

30 August 2019

Mr Keith James
c/o Nick Westerlink
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: TPBreview@treasury.gov.au

Dear Mr Keith James,

Review of Tax Practitioners Board, Discussion Paper July 2019

As the primary union representing Australian Taxation Office employees and the Australian Public Service (APS), the Community and Public Sector Union (CPSU) is committed to providing a strong voice for our members in key public policy and political debates. We are also committed to protecting the rights and conditions of Australian Public Servants.

We welcome the opportunity to make this submission to the review of the Tax Practitioners Board.

The CPSU is happy to provide further information regarding any of the matters raised in this submission and supplementary information on other relevant issues.

For further information please contact Katrina Byrne, Field Organiser, via email at Katrina.byrne@cpsu.org.au or on 02 8204 6946.

Yours sincerely,



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Introduction

The CPSU welcomes the opportunity to make a submission to this review of the Tax Practitioners Board (TPB).

Our primary concern with the discussion paper is the central tenet, which is repeated throughout the report, namely that stakeholders have a perception the TPB is not independent from the Australian Taxation Office (ATO). Instead of addressing this perception with information, the proposals recommended in Chapter 3 are a band aid solution which will adversely affect staff without necessarily addressing the issues identified. To suggest staff operate under a real or apparent conflict of interest between the Board's functions and that of the ATO Commissioner's is tantamount to an accusation of staff breaching the APS Code of Conduct as set out in Section 13 of the Public Service Act, and one we would object to.

We have to ask, what evidence is there that these issues are genuine, or are they merely the perceptions of disenchanted stakeholders? And is this response in proportion to this problem?

CPSU members oppose the recommendation in Chapter 3 that the TPB make cosmetic changes to staffing arrangements to placate the incorrect perceptions of some stakeholders, especially when these changes will come at the cost of members job security and conditions of work. Further, by remaining co-located with the ATO and continuing to use ATO staff under a "shared systems" arrangements, the TPB will make minimal progress in the visual separation of operations from the ATO.

We propose the TPB take on the difficult work of further educating the tax community regarding the integrity of its staff, and work with employees to update the current Memorandum of Understanding (MOU) with the ATO in a way which showcases the transparency of these staffing arrangements.

CPSU Recommendations

1. That the ATO and TPB pursue option 3.22.1 as a priority, with consideration given to establishing the Chair of the TPB as the relevant *accountable authority*. We strongly urge against proposals 3.22.2 and 3.22.3 which both create many more problems than they aim to address.
2. That the TPB pursue a comprehensive education program to address the stakeholder perceptions of TPB independence being hampered by the ATO Commissioner, as well as a public education program to education consumers about their rights. The CPSU also supports the recommendations to enhance the diversity of the Board, to expand the suite of sanctions available to the TPB and the proper resourcing of the TPB to deliver these functions.

What CPSU members think of the current status quo

CPSU members are satisfied with the current legislative framework governing the TPB in *Tax Agent Services Act 2009 (TASA)*. The Tax Practitioners Board is defined at S60-10 of the Act, and is independent of the Commissioner of Taxation, who holds a statutory authority independent from the Board's statutory body and functions. The CPSU supports a change to establish the Chair of the TPB as the relevant accountable authority, but is opposed to further changes to existing staffing arrangements as recommended by the Discussion Paper.

The staff who assist the Board are not members of the Board, but its secretariat. The staff, as per S60-80 and Reg 11, assist the Board in undertaking its functions and exercising its powers. All strategic, policy, and reviewable decisions of the Board are made by the Board members. We would suggest allowing more delegation to staff would be appropriate, including allowing senior staff to form part of committees, where a majority of the committee is made up by Board members.

We also note the Board, made up exclusively of active industry participants, have not acknowledged the strong influence their industry has over their submissions to this Review. There has been significant push back from the Associations and broader practitioner population as the Board has been taking a stronger regulatory and enforcement approach to the black economy, including reining in overclaiming of unsubstantiated deductions or the structuring of tax affairs to minimise child support obligations or maximise benefits. These are profitable lines of work and any undue pressure on the Board's operational and administrative resources will help divert efforts to rein in unethical conduct of behaviours.

Structure of Tax Practitioners Board

Chapter 3 raises many questions for the future of ATO staff in the TPB. It outlines three potential options to address the perceived lack of independence of the TPB.

- 3.22.1 Retain the status quo. The current arrangements have the advantage of significant savings in infrastructure costs with the TPB able to use the same premises and systems as the ATO. Working in the same building also helps to foster a close working relationship. Using ATO staff as secondees also ensures a reliable pool of staff who will already have a lot of the necessary expertise and technical knowledge.
- 3.22.2 Establish the Chair of the TPB as the relevant *accountable authority* and develop a model such that the TPB employs its own staff, is located in its own premises, and is responsible for its own budget and reporting. This would be a similar arrangement to how the IGTO has been set up. This model would satisfy the requirements set out by The Ethics Centre.
- 3.22.3 Establish the Chair of the TPB as the relevant *accountable authority* responsible for its own budget and reporting. However the majority of the staff would be ATO secondees and the ATO and the TPB would operate under a "shared services arrangement". This model would also satisfy the requirements set out by The Ethics Centre and is our preferred option and is discussed further below.

The CPSU is of the view that the current status quo, as outlined in 3.22.1, is working well for TPB operations, although we are concerned by the increasing number of labour hire staff being engaged in the TPB. CPSU members strongly support maintaining their current employment arrangements with the ATO. The current

arrangements allow for an exchange of well trained and highly qualified staff between the ATO and the TPB. Remaining as part of the ATO allows the TPB to access a large pool of potential employees and offers TPB staff further pathways in career progression and broader training capacity which would not be available if TPB was a standalone institution.

The second and third proposals in 3.22.2 and 3.22.3 are more complex and raise a significant number of concerns regarding the future job security of current TPB staff. Both proposals establish the Chair of the TPB as the relevant authority, with differing implications for staff. The second option where the TPB becomes an entirely separate entity is prohibitively expensive and not recommended by the discussion paper.

Firstly, will the TPB become its own agency under the Public Service Act, or will it be stood up as a statutory authority? A statutory authority is not covered by the Public Service Act, and thus there is a far greater risk to staff in preserving their current conditions. In addition, this will further complicate a continuation of the current secondment arrangements. If the TPB were to be stood up as a statutory authority it would lead to more tenuous employment conditions for staff, as they would no longer be covered by the Public Service Act.

If the TPB becomes its own public service agency it would still be covered by the Public Service Act which maintains the base level of conditions. There will be significant questions around both the creation of new Enterprise Agreement and the arrangements governing secondments of ATO staff working within the TPB. The arrangements for staff will be varied as the proposal flags using some ATO staff but also engaging specific TPB employees to perform the sanction and litigation functions.

Further, proposal 3.22.3 opens a potential can of worms, introducing a framework whereby some staff would be direct employees of the TPB and others acting on secondment from the ATO. We have many concerns around this proposal, as it raises many issues for equity staff moving forward.

The question needs to be asked about the effectiveness of this proposal in addressing the perceived impartiality of the TPB in any event. If the TPB remains co-located in ATO sites and continues to use ATO staff, it is unclear how it would address current stakeholder concerns.

Capability of the TPB without ATO connection

Of primary concern is the movement of staff from a very large agency, the ATO, and into a much smaller organisation. This reduces the mobility of staff in the short term, but in the long term it almost negates the opportunities for staff to be redeployed in the event of restructure. We think career development and maintaining staff capabilities is worthy of further consideration by the review.

Staff are of the view that recruitment and retention of experienced employees will be increasingly difficult without access to the large pool of ATO professionals who currently act as TPB employees. Many staff would be hesitant to move from a large organisation of over 18,000 employees into a small agency of less than 200. Removing the TPB secretariat from the ATO will cause a “brain drain” of staff, compromising institutional knowledge, experience and staff productivity.

CPSU members have expressed concern about the possibility of a forced move from their current ATO employment agreement into a much smaller agency. Any move, should it eventuate, must proceed on an entirely voluntary basis and not by force using a Section 26 determination. The use of these measures in other agencies caused great distress and detriment to staff.

Chapter 3 also includes recommendations regarding current secondment arrangements for TPB staff:

- 3.28.1 Currently the arrangement by which staff are seconded from the ATO to the TPB is governed by an MOU. The review has been advised that this MOU is currently in the process of being re-drafted.
- 3.28.2 It states in the MOU that all employee related matters are handled in accordance with the ATO's Agency Agreement and related policies and procedures.
- 3.28.3 Unlike secondment arrangements that the ATO has with other agencies there is no specific right for the TPB to terminate the secondment.
- 3.28.4 Of note is that the MOU is not a legal agreement and does not create legally binding obligations on either the ATO or the TPB.
- 3.28.5 In addition to the MOU the Commissioner of Taxation issued a direction to all ATO secondees to the TPB on 27 October 2010 that remains current. That direction states that:
I direct that all ATO employees made available to the Board should at all times carry out all reasonable and lawful directions of the Board, as conveyed by the Chair or a Board member designated by the Chair.
- 3.28.6 Providing transparency in the staffing arrangements and formalising the rights of the TPB with respect to its staff may assist to alleviate the perception raised during consultation that the TPB's staff lacked independence from the ATO.
- 3.28.7 Staffing arrangements could be formalised by requiring ATO secondees to have a signed Secondment Agreement. Alternatively, it might be that they take leave without pay from the ATO while on secondment.

CPSU members and their colleagues working for the TPB take great pride in the work they do. As per the direction from the Commissioner of Taxation in 3.28.5 above, staff are guided in all work processes by the TPB Board.

We are also concerned at the claim floated in point 3.28.3 that the current MOU does not provide the TPB with the option to terminate secondment arrangements. This is concerning as it appears the ATO is flagging their intention to change this arrangement through the renegotiation of the MOU currently underway. The CPSU is concerned by the idea of the TPB being given arbitrary powers to terminate employment arrangements without due process.

Point 3.28.7 raises the possibility of formal secondment agreements between staff and the TPB. It is difficult to comment on the nature of these arrangements given the lack of detail. The CPSU is however concerned at the proposal for ATO staff to be engaged in secondment positions whilst on leave without pay from the ATO.

CPSU staff are open to the potential to further formalise secondment arrangements between the TPB and the ATO but remain concerned about proposals such as those made in 3.25 which would create a confusing dual workplace whereby some staff are direct TPB employees and some are ATO secondees.

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

CPSU members have significant concerns about the increasing use of labour hire in the service delivery portions of the TPB. These staff are more expensive to employ than permanent ATO staff, and the temporary nature of their employment leads to high turnover which in turn exacerbates training requirements and budgetary pressures in the TPB. Building a well-trained workforce of secure and committed APS employees is essential in providing quality services to our community.

Additionally, we have serious concerns about the current workloads in the TPB. Staff are being asked to do more with less resources. Customer aggression is a frequent and unsafe experience for front line staff, often due to delays in processing registrations due to excessive workloads. The CPSU requests an honest assessment of the numbers of staff required to perform the important work of the TPB, and a commitment from the Commonwealth Government to remove the Average Staffing Level (ASL) cap to ensure adequate staffing levels in the TPB.

Community buy-in

The CPSU supports the diversification of Board representation, with the aim of better reflecting the broader community. To this end we support the inclusion of at least one “lay person” on the Board, especially persons with experience in the fields of consumer protections and public administration. All current serving Board members are themselves tax practitioners, tax advisors or tax avoidance lawyers, raising the prospect that the concerns of consumers and the boarder public are placed secondary to those of the tax profession. The broader community, and taxpayers in particular, must be assured that their rights will be championed and protected by the Board.

Future consideration should also be given by the Minister to increasing the cultural diversity of the Board to better reflect the diversity of the community as a matter of urgency.

Regulation of tax practitioners

The CPSU supports the expansion of the fit and proper person requirements under the *TASA*, particularly regarding the consideration of conflicts of interest, disqualification from managing corporations, or being involved in the business of a terminated or suspected tax practitioner. We are hesitant to endorse a broad assessment of an individual’s associates, but support the examination of business partners, especially those tax practitioners who operate a practice with a deregistered or terminated tax practitioner.

CPSU members have identified the lack of information sharing between regulatory agencies such as Australian Securities and Investments Commission (ASIC) and the TPB as a direct impediment to protecting the public interest. For example, if ASIC find a person is not suitable to be director of a business or firm, this information must be shared with the TPB to ensure these persons are not permitted to act as directors of a tax agent company, and vice versa. Currently this information is not routinely shared, which is putting consumers at direct risk.

We support the recommendation to increase the information available to consumers about individual tax practitioners on the public register. Members of the CPSU are concerned with the lack of consumer awareness regarding the regulation of tax practitioners, and consumer protections currently in place. We are concerned at the problems with unregistered tax practitioners, and fully support a public education campaign around tax practitioner registration and avenues for complaint about poor quality tax practitioners. This will empower consumers in making an informed choice and protect against unregistered practitioners.

CPSU members have identified a gap in the ability of the TPB to provide support and assistance to consumers in the recovery of monies where investigations have led to adverse findings on agents. In these instances, the TPB merely directs consumers to the police or courts for any recovery of funds, and TPB investigations conclude with actions against the agent alone. One method to expedite the resolution of these cases would be access to a consumer affairs tribunal, or establishment of a TPB mediation mechanism to rectify improper practises.

Sanctions

CPSU members support the expansion of the suite of penalties available to the TPB and a lengthening of the investigate timeframes. The current civil penalty provisions rely on the Federal Court which means the TPB is often reluctant to pursue penalties given this is a high cost jurisdiction, and the penalties imposed do not offset that cost. Increasing the variety and level of sanctions available to the TPB would allow for more frequent regulation of transgressions by tax practitioners.

At the moment, the only sanction that is not reviewable and can be determined by the investigation managers who review the work of investigators, is a caution. A broadening of sanction powers including enforceable undertakings, would allow for low level administrative sanctions such as Orders to be issued by senior TPB investigation staff. Obviously, suspensions, terminations and banning orders should be determined by a committee of majority Board appointees.

We also note that an expansion of these powers will lead to a greatly increased administrative and management load. Consideration should be given to ensuring the appropriate resourcing of these powers, especially in light of the current understaffing of the TPB. The CPSU recommends an urgent review of current staffing levels and an appropriate increase in resources to align with future work load across Registration, Client Services and Compliance.