB is carrying out its role, but does not need to have oversight of it, it is not necessary that the names of unregistered agents be published on the register.

The TPB could look to guidance in the legal profession uniform law to manage the circumstances when a registered agent hires a person that has been deregistered by the TPB. The legal professional uniform law has precedent for preventing unregistered lawyers from being hired into practice⁵.

Another option we propose may be to provide the TPB with the power not only to prescribe that a deregistered agent cannot apply for reregistration during a stipulated period but also that the deregistered agent must not undertake specific kinds of work (for example, as an employee) that would amount to the provision of tax agent services (and, therefore, would require registration save for the employee relationship) for a suitable period. This proposition is only provided in broad terms. If it is regarded as having merit, it would need to be more fully explored by the Review.

The TPB would need to be supported by the ATO in its pursuit of unregistered agents in that the ATO should continue to provide relevant information to the TPB where the ATO may have identified an unregistered agent may be operating.

15. Safe Harbour

It is difficult and costly for a taxpayer to seek recourse directly from their agent (by way of law suit) who has acted in a way that has caused the taxpayer to incur penalties, though they may be more encouraged to if the penalties are at a sufficiently high level. Therefore, the availability of the safe harbour is of value to taxpayers in cases where the agent has not acted in the best interests of the taxpayer as it provides an avenue of protection for consumers of tax services regulated by the TPB.

⁵ Refer to section 121 and following in the Uniform Law, and the definition of 'disqualified person' in section 6.

The Tax Institute considers that the safe harbour could be expanded to take account of the circumstances where it is clear that an agent has acted with recklessness or intentional disregard of the tax law without any knowledge or contribution by the taxpayer. In these circumstances, the affected taxpayer should also be afforded the protection of the safe harbour. The TPB exists to protect taxpayer clients from reckless and negligent tax agents. It is inconsistent that they not then be offered safe harbour protection from the behaviour of such agents⁶.

However, we do not agree that penalties ought to be imposed on tax agents directly in cases of mere recklessness, such as with the Canadian model referred to at paragraph 9.12. The sanctions the TPB can impose on a tax agent for such behaviours should act as a sufficient deterrent to prevent tax agents from engaging in these egregious behaviours. To move beyond this will increase business risk for tax agents which will inevitably increase the costs for taxpayers to comply with the tax law. If the Canadian model is adopted and penalties are to be imposed directly on registered agents in any circumstances, the relevant regime will need to address 'burden of proof' issues, particularly since an agent should not be presumed to have access to all information and evidence which might be available only to a client (or former client) whose interests may no longer coincide with those of the agent.

As noted above, this circumstance must be carefully distinguished from the situation where the taxpayer has been a participant in or aware of the recklessness or intentional disregard of the tax law. In this case, the recklessness or intentional disregard of the tax law is attributable to the taxpayer. The safe harbour does not have a role to play in this situation, as is the case for the current safe harbour.

We observe that the safe harbour is difficult to apply in practice because the test to prove that the agent had all the relevant tax information pertaining to the taxpayer is such a high bar to meet. For example, if a section 8-1 deduction has been claimed for expenses connected with a rental property and the ATO denies the deduction because it is of the view the property has not been adequately advertised, the ATO denies the safe harbour claim unless the taxpayer can show that the tax agent knew that the property had not been adequately advertised. This is the case even if the agent knew exactly how the property was advertised. That is, the agent knew all the facts but reached a different conclusion on the facts or didn't turn their mind to the issue of availability for rent.

Another example which illustrates the difficulty of applying the safe harbour in practice can be seen when considering the current approach to the application of the safe harbour. Under the current approach, paragraph 52 of *MT 2008/2 Miscellaneous Taxation Ruling Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable* contemplates that while a taxpayer will determine their reasonably arguable position at the time they lodge their tax return, [the taxpayer] may not document their position until a later time where they may be facing a shortfall penalty which may be some years after the return has been lodged. In these circumstances, if the taxpayer cannot sustain their reasonably arguable position, this results in an accusation of recklessness. The question which then arises is which party is the recklessness attributable to – the taxpayer has relied on their adviser (tax agent) to help them form the view that they had a reasonably arguable position; however the adviser may have been prevented from documenting the reasonably arguable position at the time by reason of, for example, the taxpayer not wanting to incur the fees for it at the time or the priority may have been to lodge the return on time without delay from preparing the reasonably arguable position documentation. Objectively, it is unclear which party has been reckless. Therefore, it would not necessarily be the correct outcome to have the penalty automatically fall on the tax agent in this case.

⁶ We query whether it might be useful for a tax agent to state to a client (perhaps in their letter of engagement) that the safe harbours exist including information about their general application.

Other matters to consider include whether the tax agent's professional indemnity insurance could cover the costs of the penalties incurred (which is unlikely if the penalty is imposed directly on an agent by statute) and the proportionality of the penalties to the tax agent with respect to the fees they have charged (significant penalties could bankrupt the tax agent).

In view of our comments above, The Tax Institute does not support the ATO's proposal for a new administrative penalty in cases of mere recklessness as set out in Box 9.1 in the Discussion Paper.

16. Tax (financial) advisers

Tax (financial) advice services provided by financial planners still need to be regulated by the TPB. In this regard, providers of tax (financial) advice services should be registered with the TPB.

We are aware of the numerous regulators financial planners are subject to and note the vigorous discussion at the Roundtable meetings. However, we support the need for maintained regulation of tax (financial) advice services to ensure those services are provided to a requisite standard and the providers have sufficient education and experience to provide those services.

Regulation of Financial Planners

While we are mindful of the numerous regulators financial planners face, we are not yet aware there is sufficient scrutiny and regulation of the tax aspects of financial planning advice. In our view, the tax aspects of financial planning advice should be regulated by a regulator which has the resources and expertise to undertake this regulation. Currently, the TPB is most equipped to undertake this regulation.

We observe that, with respect to financial planners, to date primarily the TPB's main role has been to bring financial planners that provide tax advice into 'the system' for the purpose of regulating the tax advice aspect of their advice. In our view, insufficient time has passed for stakeholders to yet assess just how effective the TPB may be in regulating the tax aspects of financial planning advice. We acknowledge Commissioner Hayne's recommendation⁷ for a new disciplinary body for financial planners that might help resolve the issue of the numerous regulators that the financial planning industry is facing. While we note the suggested options in the Discussion Paper to have co-regulators or a primary regulator, the chosen regulator will still need to have the expertise in-house to regulate the part of the financial planning advice they are not primarily responsible for⁸. For the time being, the TPB is the regulator best placed to fulfil the role of regulating the tax aspects of financial planning advice. In this regard, the TPB will need to have sufficient resources to carry out this regulatory function.

Advice re self-managed superannuation funds (SMSF) and the accountant's exemption

Currently, there are practical implications for accountants who are registered tax agents who are prevented from giving structuring advice in relation to the set up or wind up of an SMSF. Such advice is financial advice for which they are now required to obtain an Australian Financial Services Licence (AFSL) and may only provide advice on the tax aspects of these arrangements. They are therefore unable to provide holistic

⁷ Refer to Table 2.1 on p17 of the Discussion Paper regarding the recommendation from the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*

⁸ For example, ASIC will need to have tax expertise to properly regulate all aspects of financial planning advice if the TPB is no longer regulating the tax aspects of financial planning advice.

advice (including tax and financial product advice) with respect to existing interests their clients hold in SMSFs.

In light of this, we encourage consideration of a legislative change by way of reintroducing a limited form of the 'accountant's exemption'⁹ that was removed in 2016 to permit a registered tax agent who is also a 'qualified accountant' (as defined in section 88B of the *Corporations Act 2001* (Cth)¹⁰) and who does not have an AFSL to provide limited financial advice together with tax advice in the following very limited circumstances pertaining to an SMSF:

- Structuring arrangements to make a contribution, receive a pension, or exit an SMSF including; setting up and closing down the SMSF, but only after the decision has been made to establish the SMSF following the advice of an AFSL holder;
- Ability to recommend winding up of an SMSF in the circumstances where a member's balance is insufficient to keep the fund going and the member takes the remaining balance as a lump sum or pension;
- Commencing an income stream and taking a lump-sum from an SMSF (which amounts to disposing of an interest);
- Making contributions to an SMSF (which amounts to acquiring an interest and which ordinarily would form part of the provision of tax advice); and
- Advising on the application of the small business CGT concessions as they relate to making a contribution to an SMSF.

A registered tax agent (who is also a 'qualified accountant') would still not be permitted to provide financial advice to establish a new SMSF, about contributing to an alternate superannuation fund or provide advice on the disposal of an APRA superannuation interest. They would still be required to obtain an AFSL in order to provide this advice.

If this legislative change occurs, the TPB should consider specific education requirements for registered tax agents (who are also a 'qualified accountant') in this area. We would envisage that all requirements of the Code would extend to cover the limited financial advice given in this context by a registered tax agent (who is also a 'qualified accountant') to ensure that that agent is giving proper advice in this context. Any registered tax agent (who is also a 'qualified accountant') who does not have sufficient education and experience in this area with respect to SMSFs would still be expected to refer the matter to another professional with the relevant expertise.

17. Relationship with professional associations

The Tax Institute supports the sharing of information between the TPB and professional associations earlier in the process of when the TPB is investigating a member of a professional association. This will alert a professional association to concerning behaviours of a member earlier in the process such that the association could then engage its own disciplinary procedures if required.

There is a suggestion by the Review that professional associations become a co-regulator of the tax profession alongside the TPB. We understand that it is envisaged that, correlatively, the TPB ceases to regulate the professional associations.

⁹ *Corporations Regulations 2001* (Cth) Reg 7.1.29A which was repealed on 1 July 2016

¹⁰ Refer also to *ASIC Corporations (Qualified Accountant) Instrument 2016/786*

Co-regulation is not a feasible option. Rather than delegating the regulatory responsibility of the TPB to professional associations to create a 'co-regulatory environment', the TPB should work collaboratively with key professional associations in the tax profession as it currently does, together with the associations demanding their own high standards of their members. Further, The Tax Institute in its role as a key professional association for tax professionals will continue to maintain its engagement with the TPB at Board, Executive and technical levels.

We also assume cessation of TPB oversight of Recognised Tax Agent Associations (**RTAA**) would mean the loss of RTAA status (and other similar recognised status) which in turn is likely to negatively impact on the professional conduct and disciplinary procedures professional associations have in place to obtain this recognition.

Should this pathway be adopted, all registered tax agent members of RTAAs relying on the status of their association as an RTAA for their tax agent registration should be grandfathered in order to retain their registered tax agent status.

18. Future Landscape

This is a complex issue that requires more thought and consultation. A periodic review of the changing landscape of the tax profession, including identifying emerging stakeholders and new entrants to the market providing tax agent services, should occur. This is a matter we would expect the TPB to keep a watch over, be responsive to and consult with key stakeholders in the tax profession about.

If you would like to discuss any of the above, please contact either myself or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours faithfully,



Tim Neilson
President

APPENDIX A

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of almost 12,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.

Appendix B

Tax Institute submission dated 18 April 2019



THE TAX INSTITUTE

18 April 2019

Mr Keith James
Chair – Review of Tax Practitioners Board
C/- Mr Nick Westerink
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: TPBreview@treasury.gov.au

Dear Mr James,

Review of the Tax Practitioners Board

The Tax Institute welcomes the opportunity to make a submission to Treasury in relation to the *Review of the Tax Practitioners Board (Review)*. This review is an extremely important review given the role of the Tax Practitioners Board (**Board**) to govern and regulate the tax profession.

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration.

As a professional association dedicated to supporting the tax profession, we are uniquely positioned to provide input into this Review and look forward to contributing to this Review.

For further information, please refer to Appendix A.

Summary

Our submission below addresses the major issues that the discussion paper that will be issued in June 2019 (**June discussion paper**) should discuss. These are focused on ensuring that:

- registered agents have and maintain a high standard of recently obtained education and experience and keep up with the constant changes in the tax law;
- the Board operates effectively to carry out its dual functions of registration and applying disciplinary sanctions; and
- the regulatory regime has sufficient flexibility. It needs to be able to accommodate changes in the tax profession as the profession becomes more specialised and shifts more towards advice services and away from compliance services. Also, working conditions of tax practitioners have increasingly become more flexible.

Background

The purpose of the Review is to ‘consider whether the legislative and governance framework for the Tax Practitioners Board delivers on its policy objectives to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct¹’. With this in mind, it is useful to refer back to the policy objectives (**Policy Objectives**) of the legislative framework comprised of the *Tax Agent Services Act 2009* (Cth) (**TASA**) and the *Tax Agent Services Regulations 2009* (Cth) (**TASR**), which are:

Objectives of government action

...

6.25 Specifically, the policy objectives of the new legislative framework for tax and BAS agents are:

- for tax agents and BAS agents - to improve consistency in registration and to regulate the provision of tax agent services in an appropriate, but flexible, way;
- for taxpayers – to enhance the protection of consumers of tax agent services, thereby reducing the level of uncertainty for taxpayers and the risks associated with the self-assessment system; and
- for the system – to strengthen the integrity of the tax system and the tax industry.

6.26 The objectives outlined above are broadly stated in the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs Media Release No. 039 of 29 May 2008².

Essentially, the Policy Objectives can be summarised as follows:

¹ Media Release from the Assistant Treasurer, the Hon Stuart Robert MP entitled ‘Review of Tax Practitioners Board’ 5 March 2019 (<http://srr.ministers.treasury.gov.au/media-release/027-2019/>) (**Board Review Media Release**)

² Explanatory Memorandum to the *Tax Agent Services Bill 2008* (Cth) at p 129

- (1) consistency in registration and regulation of tax agents and the services they provide;
- (2) consumer protection;
- (3) strengthen the integrity of the tax system and the tax profession.

The media release³ referred to in the extract above of the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, also outlined the following key elements of the regulatory reforms (**Key Elements**), namely:

- a national Tax Practitioners Board (the Board) to replace the existing state-based boards;
- registration and regulation of entities providing Business Activity Statement (BAS) services as BAS agents;
- a legislated Code of Professional Conduct to govern tax agents and BAS agents;
- a wider and more flexible range of disciplinary sanctions which may be imposed by the Board;
- civil penalties and injunctions to replace criminal penalties for certain misconduct by agents and unregistered entities; and
- 'safe harbours' which provide that, in certain circumstances, taxpayers who engage a tax agent or a BAS agent are not liable to certain administrative penalties that would otherwise ordinarily apply for making a false or misleading statement resulting in a tax shortfall amount, or for lodging a document late.

Both the Policy Objectives and Key Elements of the regulatory reforms set the benchmark against which the effectiveness of the Board, TASA and TASR should be measured in this Review.

The Review is also intended to 'provide another opportunity for the Government to address issues concerning the black economy arising from the Black Economy Taskforce's Final Report⁴'. The relevant recommendation in the Black Economy Taskforce's Final Report is *Recommendation 7.4: A Strategy for tax practitioners* which recommended the following:

The Government should:

- Take action against implicated advisers and promoters.
- Take more visible action against egregious tax practitioners and make clearer their ethical responsibility to report suspected illegal activities and tax evasion.
- Increase the capacity of the Tax Practitioners Board (TPB) to take sufficient effective action against egregious tax practitioners by increasing its resources and interactions with the ATO.⁵

The Board was granted additional funding of \$20.1 million over the forward estimates period in the 2018-19 Budget to 'assist the TPB in meeting its broadened responsibilities to ensure that tax agent services are provided to the public in

³<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/039.htm&pageID=003&min=ceb&Year=2008&DocType=0>

⁴ Board Review Media Release

⁵ Black Economy Taskforce Final Report (October 2017) at p163

(https://treasury.gov.au/sites/default/files/2019-03/Black-Economy-Taskforce_Final-Report.pdf)

accordance with appropriate professional and ethical standards⁶. We note the source of the additional funding is increased registered agent registration fees.

The Tax Institute considers that the issues raised in this submission should be considered as part of the second stage of this review and form part of the June discussion paper.

Issues

1. Policy Objectives

a) Consumer protection

The Tax Institute considers that the most important Policy Objective in this regime is that of 'consumer protection'. This Policy Objective should be held at the centre of all the elements of the TASA and TASR and the work of the Board. The best way to meet this objective is to ensure that all providers of tax agent services, BAS agent services and tax (financial) advice services have the appropriate skills and experience to perform the function(s) for which they are registered.

Tax is a complex and ever-changing discipline. Therefore, the regime should require that persons wishing to register with the Board have a high standard of both recently attained education and experience. Otherwise, consumers will be at risk of receiving tax advice and services provided by inadequately qualified service providers or those with out-of-date skills.

Thus, consumer protection is a central objective of all aspects of this regime.

b) Consistency in registration and regulation of tax agents and the services they provide

This objective is the first of the three Policy Objectives. A number of issues arise in relation to this objective.

i) Conditions on registration

There are four items in the Code of Professional Conduct (**Code**) governing the competence of registered agents⁷, to ensure that all services provided by a registered agent are provided competently. In addition to this, there are currently 22 possible 'conditions'⁸ that can be placed on registered tax agents to limit the type of tax agent services they may provide. No conditions have separately been specified for BAS agent and tax (financial) adviser registrants,

⁶ 'Tax Practitioners Board – Funding' Treasury Expense measure, Budget Paper No. 2 2018-19

⁷ Items 7 to 10

⁸ <https://www.tpb.gov.au/conditions-registration-tax-agents>

though we understand the 22 conditions listed could also apply in these circumstances (where relevant).

A condition on the registration of a tax agent that limits the scope of tax agent services to particular area or areas of the tax law can be beneficial in that it can assist a consumer to have assurance the relevant tax practitioner has expertise in that area. In contrast, an unconditional registration indicates to a consumer that the relevant tax practitioner has expertise in all areas of tax law. It is unlikely that many practitioners with general registration will have expertise in all areas of tax law. The same assurance about the practitioner's level of expertise in all areas of tax law is not available.

A condition on the registration of a tax agent that limits the scope of tax agent services that the tax agent can provide to a particular area or areas of law can give rise to certain problems. For example, a condition may limit a tax agent's activities to capital gains tax. When further consideration is given to this, many issues can arise. Often a set of facts that potentially raise a capital gains tax issue will also raise other tax issues. For example, where post-CGT land is subdivided and sold, obviously there will be capital gains tax issues. However, there is also likely to be ordinary income issues as well as potentially GST issues (for example, an adventure in the nature of trade will be an enterprise for GST purposes). Any advice which does not cover all these issues would be deficient and, potentially, costly to the client. Even where the relevant tax practitioner has put a disclaimer or qualification in their engagement letter or advice that their advice will be limited, the value of the advice becomes limited.

How is a consumer to know whether the registered tax agent has a condition or conditions imposed on their registration if they do not look the tax practitioner up on the Board's register? In practice, how many consumers do this? What prevents a tax practitioner with a conditional registration going beyond the boundaries of their conditional registration and providing advice in an area of tax law for which their registration does not permit them to do?

The structure of the tax profession is very different to what it looked like when this regime was first proposed as part of the 1994 review of standards in the tax profession⁹. The Tax Institute considers that the issues raised with conditional registration should be explored as part of the June discussion paper, taking into account the size and depth of the tax profession as it currently stands together with an increasing number of specialisations.

In addition, the Review should also ascertain whether the competence requirements of the Code are sufficiently adequate such that when applied in practice they inhibit practitioners from straying outside of their areas of expertise, or would be so if the Board was sufficiently resourced to apply them,

⁹ Refer to the *Tax Services for the public: The Report of the National Review of standards for the Tax Profession* publication (1994) Australian Government Publishing Service, Canberra

or if in fact they require alteration. The proliferation of conditions on registration suggests these Code items may not be sufficiently adequate. The Review may also need to consider whether the competency requirements in the Code should be revised to include a requirement to comply with any conditions of registration¹⁰.

ii) Application for registration as a part-time practitioner

Members' experience with applying for tax agent registration as a part-time practitioner are that some of the current registration rules are discriminatory against part-time workers and favour those working full-time.

In particular, Regulations 205 and 206 require the equivalent of 8 years of full-time experience (ie. 96 months) in the past 10 years. These regulations may be relevant, for instance, to individuals with accounting or other degrees who have not completed the necessary law courses for registration under Regulations 201 or 202.

For instance, if in the past 10 years, an individual worked full time for 5 years, took 6 months parental leave and worked the remaining 4 ½ years on a 3 day per week basis, this would equate to 80.4 months of work, which is insufficient to satisfy these requirements.

Also, an individual working 4 days per week who took any period of extended leave, parental or otherwise, would not qualify under these regulations. This outcome can result despite the fact the individual may have significant experience prior to the last 10 years.

The nature of work has also changed in recent years. Employees work more flexibly and many more employees in the tax profession work part-time. The market place is generally recognising that 'life experience' is also relevant and employers are changing their approach to part-time employees. The length of time a person spends in a role is also less and less relevant to when they might be promoted. Rather, what they have actually achieved in that role is the key.

For example, many employers now have processes to ensure that employees returning from parental leave do not have their career progression stalled purely as a result of taking parental leave. More and more employers are also promoting individuals while they are actually on leave.

We submit that the tax agent registration rules are out of step with the modern world in this regard and should be altered to remove the level of discrimination they currently contain against part-time employees. As such, the registration

¹⁰ For example, should a registered agent with a condition on their registration have to include the condition on relevant documents (eg an engagement letter)?

rules should be reviewed to ensure they provide the consistency and flexibility to meet the modern day work environment.

iii) General application and renewal processes

Some members have reported to us that they consider that the renewal process has taken a significant amount of time to complete. One member has noted that in a discussion with a processing officer, the Board's systems had slowed down the application process.

Other members do not consider that the application or renewal process is too onerous.

iv) Registration based on 'tax return' work

The tax agent registration system is largely based on a practitioner's experience with tax returns. In particular, the 'Statement of Experience' in the registration process asks applicants to provide information about their experience with preparing tax returns.

The nature of tax practice is changing, with an increase in automation to assist with the lodgement process allowing practitioners to move away from traditional 'bread and butter' work of preparing tax returns. Tax practitioners now have more resources to put towards assisting clients with more complex tax matters and engaging in more highly skilled work, such as providing higher level tax and business analysis and advice. The current registration process does not reflect this.

This raises the question whether the registration of tax agents is simply there to facilitate taxpayers' dealings with the ATO on an electronic basis or whether there is an expectation they will provide more extensive services such as taxation advice, and consumers should expect they are qualified to do so.

This also raises the question about how the regime is meant to apply to a practitioner who just provides tax advice services and does not prepare and lodge returns. Given that 'tax agent services' includes, broadly speaking, tax advice, one would expect that, currently, such a practitioner should be registered with the Board or be working under the supervision of a registered tax agent. Inclusion of advice in the definition of 'tax agent services' presumably indicates the intention that such tax advice should not be provided except by a registered tax agent (or legal practitioner) or by someone working under relevant supervision. However, it is not clear whether a practitioner who just provides tax advice services and does not prepare and lodge returns is intended to be able to be registered under the TASA (or only ever be able to work under supervision of someone else who is qualified to give the advice), and if so whether the Board's 'Statement of Experience' indicates that this is not

happening in practice. This issue should be explored in more detail in the June discussion paper.

v) Qualification requirements

The aim of this regime is to ensure that professional tax advisers (and BAS agents and tax (financial) advisers) have appropriate levels of qualifications and experience to enable them to satisfy minimum professional and ethical standards.

The June discussion paper is a good opportunity to revisit the qualification and experience requirements for registered agents (tax, BAS and tax (financial) advisers) to ensure these requirements are sufficiently high to protect the consumer and meet the other Policy Objectives outlined above.

vi) 'Fit and proper' person

How is this aspect of the registration process policed in practice? Currently, it relies on a declaration made by the registered agent and third parties to alert the Board where they feel a registered agent has contravened their registration. There is also an issue if a registered agent persistently breaches the law; though how the Board distinguishes this from an occasional and inadvertent breach of the law is unclear. In this regard, how well the 'fit and proper' person test is applied and enforced should be reviewed. In our view, it is an important role for the Board to enforce this aspect of the registration process.

vii) Continuing Professional Education (CPE) requirements

While the Board may request evidence or confirmation of completion of a registered agent's Continuing Professional Education (CPE) requirements¹¹, it does not appear the Board will necessarily audit registered agents to confirm whether they have met their CPE requirements. Whether the Board should in fact audit registered agents should be explored in the June discussion paper. In our view, this is an important role for the Board to have.

All the issues raised above should be explored in the June discussion paper.

c) Strengthen the integrity of the tax system and the tax profession

Requiring certain minimum levels of education and experience before a practitioner is able to register with the Board and provide tax agent services, BAS agent services and tax (financial) advice services assists with strengthening the integrity of the tax profession. Where a minimum education and experience level acceptable to stakeholders in the tax profession is set and regulated by the Board, to some extent

¹¹ Refer to paragraph 47 of *Explanatory Paper TPB(EP) 04/2012: Continuing professional education policy requirements for registered tax and BAS agents from 30 June 2013*

this ensures that providers of the services regulated by the Board have the capability to be providing them. The flow-on effect of this is that the integrity in the tax system should be increased with registered agents better equipped to encourage greater participation in the tax system by taxpayers.

With the increasing complexity in tax laws, some registered agents may well find themselves practising in areas in which they are much less familiar, perhaps without even realising it. It is important that a registered agent is able to identify what potential tax issues are raised by a particular fact scenario, even if the registered agent does not know the answer to the issues. These issues could then be referred to a tax practitioner with relevant expertise in the area for external advice.

Such an issue ties back to elements such as conditional registration, the nature of the qualification and ongoing CPE requirements and the competency requirements in the Code.

Consideration of the issues arising in the Black Economy (discussed later) also ties in.

This Policy Objective sits across the Key Elements of the regime and should be born in mind when considering them.

2. Key Elements

a) Safe harbours

There are a number of issues in relation to safe harbours that should be explored in the June discussion paper. These include:

- The number of cases in which the safe harbours have been applied over the period since they commenced operation;
- The penalties, if any, imposed on agents where a safe harbour is applied;
- Whether an additional safe harbour or a sanction should apply to an agent who doesn't request relevant information in a timely manner.

The penalty safe harbours in Schedule 1 of the *Taxation Administration Act 1953* (Cth) (**TAA**) that can apply where a registered agent is engaged are deficient in some respects.

For example, section 286-75(1A) of Schedule 1 of the TAA refers to the client giving to the registered tax agent or BAS agent 'all relevant taxation information to enable the agent to give a return'. This places an unreasonable burden on the client, particularly when regard is had to the decisions that interpreted the full and true disclosure requirements of section 170 of the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**) as formerly enacted. It is also unclear as to how a taxpayer is to know what information is relevant.

This leads to the broader question of what expectations the Board has of registered agents in carrying out their work. What activities should form part of the services that a registered agent is providing? Additional guidance may be required for these aspects.

For example:

- to what extent should they be requesting information or verifying the information provided by their client?
- Does a registered agent have to review the records a taxpayer is required by law to keep?

The safe harbours are meant to relieve a taxpayer from a false or misleading statement penalty or a late lodgment penalty in what are in fact very overly restricted circumstances. No liability is imposed on the agent which is curious given that it is the agent's fault that the penalty has arisen where a safe harbour is invoked. Possibly in practice, the safe harbours have a very infrequent operation. If the safe harbours are not availed of to any real extent, this would show that they were not performing a useful function and need to be revised. See, for example, section 284-75(6) of Schedule 1 TAA with comments below.

Section 284-75 Liability to penalty

- ...
- (6) You are not liable to an administrative penalty under subsection (1) or (4) if:
 - (a) you engage a *registered tax agent or BAS agent; and
 - (b) you give the registered tax agent or BAS agent all relevant taxation information; and
 - (c) the registered tax agent or BAS agent makes the statement; and
 - (d) the false or misleading nature of the statement did not result from:
 - (i) intentional disregard by the registered tax agent or BAS agent of a *taxation law (other than the *Excise Acts); or
 - (ii) recklessness by the agent as to the operation of a taxation law (other than the Excise Acts).
 - (7) If you wish to rely on subsection (6), you bear an evidential burden in relation to paragraph (6)(b).

There should be some 'consumer protection' for clients of tax agents. We note that the safe harbour only applies to the taxpayer where the agent has been careless, not when they have been reckless or shown intentional disregard for the law. Whether the safe harbour for the taxpayer should be expanded out to encompass these circumstances should be considered in the Review.

Also, the criminal sanctions of former section 251L etc (eg section 251M, section 251O) of the 1936 Act clearly went too far, but some reasonable protections could be included, particularly as potentially costly litigation may deter clients seeking redress.

b) Code of Professional Conduct

While the Code of Professional Conduct governs the professional and ethical standards required to be met by registered agents, this isn't necessarily effective if the

Board does not have sufficient resources to enforce the Code ensure that registered practitioners are in fact meeting the requirements of the Code.

While the Code also requires registered agents to take reasonable care to apply tax laws correctly (Code item 10) and a service is provided competently (Code item 7), it is unclear how or whether ensuring that registered agents stay within their areas of competence (including in accordance with their conditional registration) is policed. As noted above, parts of the Code may need to be revised to include a requirement to comply with any conditions of registration.

c) Administrative penalties and disciplinary procedures

The Board has powers under Subdivision 30-B of the TASA to impose administrative sanctions such as issue cautions and orders, suspend registration or terminate registration. It is unclear whether the Board is making sufficient use of the administrative penalties available to it and has sufficient resources available to allow them to apply these administrative penalties. We also query whether these sanctions are flexible enough to apply in the modern day work environment.

We also note that there is a lack of transparency for stakeholders over the disciplinary procedures the Board undertakes other than seeing the results of AAT and Federal Court proceedings. From the point of view of a professional association, The Tax Institute is also advised by the Board of the outcome of disciplinary proceedings of persons who have advised the Board they are a member of the Institute where disciplinary action has been taken. We do not have visibility over how many members may currently be subject to review or investigation by the Board.

In light of the above, The Tax Institute considers that the effectiveness of the current penalty regime and disciplinary procedures should be explored in the June discussion paper. A number of useful points have been raised in the Inspector-General of Taxation's November 2018 report into *The Future of the Tax Profession*. In particular, we refer to Recommendation 6.3(a).

d) Limited resources available to the Board

As at 30 June 2018, there are 77,749 registered agents in total, including 42,561 tax agents, 15,638 BAS agents and 19,550 tax (financial) advisers¹².

As at 30 June 2018, the Board has approximately 120 staff. We understand that a majority of staff (80) are allocated to handle registrations and the remaining 40 staff are involved in reviews and investigations of registered and unregistered agents.

As noted above, the Board received funding of \$20.1 million over the forward estimates period in the 2018-19 Budget.

¹² Refer to the Board's Annual Report for 2017-18
(https://www.tpb.gov.au/sites/default/files/tpb_annual_report_2017-18.pdf?v=1540762073)

The Board has limited funding and resources to carry out its functions of registration and applying disciplinary sanctions, thus contributing to strengthening the integrity of the tax system and the profession. The allocation of the limited resources available to the Board seems to be more heavily skewed towards its registration function.

With the limited resources available to it, the Board must review all registered agents and ensure they are meeting their ongoing registration requirements. The Board has some opportunity to carry out this review when an agent first registers with the Board and perhaps at the time they renew their registration. However, they would be heavily reliant on the declarations made by agents that the agent has in fact satisfied all relevant requirements.

If most of the Board's resources are applied to registering agents and renewing their registration, there is unlikely to be many resources left to enforce the Code and apply other penalties and disciplinary sanctions other than to pursue the most egregious cases as the Board does now. This may not be the most efficient use of the Board's resources.

Recently the Board has pursued registered agents who have not met their own personal tax obligations (including tax debts). While this is a Code requirement (Code item 2), we query whether it may be more appropriate for the ATO to pursue these agents in concert with the Board.

Whether the Board has adequate resources to carry out its work should be explored in the June discussion paper. Further, whether the limited resources the Board does have are appropriately allocated between its registration and disciplinary functions should also be explored. If the Board is to strengthen the integrity of the tax system and profession, we query whether the Board is sufficiently resourced to carry out this function. We would expect that the Government would want to ensure the Board is sufficiently resourced to carry out this function.

The Review should also consider how the Board could develop a more risk-based approach to carry out their compliance activities and be more economical with their limited resources. This would, however, require the Board to obtain additional skill sets (eg data analysis). This may require a reprioritisation of the limited resources available if additional resources cannot be provided.

3. Black Economy

Recommendation 7.4: A Strategy for tax practitioners in the Final Report from the Black Economy Taskforce (extracted above) recommended that more visible action be taken against egregious tax practitioners and the Board should have its capacity increased to enable this.

The Government's response to this recommendation was:

The Government agrees that the Tax Practitioners Board (TPB) plays an important role in combatting the black economy.

The TPB will receive additional funding to allow it to receive a greater number of black economy referrals arising from increased compliance on black economy activity.

One may argue that the Government has already answered this recommendation by providing additional funding of \$20.1 million in the 2018-19 Federal Budget.

Whether the Board is sufficiently funded for this purpose should also be considered as part of this Review.

4. Other matters for consideration

a) Professional standards

The June discussion paper should explore whether it is the role of the Board to set out a 'minimum professional standard' that all registered agents should abide by. The minimum standards could outline issues such as to what extent a registered agent can rely on the information provided by a client or what responsibility they may have to verify information provided to them for the purpose of carrying out a tax agent service (or BAS agent service or tax (financial) advice service as relevant).

This concerns the expectations the Board might set around the competency of registered agents.

b) Regulation of tax (financial) advisers

The Hayne Royal Commission has recommended that there be one 'super' regulator (single, central disciplinary body) for financial advisers¹³. We note the Board regulates the tax services provided by financial advisers. In our view, regardless of how the general regulation of financial advisers changes, the Board will always have a role to play in regulating the tax services of financial advisers as a general financial adviser regulator is unlikely to have the ability or expertise to properly regulate this aspect of financial advice.

c) Interrelationship with Legal Profession Uniform Law

Some members have raised a concern about a possible issue where the services provided by a registered tax agent amount to legal services. If there is a breach of the Legal Profession Uniform Law by a registered tax agent providing tax agent services, section 109 of the Australian Constitution should apply to ensure that TASA, as a Commonwealth Act, prevails. It is unclear what role the Board may have in this scenario. This may be an issue that may need to be explored in the Review.

¹³ Refer to 'Recommendation 2.10 – A new disciplinary system' in the *Final Report: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Vol 1)* (<https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>)

The Tax Institute looks forward to contributing further to this Review at the time the June discussion paper is released. The Tax Institute would also welcome meeting with the Chair of the Review directly.

If you would like to discuss any of the above, please contact either myself or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours faithfully,

A handwritten signature in black ink that reads "Tim Neilson". The signature is written in a cursive style with a large initial 'T' and 'N'.

Tim Neilson
President

APPENDIX A

About The Tax Institute

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The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.