

KPMG submission

Treasury Discussion Paper

Review of the Tax Practitioners Board

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Contact: tpbreview@treasury.gov.au

Contacts: Grant Wardell-
 Johnson Tony Mulveney Jeff Cook



Executive Summary

KPMG welcomes the opportunity to respond to Treasury's discussion paper *Review of the Tax Practitioners Board*.

In this Executive Summary, we seek to outline the principles that should apply in considering any modifications to the role, structure and powers of the Tax Practitioners Board ("TPB").

Principles that should underpin the review

The purpose of the TPB is to ensure that tax practitioners operate with integrity and have sufficient skill, knowledge and experience to provide a professional tax agent service to clients.

Registered tax agents, their clients and the Australian Taxation Office ("ATO") should all have confidence that the TPB is fulfilling its purpose.

There should be an efficient process for sanctioning or de-registering those practitioners who do not operate with integrity.

The TPB should not be under the control or significant influence of the ATO, but the two bodies must have a very close working relationship in order for the TPB to carry out its role efficiently.

The level of the TPB's regulatory "touch" should be commensurate with the risk that a particular practitioner poses, based on reliable data about the practitioner's services.

Any increase in the level of government administration should be necessary for, and in proportion to, a well-defined benefit that would arise from such increase.

Key recommendations

- 1) The TPB should be made an "eligible recipient" for the purpose of the new whistleblower protection legislation which applies from 1 July 2019. This would protect both the TPB and the disclosing individual.
- 2) The TPB should obtain its funding directly from Treasury and not indirectly through the ATO's budget request.
- 3) The TPB should make more information publicly available about sanctions applied to registered tax agents and the reasons for those sanctions.
- 4) The TPB's current education and experience requirements for registration as a tax agent are robust and fit-for-purpose. There is no evidence that increasing the educational requirements would reduce the incidence of egregious breaches of the Code of Conduct.
- 5) Any extension of the scope of the "fit and proper person" test should be limited to consideration of the behaviour of entities genuinely under control of the applicant. This would not include a spouse or other adult relative merely because of their status as a spouse or other adult relative.

- 6) The Code of Conduct should be removed from TASA and the TPB given delegated authority to modify it via legislative instrument.
- 7) The Code of Conduct does not require modification to specifically address behaviour in relation to legal professional privilege. This code's provisions already require the tax agent to display the necessary professional and ethical behaviour.
- 8) It would be unreasonable to suspend a practitioner's registration (and consequently their livelihood) pending completion of a full TPB investigation of their conduct.
- 9) The TPB should publish for the community's benefit a list of known unregistered businesses that are offering tax agent services, provided this is clearly differentiated from the registry of bona fide tax agents.
- 10) Any penalty regime for practitioners that applied where a client had a tax shortfall should recognise that in many situations the practitioner may bear the cost of the client's tax shortfall penalty.
- 11) The safe harbour regime for taxpayers who use a tax agent should not be extended to cases of recklessness or intentional disregard for the law.
- 12) The TPB should implement a program to monitor the community's level of trust in tax agents.

Detailed comments

1. General

- 1.1 KPMG welcomes the opportunity to comment on the Discussion Paper (“DP”): *Review of the Tax Practitioners Board* published by Treasury on 1 August 2019.
- 1.2 The review of the Tax Practitioners Board (“TPB”) should be underpinned by a number of principles, against which options for change should be assessed.

Principles for the review of the TPB

- 1.3 The purpose of the TPB is to ensure that tax practitioners operate with integrity and have sufficient skill, knowledge and experience to provide a professional tax agent service to clients.
- 1.4 Tax agents and their clients and the Australian Taxation Office (“ATO”) all need to have confidence that the TPB is fulfilling its purpose and that there is an efficient process for sanctioning or de-registering those practitioners who do not operate with integrity or with sufficient skill.
- 1.5 The TPB should not be under the control or significant influence of the ATO, but the two bodies must have a very close working relationship. The ATO is in the best position to provide the TPB with the data it needs to carry out its role, and efficiency can be maximised by having ATO staff seconded to the TPB for periods as part of their career path.
- 1.6 The level of the TPB’s regulatory “touch” should be commensurate with the risk that a particular practitioner poses, based on data about their services. Heavy regulation of those practitioners who already act with integrity would be unlikely to lead to better outcomes for the community.

2. KPMG responses to discussion questions

Topic 1: Could the sharing of information between the TPB, ATO and ASIC be improved, and would there be any disadvantages from greater information sharing?

- 2.1 The TPB should be added to the list of bodies with which ASIC is statutorily permitted to share information. The TPB should also be added to the category of “eligible recipient” for the purpose of the new whistleblower protection legislation which applies from 1 July 2019.
- 2.2 Consideration of mandatory information sharing between regulators should be restricted to those categories of information that are likely to be of most benefit to the recipient regulator. There would be a detriment in mandating the sharing of information that would be of little use to the recipient.

Topic 2: Should the TPB become directly accountable to government, rather than reporting through the ATO, and do the arrangements for the TPB’s use of ATO staff require modification?

- 2.3 Having the TPB be directly financially accountable to government, rather than reporting up through the ATO, would be supportive of the independence of the TPB and of its public perception as such. Given the beneficial synergies arising from the TPB’s use of ATO staff and other resources, making the TPB completely independent of the ATO in those respects would be likely to be detrimental. Therefore the option described in paragraph 3.22.3 of the DP should be considered further.
- 2.4 Nonetheless, under the status quo, the efficacy, integrity and operational independence of the TPB can still be of a very high standard where the TPB’s board members and executive leadership are strong and independent-minded.
- 2.5 The costs of transitioning to the model set out in paragraph 3.22.3 of the DP should be weighed against the risks of remaining with the status quo.

Topic 3: Should the TPB membership include representation from consumers, the technology sector and, if the TPB reports directly to government, the ATO?

- 2.6 The TPB has a very specific role and consequently there should be a preference for TPB board members to have experience in the practice of taxation law. A board member with this experience, combined with wider business experience, would typically represent a positive addition to the TPB's capability.
- 2.7 We expect that the TPB can obtain high quality input from the ATO about developments in technology that impact the provision of tax agent services. The ATO would usually have a high level of awareness of new tax-related applications.

Topic 4: Should the objectives of TASA be updated to include maintaining the integrity of the tax system?

- 2.8 This would be a reasonable step.

Topic 5: What action can the TPB take to make the community more aware of the TPB's role?

- 2.9 Greater visibility across the community would assist the TPB in carrying out its work. In addition, public clarification of the TPB's role versus that of the Inspector General of Taxation / Taxation Ombudsman would be beneficial.
- 2.10 The TPB should work with Chartered Accountants ANZ, The Taxation Institute, and other TPB-recognised professional associations to identify the areas where enhanced communication would be beneficial.
- 2.11 In a similar vein, we also believe it would be beneficial for the administration of the TPB to implement a program to monitor the community's level of trust in tax agents by the community.

Topic 6: Should the TPB register include more information on de-registrations and the reasons for them, and also include details of the governance structure of tax agent firms?

- 2.12 Providing details of sanctions applied to tax practitioners and reasons for de-registration would be valuable for the community, and this measure should be pursued.

- 2.13 It would be reasonable for the TPB to require tax agent businesses to attest to meeting certain TPB-endorsed governance standards (to the extent that these are not already covered in the Code) in relation to the tax agent services that those businesses provide. Where this was a pre-requisite for registration and the standards were publicly available, there would be no additional benefit in having the business's own governance documents made accessible to the public via the register.
- 2.14 The approach set out in the preceding paragraph would be far preferable to requiring each tax agent business to share its own internal governance documentation via the register. The variety of formats and styles in which these documents would be likely to be presented would result in little benefit for the public.

Topic 7: Should the TPB registration become an annual requirement? Are the time periods of relevant experience still appropriate, and should membership of a tax professional association remain as an eligibility pathway for those without a degree-level qualification?

- 2.15 The TPB should retain the current requirement for tax agents to register every three years, with compliance declarations required in each of the intervening years. Annual registration would not provide the TPB with any greater opportunity to identify and take action against agents who are contravening the Code of Professional Conduct (“the Code”) or other aspects of TASA, and would therefore constitute raising the administrative burden, for little benefit, for both tax agents and the TPB.
- 2.16 It is appropriate for a tax professional who has the required eight years’ experience out of the last ten, and who is a member of a recognised tax agent association to continue to be eligible to practice. Such a person would be subject to the professional standards and continuing education requirements of the association (in addition to those in the Code), and would have sufficient experience of working in the field.
- 2.17 From the examples of egregious tax agent behaviour that have come before the courts and tribunals, it is not possible to conclude that such behaviour stems from a lack of knowledge of the tax law, or of the Code. Instead, those agents have made a deliberate decision to “push the boundaries” in the furtherance of their business. Based on this evidence, one would expect that increasing the education or experience requirements will increase the regulatory and administrative burden for compliant tax

agents without having any material prospect of deterring those who would choose to not comply with the Code or with other requirements.

Topic 8: Should the “fit and proper person” test be expanded to include, for example, close associates of the tax agent, and cover behaviour over more than the last five years?

- 2.18 The test could be expanded to cover entities over which the tax agent has control or significant influence, such as a company of which the tax agent is a director or majority shareholder. The test should not extend to the tax agent’s family members, as there may be considerable variation from family to family as to the degree to which the tax agent can influence (positively or otherwise) the tax-related behaviour of other family members.
- 2.19 Applicants for registration should be required to disclose previous criminal convictions and imprisonment in certain instances. Convictions relating to offences that have dishonesty as its fundamental base should be disclosed unless they pre-date the application by a relatively long period (of, say, more than fifteen years). Convictions relating to offences that do not have dishonesty as its fundamental base should be disclosed unless they pre-date the application by a relatively short period (of, say, more than five years).
- 2.20 TASA should be amended such that the TPB has greater flexibility in determining whether to register an applicant in the case where the applicant is associated with inappropriate circumstances such as company phoenix activity.

Topic 9: Should the TPB have delegated authority to update the Code, in order that this no longer require legislative change?

- 2.21 The TPB should have the delegated authority to modify the Code via legislative instrument. The legislative instrument should specify that consultation with registered tax agents must take place before any proposed modifications can occur.
- 2.22 The Code should remain principles-based. It would be timely to review the current wording to ensure that the principles have sufficient scope to address the emerging features of the tax profession that the DP has identified.

Topic 10: If legal professional privilege (“LPP”) is able to be claimed by a tax agent, how should the code of conduct apply in making such claims?

- 2.23 The Code should remain principles-based, and specific wording to address the approach to LPP is in any case not necessary. The Code already requires the tax agent to act lawfully, with honesty and integrity, and not to knowingly obstruct the proper administration of taxation laws. The tax agent would infringe all of these requirements if he or she made an unreasonable claim for LPP on behalf of a client.
- 2.24 The current Code should apply in the same way to tax agents’ use of the “Accountants’ Concession” on behalf of their clients.

Topic 11: What changes should be made to the sanctions available to the TPB when a tax agent breaches the Code or another provision of TASA?

- 2.25 It would be reasonable to introduce measures which would allow the TPB to require a tax agent firm to undergo a quality assurance audit, and allow enforceable undertakings from tax agents, as an alternative to the TPB seeking civil penalties.
- 2.26 The interim suspension of a tax agent’s registration would not be appropriate. A tax agent’s livelihood should not be taken away, even temporarily, before a full investigation and due process have taken place. Failure to cooperate with the investigation would in its own right be a breach of the Code, giving the TPB the scope to de-register an agent who was seeking to delay the investigation process in order to continue to profit from inappropriate activity.
- 2.27 Adequate resourcing of the TPB’s tax agent oversight function would be the most important factor in ensuring that investigations into poor agent behaviour are concluded efficiently and fairly.
- 2.28 Infringement notices would not be a cost-effective measure in dealing with “low-level” breaches of the Code. They would be unlikely to deter agents whose actions were deliberate from repeating the behaviour, and would create disproportionate administrative effort where agents who had made an honest mistake sought to appeal against the notice.
- 2.29 Permanent disbarment from the tax profession, including as an unregistered employee of a registered tax agent, would generally be inconsistent with the social objective of

seeking to rehabilitate offenders. But there may be more extreme circumstances where permanent disbarment is appropriate.

- 2.30 The TPB register should be modified so that it contains details of a termination of registration for at least three years after the termination.

Topic 12: Should the TPB have additional powers to curtail the activities of unregistered agents?

- 2.31 It would be appropriate for the TPB to require that applicants (other than sole traders and individuals) provide details of their organisation's governance structure insofar as it relates to the provision of tax agent services. This could take the form of the applicant explaining the processes it has in place to minimise the risks of non-compliance with each item of the Code.
- 2.32 Where the TPB makes this a pre-requisite for registration, there would be little additional benefit to the community in making the applicant's specific governance information available to the public. It would be sufficient for the public to know that registered tax agent businesses have been required to provide an acceptable governance document to the TPB.
- 2.33 The TPB should publish the names, trading names and associated entities of known unregistered businesses who are, or have been in the last 12 months active in the tax agent services market. However the TPB must very clearly differentiate this list from the register of authorised businesses, and include the advice that taxpayers should not deal with those unregistered businesses.

Topic 13: What would be an appropriate penalty regime for tax agents where there is a false or misleading statement on a client's tax return?

- 2.34 Any regime for imposing a "parallel" penalty on a tax agent where a client's return contains a false or misleading statement should recognise that in practice the tax agent may bear some or all of the client's penalty also. This could occur where the client successfully sues the tax agent for negligence, or where a commercial settlement is reached between the parties.

- 2.35 Therefore if a parallel penalty regime were adopted, the tax agent penalty should be a flat amount, rather than geared to the tax shortfall, in recognition that the more serious the reason for the false or misleading statement, the greater the taxpayer's penalty and the more likely it is that the taxpayer will pursue the tax agent for negligence. Consideration could also be given to reducing the penalty to nil in line with amounts of compensation paid by an agent as a result of a finding of negligence or a settlement.
- 2.36 Alternatively, where the client's safe harbour was extended such that only the tax agent would incur a penalty, it would be more reasonable to consider whether the penalty should be variable based on the seriousness of the conduct and the amount of the tax shortfall.
- 2.37 The concern with this second approach would be that the taxpayer has no incentive to take reasonable steps to understand what the tax agent is doing with the tax return. The taxpayer could even be in a better position as regards penalties by taking no interest in the statements made on the return, and leaving everything to the conduct of the tax agent. Therefore if a practitioner penalty scheme were to be implemented, it would be preferable for it to operate alongside the taxpayer penalty regime for those taxpayers who use a tax agent.

Topic 14: What can be done to facilitate better communication between the TPB and professional bodies, such that more prompt action can be taken against inappropriate behaviour?

- 2.38 Measures to improve two-way communication between the TPB and professional bodies, as envisaged at paragraph 11.12 of the DP, would be welcome. There would be a benefit in having TPB programs to educate practitioners about the Code being consistent with the educational material of the professional bodies.

Topic 15: How should the code of conduct be updated to address the challenges of the profession of the future? Does the scope of TASA and the definition of a tax agent service need to be revisited?

- 2.39 The current definition in TASA of a tax agent service is broad and adequate. However, since TASA was enacted the ability of practitioners to provide tax agent

services without having a physical presence in Australia has increased. To the best of our knowledge, TASA does not require practitioners to be Australian resident, or to carry on their business through a physical presence in Australia, in order to be eligible for registration.

- 2.40 Consequently there is a risk that the TPB may find it difficult in future to investigate and impose sanctions, short of de-registration, on an increasing number of foreign resident practitioners. This situation may necessitate some strengthening of the TPB's ability to suspend and / or de-register a practitioner who does not cooperate with the TPB's reasonable requests or instructions.