Morton and Devos
Submission to The Treasury Review of eligibility requirements for registration with the Tax Practitioners Board

7 August 2024

Director, Tax Agent Regulation Unit
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The Treasury
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Dear Director,

Review of eligibility requirements for registration with the Tax Practitioners Board

Dr Elizabeth Morton (RMIT University) and Associate Professor Ken Devos (Swinburne University of Technology), tax academics, make this submission to Treasury. We are part of a team of authors, who obtained research funding in 2022 from CPA Australia to investigate the tax professions response to the TPB Review and related recommendations. As part of this research, we interviewed twenty tax practitioners nationally to gather their views on the recommendations concerning, the Code of professional conduct, investigations, and sanctions.[1] This work was preceded by earlier work in 2021 which surveyed some 145 tax practitioners to gather their views on selected TPB Review recommendations.[2] We have previously made a copy of our publications/papers available to Treasury.[3]

As part of this submission, as independent researchers we put forward perspectives on the areas of potential reforms detailed in the consultation paper that builds on both our prior research and engagement with industry. We would be pleased to provide any further information regarding our submission.

Yours faithfully,

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Encl. Consultation Questions and Responses

[1] Ken Devos, Elizabeth Morton, Michael Curran, and Chris Wallis, 'The tax profession's response to the recent review of the TPB, the TASA 2009 Code of Professional Conduct, investigations, and related sanctions' (2023) 21(2) *eJournal of Tax Research* 253 ('Tax Profession Response'). Available online at https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/business-school/faculty/research/ejournal-of-tax-research/23-12-14.2-eJTR-21(2)-compilation-final.pdf.
[2] Ken Devos, Elizabeth Morton, Michael Curran, and Chris Wallis, 'Tax practitioner perspectives on selected 2019 TPB review recommendations' (2023) 38(1) *Australian Tax Forum* 151 ('Selected 2019 TPB review recommendations').
[3] These papers can be provided on request.

Overview

Overall, we are in agreeance that Tax Practitioner Board ('**TPB**') registration requirements need to be fit for purpose and there is room for the current regime to be modified to enhance its objectives. TPB registration ought to make sense in a contemporary landscape and signal to prospective and registered practitioners the necessity to have an ethical and professional practice. At the same time, there is an inherent need to have flexibility and agility in recognising the multitude of pathways that can lead to registration.

This Review focuses specifically on aspects of education, qualifications and experience requirements for new entrants and existing practitioners.[4] The objective of this Review was to consider whether the regulatory framework ensures that registered tax practitioners possess the knowledge and skills required to assist clients with their tax affairs in a modern world.[5]

The Independent Review suggested that the requirements to register – being a combination of primary qualifications, TPB approved courses and relevant experience – needed to be updated to better align with existing government initiatives and to lift standards and ensure consistency across the profession.[6] The submissions to the Independent Review, showed perspectives from stakeholders on this issue was mixed.[7] Importantly, there was a recognition that registration requirements were the responsibility of not just the TPB, but also other regulators, professional associations, educational providers and other key stakeholders.[8] We are therefore mindful of a continued appreciation of the holistic system that the TPB and tax practitioners are a part of.

Recommendation 4.1 of the Independent Review included in relation to primary qualifications (education and experience requirements), that:

a) The TPB, in collaboration and consultation with other regulators, professional associations, education providers, the tax profession and other key stakeholders, undertake a review to determine if the primary qualification level itself has been set at the right level and what grandfathering arrangements would be appropriate (if required).

b) The Treasury and the TPB, with input from key stakeholders, determine whether an amendment to the Tax Agent Services Regulations 2009 is appropriate to give the TPB greater flexibility to accept other qualifications that may not fall within the traditional tax practitioner course of study.[9]

In our research, albeit not focusing directly on the issues pertaining to TPB registration requirements, we acknowledge that there is evidence amongst some tax practitioners that there is a lack of knowledge and appreciation of some of the professional and ethical requirements under the Tax Agent Services Act 2009 Code of Professional Conduct (hereafter '**the Code**').[10] It has been found that as tax practitioners were generally time poor, their attention to keeping abreast both professionally and technically was at times found wanting.[11]

These findings are supported by earlier research which revealed that while tax practitioners were generally supportive of the professional standards under the Code, results were more qualified with regard to the appropriateness and knowledge of penalties under the Code.[12] Previous research findings are also mixed with regard to other ethical issues, such as the outsourcing and transfer of client information, which is critical in the modern business environment. Further evidence with regards to deficiencies in tax practitioner skills and competencies were highlighted with a lack of clear guidelines regarding the maintenance of in-house tax

[4] Australian Treasury, Review of eligibility requirements for registration with the Tax Practitioners Board (Consultation Paper, July 2024).
[5] Ibid 7.
[6] Australian Treasury, Independent Review of the Tax Practitioners Board: Final Report (31 October 2019) ('The Review') 35.
[7] Ibid.
[8] Ibid.
[9] Ibid 37.
[10] Devos et al (n 1) Tax Profession Response; Devos et al. (n 2) Selected 2019 TPB review recommendations.
[11] Ibid.
[12] See Ken Devos and Paul Kenny, 'An Assessment of the Code of Professional Conduct under the TASA 2009 – Six Years On' (2017) 32(3) Australian Tax Forum 629.

practitioner guidelines at all levels, the need for protocols and standards for data security and outsourcing of services, and the need for further education and training of tax practitioners with regard to penalties per se.[13]

Overall, the tone of the current Review's proposals hone into not only flexibility, but a shift towards establishing mechanisms for good governance, continual improvement with the potential for positive duties aligned with the Code on registration and renewal. Overall, we are in agreeance that the process of TPB registration should set the tone and expectation towards practitioner behaviours and offer the opportunity to ensure the Code remains front and centre. We raise a general observation, however, over the overlapping regulation already in place that requires practitioners to have good governance. These stem from not only accounting bodies (including Codes such as the APES 110 and 220) and professional practice requirements but other frameworks operating within the business environment. Moreover, the TPB itself, including the new tranches of reform already having proceeded as well as the most recent Determination by the Minister, come with various obligations. Many of these are overlapping, repetitive or create uncertainty as to their level of alignment.

We highlight the critical need for not only regulation to impose obligations on the tax practitioner and for the TPB not only to set the tone, but ensure that the TPB's monitoring and policing, its checks and balances continue through the life of the registration and therefore the life of the tax practitioner underpinning the tax agent number ('**TAN**'). As already indicated above that there is overlapping requirements for good governance, where the TPB can police deficiencies. In contemplating the TPB's monitoring and policing, this includes building in and strengthening verification processes where technology and data matching capabilities are available and where possible, having checks and balances close to real-time.

We also argue that there is a general need to undertake a broad review of regulation imposed on the tax profession and to look at how this can be not only streamlined or simplified but ensure there is equity and fairness across various practitioners that provide tax services. We need to remember that tax practitioners are part of a broader community of practice.

The following responses specifically provide input into the respective consultation questions. Where necessary, question responses have been grouped based on their particular area of focus.

Strengthening registration requirements for companies and partnerships

1. Will the inclusion of governance requirements in registration criteria for companies and partnerships help to meet the objectives of the TASA of maintaining integrity of the tax system and providing adequate professional and ethical safeguards to consumers?

Yes, we are of the opinion that vetting governance requirements on registration is likely to assist in maintaining ethical and professional safeguards. It sends a clear message as to the expectations and duties that follow registration.

We note that in assessing the adequacy of any additional governance arrangements, the TPB will require detailed guidance documents to support this new initiative along with considerations of overlapping regulation already in existence. Moreover, the development of such should be open to consultation from both Treasury and the profession – including the Tax Practitioner Governance and Standards Forum ('**TPGSF**').[14] For this, sufficient time should be given in the drafting of any legislation to allow for this guidance to be developed before the reform becomes effective.[15] Having appropriate lead times and guidance will ensure that governance requirements imposed are not unnecessarily burdensome. We also highlight here, the relevance of recent anti-money laundering and counter-terrorism financing ('**AML-CTF**') proposals and the ongoing implications for practitioners.

[13] Ibid.

[14] Evidence based research has indicated that there is a lack of clear guidelines regarding the maintenance of in-house tax practitioner guidelines, so there is a rationale to strengthen these and make it mandatory for registration. See Kenny and Devos (n 12).

[15] Compared for example to the relevant 2024 Determination timelines, whereby following concerns raised by the profession a delayed start date for smaller firms was announced by the Minister on 31 July 2024.

More generally, as with other aspects of this Review, the TPB ought to avoid regulatory overlap. This extends beyond for example accounting bodies. It is noted that for example companies are already heavily regulated through ASIC requirements, so the focus should, as identified in the Consultation Paper, be restricted to tax agent services. When we reflect on what "governance requirements" entail, a focus is internal policies and procedures to ensure quality assurance. This ought not to extend to what entity structure broadly is deemed fit for purpose. Structuring decisions are based on a multitude of factors relating to commercial and other non-tax factors. Whilst we can contemplate restrictions or conditions therein, which are reflected within numerous aspects of the responses presented today, there is inherent risk of scope creep as to what the TPB function relates. Similarly, perhaps there is a lack of scope for this particular proposal, in that focusing on only companies and partnerships inherently exclude a sole trader that requires two TANs (business, individual). Such a business should come under comparable governance standards as could for example be supervision.[16]

However, we note that already through the 2024 Determination for example, there are now already impositions on all tax practitioners with respect to quality assurance. So, what does this proposal add? What can already be captured by TPB guidance expected to be delivered on the 2024 Determination. Our research highlights the importance and usefulness of TPB guidance in particular.[17]

We also highlight the importance of checks and balances following the initial registration. We raise the question as to whether the entity will ultimately be subject to any regular review (as opposed to investigation of breaches to s20-5 TASA 2009 or breaching the newly released 2024 Determination).

We present the analogy of the regulation and governance requirements for higher education providers. Universities and other institutions are subject to reoccurring reviews and audits to remain registered (e.g., Tertiary Education Quality and Standards Agency, '**TEQSA**').[18] Similarly, accounting programs therein are also subject to accreditation reviews by various bodies such as accounting bodies and Treasury (for courses falling within the financial planning program).

We are not recommending necessarily that the TPB initiate such extensive audit processes, as this would need to be subject to extensive consultation and ongoing resources. We do instead interpret lessons we can take from such approaches. For example, monitoring governance requirements following registration could build on annual self-declarations on renewal of TPB registration to reduce the burden.[19] This would create a positive duty to reflect on an ongoing basis the governance requirements that underpin being registered with the TPB. Any more substantial review by the TPB would be subject to a normal investigation process.

However, we argue that technology developments and data matching capabilities should be utilised here to take annual renewal obligations further. What elements of renewal declarations and the verification therein can be automated or semi-automated? In that sense, we argue that annual renewal offers the opportunity to submit what is analogous to a tax return but for a TAN. Given the question here relates to companies and partnerships, this "**TAN return**" would encompass detailing of the TFN of all supervisory agents or natural persons and naturally where applicable, their individual TANs. In this manner, there are plenty of lessons to learn from the ATO, from their data matching and prefilling programs. However, such a "return" should equally be relevant to individual TANs, designed for the particular circumstances of an individual registration. Overall, consideration needs to be given not only to the business structure in place but the connections and governance between natural persons and TANs, as well as authority and delegation.

This is a clear starting point for a transparent process of verification and validation, that makes use of contemporary technology and naturally aligns to an objective to have TPB registrations fit for purpose in a contemporary society – a digital society. We must then tap into that technology in response. Comparably, this follows the self-assessment principles of the tax system, however a sufficiently high bar needs to be set to ensure if this process of validation hits a roadblock, then the credibility of the tax practitioner naturally comes under question.

[16] It is important to note that tax practitioners are subject to practice certificate requirements, such as the APES codes and therefore many quality assurance requirements are already in place. We suggest a mapping exercise across such regulators would be useful to better understand the scope of overlap.
[17] See Devos et al (n 1) Tax Profession Response; Devos et al. (n 2) Selected 2019 TPB review recommendations.
[18] See for example TEQSA, Our approach to quality assurance and regulation (Online, 10 January 2023) https://www.teqsa.gov.au/how-we-regulate/our-approach-quality-assurance-and-regulation. Here, TEQSA outlines the purpose of such as protecting interests of students and the reputation and standing of higher education in Australia. The regulation ensures maintaining minimum standards, including adequate facilities, staffing, support and governance.
[19] Note for example CA ANZ members are required to declare number of CPD hours undertaken.

To really build strength, the "TAN return" could encompass pre-lodgement checks, operate as traffic lights – if verifiable declarations prove false, the TAN may be suspended – or proceeds to a more robust verifiable process to resolve the problems identified. This cuts to the heart of the concerning statistics that the TPB are flagging on tax practitioners failing in their duty to ensure their own tax affairs are sorted. These statistics reveal the reputation and standing of the tax profession and should not be tolerated.

Our research has raised concern over the TPB not having 'teeth'[20] and that those behaving egregiously simply ignore their obligations.[21] Expanding upon our research, we extrapolate this to the hypothetical applicant practitioners that may present an ideal set of governance policies and protocols on registration, however how do they proceed to operate? Similarly, tax practitioners may make declarations on renewal that are found to be false, however, does this stop their renewal in its tracks? Clearly, this is notwithstanding that most tax practitioners do the right thing.[22] If there are no checks and balances to cross check and validate proposed controls and declarations, the objective will come under question. Beyond investigations over whether there has been a false declaration made, what of the underpinning purpose of the declaration? What has ultimately been achieved?

We do also recognise the need for the TPB approach towards good governance to be one of ongoing and continual improvement. A gap / issue identified with respect to governance should not result in an immediate breach. The relevant entity should have adequate allowances to rectify the policy or procedural flaw. Similarly, an entity's activity that shows a progressive plan of such continual improvement should be able to present stages of development as satisfying requirements. This can be compared for example with the recent TEQSA request for information to address the risk of artificial intelligence ('**AI**').[23] Or for our "TAN return" analogy, an "amended assessment" ensues rectification of the issue to be progressed.

Ultimately, this is about continually progressing towards the ideal in an ever-evolving landscape, of education to prevent the need to punish and as such creating the setting to ensure a fundamental culture of ethical practice.

This response sets the scene for our responses in the following consultation questions.

2. **Is the current policy setting requiring entities to only demonstrate that they have a 'sufficient number' of individually registered tax practitioners appropriate? Should the number or ratio of individually registered tax practitioners be prescribed, or the number expanded to include all partners or directors within the entity who provide tax services?**

When we contemplate in isolation the idea of a ration of supervisors, this should not be prescription-based. We indicate that having a sufficient number in any particular circumstance would depend on the situation and will vary from cases to case.[24] As such rather than prescribing a particular number some flexibility recognised within the guidance documents would be best and a range or matrix could be provided. Expanding the number to include all partners and directors is also advisable. TPB guidance documentation should indicate various acceptable tax agent numbers for a variety of situations as indicated. There is no doubt a need for absolute transparency to build the culture these reviews are seeking to achieve.

However, there are fundamentally more pressing issues that play into the supervisory role. This goes to the utilisation of a TAN without sufficient supervision, for example. In addition, considerations of employee/contractor, offshoring and the implications of AI are critical elements that need to be contemplated.

Reflecting on Question 1 ('**Q1**') of this consultation, governance principles – internal controls – should encompass issues pertaining to supervision. Rather than prescribing a ratio, firms should have the ability to develop appropriate standards, policies, procedures to manage supervision aligned to the nature of their firm. This then enables leeway for transitioning, for contemporary developments within industry, for staff turnover, remote working, offshoring, for managing poor performance (whether in relation to the supervisor or supervisee), for managing distress, for managing inappropriate behaviour, for managing positions of power, conflicts of interest and so on.

[20] Devos et al (n 1) Tax Profession Response; Devos et al. (n 2) Selected 2019 TPB review recommendations.
[21] Ibid.
[22] The Review (n 6).
[23] TEQSA, Request for information: Addressing the risk of artificial intelligence (Online, 5 July 2024) https://www.teqsa.gov.au/guides-resources/higher-education-good-practice-hub/artificial-intelligence/request-information-addressing-risk-artificial-intelligence.
[24] For example, the scope of work, size of firm, level of complexity, area or extent of specialization, etc. all play a part.

Prescribed ratios capture none of this. Ratios are inherently going to be generalist and therefore in many respects arbitrary. They inherently focus on a threshold to respond and punish. They are not proactive in the holistic sense.

The TPB – as detailed in the consultation paper itself – looks towards flexibility in the proposed reforms. Prescribed ratios do not achieve this. As reflected in Q1, a constructive approach, in developing good governance frameworks are appropriate.

We similarly identify the link here to the underlying problem – egregious behaviour. What mechanisms are in place to prevent egregious tax practitioner supervising those readying themselves for registration? Those who have a problematic history of tax compliance, and TPB compliance, what culture are they embedding for the next generation of tax practitioners? What about those supervisees that find themselves in a position where their supervision has not met the standard and therefore fail in their ability to register with the TPB?[25]

Supervisors have an obligation to supervisees; supervisees need a pathway to respond before it is too late. However, supervisees are not yet registered and therefore are not subject to the dob-in provisions. Do they have whistleblowing protections? There are fundamental gaps here and these are about protecting and nurturing future ethical practitioners, preventing egregious perspectives.

How can we empower supervisees to maintain a pathway to ethical practice?

Whilst some may be within the scope of employer/employee, others may be contractors. What checks and balances are in place to ensure the supervisor/supervisee relationship makes sense? That they can actively supervise the work to an appropriate standard, that the protocols and policies enacted by a firm would capture? Would the governance in Q1 capture relationships beyond employee/employer? Could a potential applicant present sound governance policy that leave gaping loopholes for such problematic supervisor/supervisee relationships to ensue?

There are a range of core questions and issues observed that warrant further examination.

Reviewing the professional association accreditation and registration pathways

3. **Is the current RPA framework (initial eligibility, ongoing eligibility and compliance framework) appropriate?**
4. **If not, what should that framework look like? For example, replaced with an enhanced PDB regime?**
5. **How should tax practitioners who are currently registered under the voting member pathway be treated if RPA pathway was to be removed?**

We are of the opinion that the current PRA framework is adequate and that most tax practitioners are members of a professional body – this reflects an ongoing connection to the broader accounting community. Professional bodies have extensive regulations covering the activities of tax practitioners and should not be disregarded. This has the potential to fragment the community and long-term implications for the tax community should be carefully considered. Treasury and the TPB should contemplate the nuances that accounting bodies offer and the interaction and overlap in the regulatory landscape.

It is understandable to consider approaches where the TPB operates independent of and not be perceived as governing accounting bodies. Recognition of prior learning and experiences ('**RPL**') is a genuine pathway for practitioners to be eligible to register and practice ethically. We recognise that the underpinning rational for this recommendation is about perceptions of "regulatory capture", however it is important to note that we are not aware of statistics that indicate RPA pathways are associated with egregious practice. Moreover, RPL via accounting bodies are subject to quality standards.

Where prior learning meets comparable standards to the more traditional pathways, RPL should be considered. This is considered in a number of ways throughout this consultation document. The inherent shift we perceive as being proposed is away from the accounting bodies per se towards the learning experiences (such as micro-credentials, simulations, study generally). The nuances of discontinuing RPA yet introducing broad/non-

[25] See for example, *Duo v Tax Practitioners Board [2024]* AATA 2580.

standardised learnings as outlined in this consultation document needs further unpacking. Reflections of the quality of experience under supervision similarly needs to be contemplated within the scope of registration pathways.

Appropriate safeguards are necessary to ensure the RPL is appropriate. This should take into consideration the source of RPL, their compliance history (and supervisory), governance practices. Notably, it can be the provider that undergoes oversight/regulation as opposed or in addition to the learning. We observe that inherently the TPB's role can be made easier by leaning on providers that go through rigorous quality processes rather than it being an issue of regulatory capture.

There are key challenges faced across the education sector in terms of verification, authenticity, and invigilation – AI and academic integrity being a key element of this debate.

We also note as an example that CA ANZ is now in a position to provide Commonwealth Supported Places (CSPs) and with such example highlights the not so black and white position accounting bodies are in. The changing nature of the education landscape could lead to unintended consequences and an uneven playing field.

Any reform in this space ought to be grandfathered into the registration regime as this is only fair. Making it retrospective will only cause objection amongst current registered members. To de-register or impose additional burden on one particular category of registered practitioners, where no breach of TASA has occurred, is unfounded and arguably discriminatory.

Broadening the TPB's ability to accept alternative forms of 'relevant experience'

6. Do you agree that the current 'relevant experience' settings are set at an appropriate level for both tax agents and BAS agents? If not, what changes to these settings should be made and why?

Generally, we agree that the current 'relevant experience' settings are correct and set at the appropriate levels. It is important that these levels be maintained to ensure high standards. Evidence indicates that there are a small proportion of practitioners who are not competent in carrying out their duties, so these cases are likely to be reduced by maintaining high standards as a general rule. Having said that, we agree that some flexibility should also be afforded in individual cases (i.e., allow for career breaks) as exceptions to this general rule.

It is not unusual to incorporate career breaks. For example, in the university setting we have "achievements relative to opportunity" or "**ARtO**". Recognition of restricted opportunities is appropriate, however the mechanism to accommodate such circumstances needs to ensure integrity of contemporary experience. Where a case-by-case approach is taken, clear transparency in such decision making should occur and monitoring and reviewing to ensure consistency. This should include clear policies and guidance around how a particular tax practitioner can trigger ARtO.

Fundamentally, relevant experience is an on-going necessity for practitioners and therefore quality of ongoing continued professional development ('**CPD**') is equally front of mind particularly in an ever-changing tax and technology landscape.

7. Do any of the proposed options, or combination of proposed options, provide a balanced and equitable method of embedding flexibility in the registration regime? Are there any other alternative options which provide a more balanced method of providing additional flexibility?

Our preference is for option 1 as read as this requires minimal change and provides further flexibility as desired.

8. Do you perceive any problems or have any concerns with providing the TPB the ability to consider exceptions to the 'relevant experience' criteria on a case-by-case basis (Option 1)?

No, we believe that option 1 is appropriate in providing the TPB a discretion in particular cases, to overcome the rigidity of the relevant experience criteria. In this regard it is important that the TPB are consistent in applying their discretion and are able to base their decisions on the evidence presented.

9. In relation to simulated work experience programs under Option 1, do you believe the cap of 20 per cent provides sufficient flexibility without compromising the quality of tax practitioner services that would be provided? If not, what would be a more appropriate percentage and why?

The issue with simulated work programs relates to being able to assess the evidence measuring their genuine quality/equivalence. In a university setting, decisions are made to allow credits and recognition of prior learning on a case-by-case basis subject to formal policies and procedures. In setting an arbitrary cap whether 15% or 20%, there is the potential to compromise the decision taken in making an overall assessment. If a cap must be made available to ensure standards are kept, a lower threshold is advisable as opposed to increasing it.

Fundamentally, the question needs to be asked – is simulated experiences seeking to replace real-world experience? If so, what are the inherent risks of such. There is a fundamental need for both education and work-experience.

We highlight experience in the form of work-integrated-learning ('**WIL**') in the higher education space, such as via Tax Clinics or industry placements. There are clear opportunities to work with universities to establish quality offerings that encompass WIL. Notably, Tax Clinics are limited to select universities. We see there being a need to contemplate further opportunities for tax-specific WIL programs rather than just simulated experiences.

10. Do you believe that the introduction of an alternative, longer time period to obtain 'relevant experience' (Option 2) would provide sufficient flexibility to account for special circumstances? What levels of relevant experience are appropriate alternatives for each registration pathway?

We believe that the danger with Option 2 is by expanding the time period within which to gain the additional experience the practitioner experience has more chance of becoming out-dated. As indicated, the fast-evolving nature of the tax profession requires experience gained to be relevant and current. Understanding that option 2 provides for more flexibility the trade-off is that the profession risks taking practitioners who are not up to date with the latest knowledge/knowhow. It still may be possible to consider exceptions to the current general rule for registration pathways, but prescribing a longer period per se is not supported.

11. Have any other regimes embedded similar flexibility in an effective manner? If so, how?

Not that we are aware of. Refer to our earlier reflection on WIL programs in higher education.

12. Should the definition of 'relevant experience' for registration purposes be broadened (or, contracted)? If so, why?

The current definition of 'relevant experience' is sufficient allowing for supervision and control and also some flexibility with 'work of another kind approved by the Board'. This discretion for the TPB gives them flexibility in deciding particular cases already so there is no need to broader further.

Overall, there is an importance in vetting or accrediting programs and/or providers to ensure any experience or learning is of a sufficient quality or standard. Similarly, considerations or frameworks towards verification of identity, authenticity of learning and invigilation mechanisms are relevant. It is particularly pertinent to contemplate such within an AI enriched society.

Primary qualifications settings

13. Do you agree that the current primary qualification requirements are struck at a level that remains fit for purpose? If not, why not and what changes do you believe are required?

Yes, we agree that the current primary qualifications are appropriate and fit for purpose. University courses should provide the right mix of technical, ethical, and digital competences within their courses as a basis for an accountant/tax practitioner. Core business, accounting and legal subjects taught are current and rigorous to comply with TPB requirements.

Similarly, such programs are subject to significant oversight (TEQSA, accounting bodies, Treasury, TPB) and therefore have inherently strong governance structures. We recognise that the education landscape is evolving, however there ought to be a foundational of knowledge underpinning qualification requirements. Specialisation, up-skilling, updating can then be considered through education and experience stacks that make use of a broader range of educational offerings.

14. Do you agree that short-form credentials should not be included within the primary qualification settings? If not, how should they be included?

Short-form credentials should not in the most basic terms be included in the primary qualification settings, but it is agreed and understood that there is a place for this more specialized learning in an on-going post graduate mode in particular and this is an area of potential growth and opportunity. In this regard it is suggested that tax practitioners take up these short courses with their respective professional bodies and have completed competency-based assessments to certify competence (e.g., digital literacy). Completion of such modules/micro credentials should or could become a requirement of the practitioner's CPD and should be recognised as such by the TPB.

As already highlighted, the tone of this consultation document indicates a re-orientation from provider (accounting body) to learning experience (micro-credential, simulation, etc.). Whilst this is inherently logical to streamline and offer flexibility and agility, inherently checks and balances are required to ensure the learnings are of a necessary standard. This reflects issues of not only of level of learning (such as in accordance with the Australian Qualifications Framework, '**AQF**'[26]) but governance and oversight of the quality, verification of identify and authenticity of learning.

Similarly, consideration of AI and other integrity issues are paramount in any learning offering. Inherently this can be managed through utilising accredited/registered providers. Thus, working with these to establish appropriate education stacks that can be equivalent to primary qualifications is possible. This would involve necessary mapping of course learning outcomes, assessment requirements and other aspects. This may be suitable for when a candidate comes from an alternate discipline and utilises micro-credential stacks to meet competencies expected within this discipline. Overtime, it is expected that more opportunities to complete such education experiences via micro-credentials will arise.

This is also relevant for CPD, and we highlight the importance of on-going contemporary CPD that build competencies and expertise.

15. Are there any unintended consequences, benefits or issues that should be considered in granting the TPB additional flexibility to accept short-form credentials?

The TPB can accept these short-form credentials from only recognised professional bodies or accredited training organisations, where credentials have sufficient safeguards and controls in place to manage quality, verification of identity and authenticity of learning. Completion of the competency based short-form credentials need to be officially recognised by the TPB at various stages so that the practitioner can continue to operate. TPB ought to develop a register of approved micro-credentials that meet these requirements in a similar manner to approved courses.

'Fit and proper person' in the TASA context

16. Is the fit and proper test currently fit for purpose? If not, what needs to be included in this test?

We agree that generally the fit and proper purpose test could be tightened up and aligned with that of other regulatory bodies to promote a more consistent approach by government. Similar criteria used by ASIC, VLAB and APRA in the fit and proper person test can be brought into the TASA. It is noted that aspects of 'conflict of interest,' disclosure of spent convictions, and the 5-year mandatory consideration can all be updated and revised.

[26] Australian Qualification Framework (Online) https://www.aqf.edu.au/.

Through registration and renewal, there should be an alignment between what constitutes fit and proper with the elements of the Code. As highlighted in Q1, practitioners ought to register/renew in a manner which is not only self-declaring, but where technology and data matching permits, that these are verifiable. The "TAN return" identified in Q1 should incorporate evaluation of fit and proper, the Code items and other relevant information. This should be an active process for both the practitioner and TPB, where this "TAN return" is vetted/verified to the extent practical.

17. Should the matter of conflicts of interest be incorporated into the fit and proper person requirement? (Option 1)

It is recognised that s 30-10(5) of the TASA indicates under independence that, 'adequate arrangements for the management of conflicts of interest' should be in place. On registration, this bar should be set by incorporating it into the fit and proper person requirement with ongoing requirements on renewal. Evidence from recent events have shown how accountants/advisers can be compromised when operating in different capacities and to assist them in making the correct judgements when these situations arise it would be beneficial to have the conflict-of-interest issue prescribed.

Part of the "TAN return" identified in Q1 is the potential to incorporate along with fit and proper reflections is the inclusion or updating of a register of conflict of interests. All potential conflicts of interest should be declared at the outset of any engagement and having a formal record of such will assist in identifying and managing any issues that may arise.

18. What considerations or requirements should be included in the TPB's conflict of interest test? Are APRA's and ASIC's conflict of interest considerations appropriate for the TPB to model their conflict-of-interest requirements?

It is noted that the APRA requirement which indicates that a person 'has no conflict of interest in performing the duties of a responsible person position or if there is a conflict of interest it must be managed to ensure that there is no material risk in performance of duties,' is also appropriate for inclusion in the TPB model.

19. Should the management of an individual's personal income tax affairs, and that of their associated entities, be a relevant statutory consideration under the fit and proper person requirement?

We agree that the management of an individual's personal income tax affairs is a relevant consideration and falls under Code item 2 of the TASA.[27] There have been recent statistics by the TPB highlighting the significant number of tax practitioners failing in this duty, which brings disrepute to the profession and the TPB.

We perceive this issue as fundamental to the ongoing responsibilities of a registered tax practitioner and should be closely policed by the TPB. There should be a positive duty established annually to reinforce this – for which verification can occur. This sets a fundamental tone to a practitioner's duty, and for which should be a gatekeeping duty. In the "TAN return" identified in Q1, we propose that a practitioner make such declaration and that declaration is confirmed through data matching (based on for example dichotomous lodgement status of tax return/BAS/FBT etc. of each respective TAN declared). Data matching then can proceed to confirm and then approve comparable to the ATO's notice of assessment or otherwise, trigger request for further information or other.

20. Should disclosure of spent convictions in applications for registration be mandatory? (Option 2)

We agree that it may be reasonable for disclosure of spent convictions to be a requirement of TPB registration. To assist in establishing whether the applicant is a person of integrity and good character and thereby suitable for the position of tax practitioner, knowledge of their history is paramount. Whether an applicant is a fit and proper person may not be determinable without an assessment of relevant spent convictions.

[27] Section 30-10(2) of the TASA 2009.

However, it is important to reflect on the underpinning purpose of spent conviction schemes generally. These are for example in place to ensure rehabilitation, to reflect that parties have done "their time" and in recognising the passage of time and level of offence.[28] We can see comparable reflections being made in our research when raising the issues of naming and shaming and the TPB register of tax practitioners who have breached the Code.[29] The difference here though is the public nature of the TPB register and the spent convictions being accessed within the scope of TPB registration application reviews.

We recognise that the tax profession – similar to the legal profession – is one that expects a high level of integrity. We recognise therefore that convictions inherently may not be consistent with that. We do, however, need to be mindful of the justice system and how it operates. We need to be mindful of the vulnerabilities in spent convictions, including the age of when the offence occurred, the passage of time, the nature of the offence and whether it was minor, as well as the relevance to the tax system. We need to be mindful of those that may be overrepresented in the statistics, such as First Nation communities and youth.[30]

More generally, a spent conviction is not necessarily equivalent to or going to result in egregious behaviour within the tax profession. Treasury ought to consider not only the vulnerabilities noted above, but whether the spent conviction has anything to do with financial matters (e.g. compare fraud with a motor vehicle offence).

Where spent conviction records are obtained, these should be treated with appropriate safeguards to protect the privacy of parties involved. There ought to be protections more generally for the interpretation to prevent discrimination.[31] Like many facets of our research findings, this trends towards proper process and caveats to agreement.[32]

Fundamentally, the presence of a spent conviction ought not to result in an automatic denial of registration.

21. Do you believe the TPB should be required to consider the events listed in subsection 20-15(b) from within a different period of time? Should this be a longer or shorter period, or regardless of when the events occurred?

It is noted that a 5-year time frame is specifically referred to in s 20-15(b), but as indicated this does not limit the TPB considering other events beyond the 5-year period. So, in that case it could be removed altogether if causing confusion or left as is. The TPB has flexibility anyway to go beyond this time period and the section would be interpreted as such so Ok to leave.

22. What other matters should be considered in assessing fitness and propriety? Are there any considerations used by other Government regulators that should be included in the TPB's fit and proper test?

The measures discussed above adequately cover what should be considered as part of the fit and proper purpose test.

Other proposals for consideration

23. Should the Code be amended to require individual tax practitioners to establish and maintain a contingency/succession plans to ensure there is continuity of services to clients in the event of a significant disruptive event?

It is part of any good business to have policies and procedures in place for a raft of issues such succession planning, although this is generally at the discretion of the professionals themselves. However, to prescribe principles with respect to contingency/succession planning within the Code or as part of the governance principles

[28] Parliament of Victoria, Inquiry into a legislated spent convictions scheme (Online) https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-a-legislated-spent-convictions-scheme/reports ('Spent Convictions').
[29] Devos et al (n 1) Tax Profession Response; Devos et al. (n 2) Selected 2019 TPB review recommendations.
[30] Spent Convictions (n 28).
[31] Ibid.
[32] Devos et al (n 1) Tax Profession Response; Devos et al. (n 2) Selected 2019 TPB review recommendations.

considered in Q1, would be prudent given the nature of the tax profession and level of risk involved in modern business operations. In the interest of client protection although insurances also come into play here. It is also relevant to note that policies and procedures should be place for other aspects of the client/agent relationship – such as where it may be appropriate to discontinue engagement. To what extent these should be prescribed though is challenging and a principles-based approach is necessary along with appreciation of overlapping regulation.[33]

24. Should the TASA be amended to give the TPB greater flexibility to accept other qualifications outside the traditional tax practitioner course of study?

We have reservations with regards to allowing other qualifications to be accepted outside of the traditional tax practitioner course. Generally speaking, the high standards of the current qualifications can be difficult to match. Whether the TPB should be given a discretion outside the legislation to consider other qualifications could be accommodated but it should not be prescribed.

Similarly regard needs to be had to the accreditation process underpinning any other qualification. Whilst the accounting and legal education programs face significant oversight across a range of regulators or professional bodies, other disciplines face oversight from only higher education regulators. Similarly appropriate AQF levels should be maintained.

25. Should the TASA be amended to capture existing and emerging tax intermediaries?

Amending the law to capture existing and emerging tax intermediaries to keep up with change is appropriate. At present, tax laws are arguably lagging in keeping pace with various waves of technological changes. Inherently, appropriate law and regulatory reform takes time to be carved out to be suitable in a modern business environment.[34] Likewise the TASA and TPB should comparably adapt to technological changes.

We refer to recent work co-authored by one of the authors of this submission that examines issues pertaining to what constitutes tax agent services when tax practitioners or taxpayers utilise third-party providers of information.[35] This examination delves into the potential areas where these information providers may meet the necessary elements[36] to satisfy the definition of tax agent services as per s90-5 of the TASA 2009.[37] This raises key concerns over when a provider may in fact be obligated to register with the TPB and currently falling outside of the scope of regulation.[38]

The TPB ought to reflect further on the increasingly digitalised toolkit both practitioners and taxpayers can make use of, as well as the diversification and expertise relied upon in bringing together key components of an entity's tax liabilities, obligations, or entitlements that the entity can reasonably be expected to rely on in order to satisfy or claim such.[39] This extends to the scope for which Regulation 26 provides for exclusions for which services are not considered tax agent services.[40]

This is particularly relevant where we see increasing numbers of taxpayers lodging via myTax rather than relying on tax practitioners.[41] The access and utilisation of such third-party providers become increasingly pivotal.[42]

26. Should the TASA be amended to capture in-house tax advisers such as employees or secondees? If so, which classes of in-house advisers should be required to register with the TPB?

[33] For example, where a public practice certificate is held.
[34] See for example Elizabeth Morton, Ken Devos, Gillian Vesty and Lan Nguyen, 'The crypto-economy and tax practitioner competencies: an Australian exploratory study' (2023) 21(2) eJournal of Tax Research 203.
[35] Elizabeth Morton and Lisa Greig, 'Generating and relying on third party information in a digital eco-system: what are tax agent services?' (Working Paper, August 2024)..
[36] TPB(I) 39/2023 What is a tax agent service? (Information Sheet, 31 January 2023) https://www.tpb.gov.au/tpbi-392023-what-tax-agent-service 3.
[37] Morton and Greig (n 35).
[38] Ibid.
[39] As per s90-5(1) of the TASA 2009.
[40] See sub-section 90-5(2) of the TASA 2009 and Regulation 26 of the Tax Agent Services Regulation 2022.
[41] See for example Jawad Harb, Elizabeth Morton and Venkateshwaran Narayanan, 'Acceptance of myTax in Australia' (2023) 38(1) Australian Tax Forum 111.
[42] Morton and Greig (n 35).

Whilst in theory, we understand introducing a requirement to register with the TPB to ensure consistent rules apply to all who provide taxation services and reduces the likelihood of an adviser not being accountable for their actions, the current proposal is too broad and therefore not appropriate in its current form.

Fundamentally, we must acknowledge that the Australian taxation system is a self-lodgement system in the first instance. All taxpayers are required to lodge and can self-lodge. Any in-house employee of the business is subject to the terms and conditions of their employment/secondment and other regulatory frameworks.[43] Arguably, they can be characterised as self-lodging not providing tax agent services for a fee or other reward. Firstly, the employee is not acting as an intermediary. Secondly, salary and wages do not fall within the element of 'fee or other reward'.[44]

There is an inherent risk of scope creep and overlapping regulation leading to unnecessary burden presented by this proposal. Without having clear definitions of the advisers to be caught by this proposal, there is a lack of clarity of services captured, of authority and delegation, supervision, and oversight and so forth.

Currently, the TASA already captures within its scope unregistered tax practitioners. Thus, the TPB can and should investigate and action egregious behaviour. If a party is not providing tax agent services for a fee or other reward, then their activities are beyond the scope of the TPB, and other relevant agencies and regulators apply. Whilst an entity can provide services within the scope of employee/employer, the question arises as to the characterisation of that circumstance.

Further investigation and data gathering on the risks of egregious behaviour within such context is warranted to clarify the purpose of this proposed reform. Moreover, a general observation is that the TPB is inherently subject to resource constraints and the concern here is that there have been waves of additional regulation being imposed on tax practitioners and a focus ought to be on the capacity and responsiveness of the TPB in relation to monitoring and policing the TASA. There is no value in imposing additional layers of regulation if there is insufficient action by the TPB to ensure compliance. Our research has highlighted concern by tax practitioners in the TPB having 'no teeth' in this regard prior to the waves of additional regulation being imposed.[45] Broadening the scope, will inherently increase the strain on the TPB and would warrant appropriate resource allocations if such a proposal were to be adopted.

One example of concern here is the TPB statistics on tax practitioners' non-compliance with their personal tax obligations.[46] This is not a new issue as observed in our analysis of TPB Annual Reports.[47] Such compliance is subject to annual self-declarations made by practitioners on renewal of their registration. This suggests that registered tax practitioners are making false declarations, and the question arises as to whether they are being sufficiently policed on their self-declarations, and to what extent are they being called out for this non-compliant behaviour in real-time. Such data points ought to be verified through data matching in real-time. As highlighted in this submission, reflection on the renewal of registration and self-declaration process is warranted and that reframing it as a "TAN return" may be an approach that does not inherently increase the burden on tax practitioners but ensures that the TPB is actively responding to fundamental components of ethical and compliance practice. Simply put, we perceive there to be avenues for checks and balances to be strengthened in real-time. Treasury should contemplate in this Review process that solutions are not restricted to increasing regulation and imposing additional obligations (many suggestions and new reforms can already be mapped to overlapping regulation derived from existing codes). Treasury should look to ways in which existing compliance can be monitored and policed.

27. Should the TASA be amended to require legal practitioners who provide tax agent services, as defined in section 90-5 of the TASA, for a fee or reward, to be registered with the TPB?

It is suggested that in the interest of consistency of treatment legal practitioners who provide any kind of tax agent services should also be registered with the TPB. The basis for this proposal is to ensure consistency of treatment

[43] E.g., they could have a legal practice certificate, be a member of an accounting/tax/legal body and subject to comparable codes of ethics, or more generally be a member of the Corporate Tax Association.
[44] TPB(I) 40/2023 What is a fee or other rewards? (Online Information Sheet, 9 February 2023) https://www.tpb.gov.au/tpbi-402023-what-fee-or-other-reward.
[45] Devos et al (n 1) Tax Profession Response; Devos et al. (n 2) Selected 2019 TPB review recommendations.
[46] TPB, Message from our Chair (YouTube, 18 July 2024) https://www.youtube.com/watch?v=UXwgdSD9hcY.
[47] Elizabeth Morton and Ken Devos, 'Reflections on TPB investigation statistics following the crackdown on tax practitioner misconduct' (Working Paper, August 2024).

and reduce the likelihood of a legal adviser not being accountable for their actions in a comparable manner to tax practitioners.

However, the function of the TPB and TASA is a fundamental carve out that provides to accountants the ability to provide tax agent services. This is a narrow form of legal service, the broader service forming part of legal practice – subject to significant and separate regulatory oversight. This is reflected in the exemption of such services from falling within the scope of tax agent services regulated by the TPB.[48]

It therefore should not be the position of the TPB to then overlap regulation of such legal practice. It is not the remit of the TPB. These practitioners are subject to significant comparable requirements such as the Legal Professional Uniform Law in NSW and Victoria. They are subject to comparable codes of conduct. They cannot provide legal services without the necessary certificate of practice that encompass robust checks and balances.

If they choose to have the ability to prepare and lodge tax returns, have access to the portal, then they are required to register with the TPB. This in theory appropriately captures the relevant activities.

Where we see it as more appropriate to contemplate bringing in legal practitioners within the scope of the TPB is where there are more grey areas between preparing and lodging tax returns and providing broad tax advice. One example is Tax Clinics run by universities. There are examples where one can be run by a registered tax practitioner and therefore subject to TASA obligations and the new tranches of reform; whilst another may be run through a law department with oversight by legal practitioners. In this example, the question arises as to whether they have (or should) the same regulatory obligations.

Whilst we do not see it as appropriate more generally to bring legal practitioners within the scope of the TPB, we see instead the potential need to tweak, or clarify, the existing exclusion for legal practitioners to consider the *context* for which that legal service or practice is being offered. If the context is consistent with tax practitioners (e.g., within a Tax Clinic setting[49] or tax practice), then the legal practitioner ought to be captured by the TPB and TASA. This may be irrespective of the extent to which they are permitted under legal practice regulations to do so or to the extent they are providing service consisting of preparing, or lodging, a return or statement in the nature of a return.[50] In essence, this is comparable to a test of **perceived tax agent services**.[51]

In contrast, if the legal practitioner is providing services relating to taxation laws with the context of legal practice, then the legal practitioner should not be captured. Instead, it remains appropriate that they fall within the significant oversight of legal regulations and frameworks as s50-5 of the TASA 2009 ensures.

Alternatively, the core issue that is arising when contemplating this proposal is the now fundamental imbalance in regulation for services provided in respect to taxation laws. The concern here is that comparing the regulatory frameworks for tax practitioners and legal practitioners – as flagged in the virtual roundtable held on these issues on the 31 July 2024 – is whether there is a need to recognise *over-regulation* of tax practitioners. Treasury ought to undertake a mapping exercise comparing the rights and obligations of tax practitioners and legal practitioners and contemplate the equity and fairness for what is overlapping services and the detrimental impacts for the tax practitioner community.

Finally, given the nature of this review is specific to the TPB registration requirements, additional consultation ought to be carried out that is directed to and therefore appropriately alerts legal practitioners to their potential inclusion into the TASA. We are mindful that legal practitioners may not be aware of this consultation as being relevant to them, nor the potential impact to their obligations to practice law. As such we urge further opportunity for legal practitioners to turn their mind to this proposal.

[48] See s50-5 of the TASA 2009.
[49] An issue identified in the Treasury Roundtable held 31 July 2024.
[50] See s50-5 of the TASA 2009.
[51] Borrowing the terminology from the auditing concepts of 'perceived independence' and 'actual independence'.