



2 September 2019

Nick Westerink
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: TPBreview@treasury.gov.au

Dear Mr Westerink,

SMSF ASSOCIATION SUBMISSION ON THE REVIEW OF THE TPB

The SMSF Association (SMSFA) welcomes the opportunity to make a submission on the review of the Tax Practitioners Board (TPB). As stated in our initial submission on the terms of reference, the TPB has performed admirably as the national body responsible for the registration and regulation of tax practitioners over the past nine years. However, we believe there are areas where the TPB should be adjusted to ensure it is appropriately regulating the tax profession in the current regulatory environment.

There is a need for some aspects of the TPB's regulatory framework and operations to be improved, specifically with regard to increased resourcing, greater information sharing and less complexity and regulatory burden. The regulatory burden on tax (financial) advisers (TFAs) is of great concern to the SMSFA.

In the whole, we agree with the majority of the preliminary views made by the TPB, Australian Tax Office (ATO) and Treasury. They provide a common-sense starting base for the review's final recommendations.

We reiterate that the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Report provides a framework for what an effective regulator should look like and we believe this should be a consideration in all recommendations. We have outlined our positions where relevant below.

Information sharing

The SMSFA is supportive of the preliminary views relating to information sharing between the TPB and other Government agencies. All Government agencies are working towards the same overall goal of consumer protection and professionalism and therefore any action that ensures information sharing between the bodies occurs more efficiently and accurately is welcomed.

We agree that the model suggested by Commissioner Hayne of mandatory, rather than discretionary, sharing of information should be pursued.



However, it must be adequately clear when the threshold for information sharing begins. As Hayne recommended, we believe an appropriate threshold for agencies to share information will be when they form the belief that a breach in respect of which the other has enforcement responsibility may have occurred.

TPB Governance

We believe it is important that the TPB is an independent decision maker from all stakeholders, including the ATO. However, we agree that the issue of independence seems to be one more of perception than reality. Implementing independence should not be attained to the detriment of the overall objective of the TPB.

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

We also support the *Public Governance, Performance and Accountability Act* being amended to allow independent statutory authority holders, such as the Chair of the Board, to certify the accuracy of the TPB's performance reporting.

We support Treasury's preferred option which will 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".

Membership of the Board

We support the review of the membership of the Board so it takes into account as much expertise and broad input as possible. This may include a wider range of individuals who represent each section of the industry or independent board appointments.

The SMSFA understands the benefits of having the eight Board members being registered tax practitioners in their own right and regulating other tax practitioners. This ensures they have the level of knowledge and expertise to regulate with their practical experience. However, there may be a conflict of interest as Board members themselves are subject to TPB regulation.

One of the primary functions of the TPB is its mandate to regulate tax practitioners to protect consumers. Therefore, the structure and governance of the Board should aim to reflect this purpose through board members who are independent from the tax profession. This may be through appointment of some individuals who have extensive board experience and skills from outside the tax practitioner industry. There also may be merit in appointment of a 'consumer advocate' board member.

Object of the TASA

The SMSFA agrees with the views expressed by Treasury, TPB and the ATO on the object of the *Tax Agent Services Act (TASA)*.



Community awareness

We believe increasing the awareness of the TPB, particularly for consumers, will be beneficial in allowing the TPB to achieve its primary goal of protecting consumers. It is our anecdotal evidence that the TPB has a very low profile for a regulator, particularly a regulator that moderates a profession that is widely used by many Australians.

If consumers are aware that their tax practitioner must be registered by the TPB to provide their services and will be disciplined in the case of breaches of law, it will strengthen the protection of consumers.

We are supportive of an increased use of an individual's registration number in appropriate circumstances. However, we believe a mandated use of the registration number would not provide extensive awareness and utility to consumers.

We also believe the TPB's increased compliance focus and greater use of new sanctions will increase its awareness to the tax profession as a whole organically.

Public register

The SMSFA has no direct concerns with the current public register and the information it provides. However, we believe it is not widely used by consumers.

We would have reservations around the inclusion of firm governance arrangements as it may create further complexity. The Association is supportive of individual registration requirements which would reduce the need for partnerships and corporations to be identified on the register.

Registration, education and qualifications

The SMSFA agrees that the current registration and education framework requires amendments so that it better reflects contemporary practices.

Education and experience

We believe a review of the education and experience requirements is necessary to meet today's current standards. This is in light of the increase in financial adviser standards which applies to all licensed financial advisers and TFAs and an industry move towards increased professionalism, ethics and education. Acknowledging that the tax industry is already a profession should mean that minor adjustments to education requirements should not be too disruptive.

We believe one aspect that requires attention is ensuring that going forward, all new tax practitioners have some form of approved minimum diploma or equivalent higher level qualification in taxation law, commercial law and basic accountancy principles to complement their relevant experience.

Currently, there are six pathways to register as a tax agent, two for a BAS agent and four for a TFA. This seems to be overly complex and difficult to understand depending upon your previous education and experience. For example, a tax agent with a diploma is rendered equal to a tax agent with a degree for completing one extra year of relevant experience. However, our understanding is that verifying the quality of this experience is difficult.



A simpler approach may be for the TPB to approve minimum education requirements it deems satisfy its education standards for each type of practitioner. I.e. Tax agents must have a diploma in Accounting and TFAs must meet the Financial Adviser Standards and Ethics Authority (FASEA) requirements with a TPB approved tax subject. The TPB can then provide an independent standardised period of experience for practitioners. This approach may also allow the TPB to consider special circumstances on a more consistent and flexible basis, such as maternity leave.

This approach would also include removing the pathway to registration via membership of a professional association which seems out of step with current standards. Removing this would reduce the burden on both associations and the TPB. Additionally, it is very likely that members of professional associations would meet the education and experience requirements of other pathways.

We agree that a periodic review of the educational requirements by the TPB in consultation with practitioners, professional associations, tertiary institutions and the ATO is needed.

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

The SMSF Association believes the registration standards requires significant consideration.

One issue is multiple overlapping registrations, particularly for tax financial advisers. For example, there are scenarios where a TFA may have to register themselves as an individual, their Australian Financial Service Licensee (AFSL) and their Corporate Authorised Representative (CAR) structure.

There are also complex and subjective requirements relating to registrations when a partnership or CAR is registered. This includes considering the 'sufficient number of individuals' requirements where the company must have a sufficient number of individuals registered as tax agents to maintain competency.

We would recommend the review to look at streamlining and consolidating the registration requirements for all tax practitioners. This will reduce complexity and reduce red-tape.

As recommended in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry a new disciplinary body should have each financial adviser individually registered. This deserves consideration for the tax profession.

The most extreme example would be that all individuals who are providing tax agent services for a fee or other award, must be registered with the TPB, regardless of the organisational structure they are using. Support staff and employees who are not ultimately responsible for the tax advice will be able to continue to be unregistered under a simplified registration process. The 'onus' will be on the registered practitioner or practitioners to ensure that the advice provided under their registration is compliant.

However, we are aware that company registration can be efficient for large tax firms. This includes reducing the amount of registrations for the company but also simpler software administration and processes through the use of one single tax agent number. Therefore, a solution to the regulatory overlap and burden of differing type of registrations may lie somewhere between individual registration for all and company registration for large firms.



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

If the registration process is simplified and the annual registration is an efficient rolling over from one year to the next then we are supportive of an annual registration process.

Tax Intermediaries

The Association supports the TPB's view of registration under 5.19.

Fit and proper person

The Association has no significant concerns relating to the criteria which determines if an individual is a fit and proper person.

We would support guidance being taken from other government agencies who monitor professions to improve consistency. We support increasing the test to include a tax practitioner's own tax obligations and associated entities.

Understanding the merit in including the close associates of a tax practitioner in determining whether they are a fit and proper person, we would urge caution in extending the past behaviour of others as a reflection on an individual's character.

Code of Professional Conduct

We agree with the preliminary views regarding making the Code a more dynamic instrument that can adjust to changes in a more contemporary manner.

We are aware there may be concerns with providing the TPB with the power to create a legislative instrument for the Code of which they also enforce. However, the TPB has traditionally been a very consultative regulator and we believe that this would continue before any changes to the Code are ratified.

Efforts should be made to make the Code as similar as possible to the new FASEA code and professional body codes to ensure simplicity.

Sanctions

The SMSFA believes it is important that the TPB have an appropriate toolkit to sanction egregious tax practitioners. Currently, the available options to the TPB are insufficient in curbing poor behaviour quickly and are inefficient to administer.

We strongly support an increase in resources and capacity for the TPB to apply its compliance approach more effectively. This will allow the TPB to target more individuals who are purposely evading the law and those who are unregistered. Through greater compliance activities the TPB will highlight its effectiveness to the broader tax community and public.

We also believe further agile compliance tools should be provided to the TPB in conjunction with greater staffing. We have provided our views on the options below:

- QA Audits – Internal control weaknesses



- Depending on the level of tax practice misbehaviour this may be an appropriate sanction. However, this would be resource intensive and potentially complex. Therefore, this is not our preferred sanction method.
- Enforceable undertakings
 - Enforceable undertakings were a subject of debate during the Financial Services Royal Commission as to their ability to curb behaviour. However, they can be an effective form of sanction which the TPB may wish to use.
- Interim suspensions
 - The SMSFA would support the use of an interim suspension in cases of serious immediate harm to the public and or tax system.
- External intervention
 - We are unaware how prevalent this issue is in the tax system and therefore do not have a view.
- Transparency of unregistered agents
 - We support the transparency of unregistered agents. However, we are unsure of how effective it will be for the public given the lack of awareness of the TPB.
- Deregistered agents
 - We support the continued compliance of deregistered agents. Deregistering from the profession should not provide the ability to avoid a sanction.
- Administrative sanctions and Infringement notices
 - The SMSFA supports the use of administrative sanctions and infringement notices on tax practitioners who breach the *TASA*. This provides an agile sanction which will be effective in curbing behaviour. However, the guidelines for the sanctions must be clear and built on principles that are agreed by the tax profession.
- Permanent disbarment from the tax profession
 - We would support this sanction for the most egregious behaviour where all reasonable minds would believe that the individual should not work in the tax profession again.

We would also support the process where the TPB is able to demand information before formally commencing an investigation. However, this must be conducted with an appropriate time frame for the practitioner to reply. I.e. 4 weeks. We also believe that practitioner should have the right to refuse this request until a formal investigation has been commenced.

Unregistered agents

The SMSFA is supportive of the objective that the TPB should look at unregistered agents because it has an overall duty to the tax profession.

We believe it is important that the TPB has the ability and tools to quickly address inappropriate behaviour of individuals who should be registered but are not and are therefore operating illegally.

We support the use of infringement notices against unregistered individuals as the most effective form of efficient regulation. This provides a clear material punishment to the individual and highlights the TPB's regulatory activity.



In order to raise awareness, we believe that media releases which detail TPB activity against unregistered agents will provide more utility than relying on the public to search the register.

We are unsure if requiring tax firms to provide details to the TPB of their actual governance and control structures will be effective in curbing unregistered agent behaviour. It may only increase reporting requirements for firms who have appropriately registered the correct individuals, while firms with unregistered agents will most likely find a way to not report as current unregistered agents do.

Safe Harbour

We agree with the preliminary view that it is fundamental to the self-assessment system that taxpayers, as consumers of tax agent services, can be confident in relying on the expertise of their registered tax or BAS agent.

We are unaware of any specific concerns from our membership regarding the safe harbour. However, we are supportive of minor amendments that ensure that consumers are protected by unscrupulous tax agent behaviour. If there is an increased streamlined focus on registration, qualifications and discipline then this should include ensuring fault on the tax agents behalf does not negatively impact the consumer further.

Removing the restriction of the safe harbour not applying in instances of recklessness or intentional disregard by the relevant agent seems logical. This should be evidenced by a clear, significant and obvious departure from the appropriate standards of a qualified tax practitioner.

An administrative penalty regime that applies to recklessness or intentional disregard also has merit as a solution to the issue where the taxpayer must sue their agent under action of negligence.

We note, if the lack of industry concern from consumers on this aspect of the *TASA* continues it may indicate that significant change is not needed.

Tax (Financial) Advisers

The SMSF Association acknowledges the complexity involved regarding TFAs and the regulatory burden they face.

As highlighted in the Paper, TFAs are accountable in some form to the TPB and ATO, FASEA, ASIC, the Australian Financial Complaints Authority, a new code monitoring body and a potential new disciplinary body. It is essential that the TPB review is able to remove some of the regulatory burden and create a more streamlined regime.

We agree with the preliminary view that any model is aligned with the recommendations in the Final Report of the Financial Services Royal Commission. The existing arrangements for financial advisers are fragmented and are hampered by inadequate sharing of information between the multiple bodies. Moving to a model that is consistent with Recommendation 2.10 for all TPB registrants should as much as possible should be the aim. This is consistent with the views we have made throughout this submission and our submission on the terms of reference.



The Association supports either Option 3 or 4 as an appropriate short to medium term fix for TFAs under the current regulatory environment. Noting, that these options may also work in conjunction with a future solution to SMSF advice issues which we detail further below.

Option 3 or 4 will reduce the regulatory burden for individuals who must register under ASIC and the TPB. We believe that a financial adviser who is providing competent quality advice will almost always need to provide incidental tax advice services. Therefore, we believe when individuals register with ASIC this would provide TPB registration under an opt-out method.

We believe the existing ASIC criteria and requirements set by FASEA could serve as substitute to the TPB's requirements. This would involve discussions between these bodies to ensure that they reach a consistent position they are content with. For example, when registering with ASIC we imagine there would be a process that allows the adviser to demonstrate they have met an appropriate TFA educational and continuing professional development (CPD) requirement.

Secondly, we believe that the TPB should be responsible for determining any breaches of the TASA Act. This is line with the processes the TPB currently undertake when they review the provision of tax advice.

We are ambivalent to whether the TPB or ASIC is the body which provides the sanction. As long as this penalty is consistent across the TPB remit, it should be left to TPB and ASIC to decide which process is most efficient for them. From the individual's point of view, the outcome should be the same regardless of which body provides the final sanction.

We believe this solution reduces the duplication in the current system and is an appropriate outcome from a review of the TPB.

Broader issue around unmet SMSF advice needs

Option 7 proposes that financial advisers who provide incidental tax advice would not need to be registered with the TPB and that accountants would be able to provide basic SMSF advice without needing to be registered with ASIC.

The SMSFA recognises that there are impediments in the current regulatory advice model which prevents SMSF trustees from seeking basic SMSF advice they require. For example, an unlicensed tax agent cannot recommend that their client disposes of an interest in an SMSF when it is clearly inappropriate for their circumstances.

Since 1 July 2016, individuals must be licenced with ASIC either through a full AFSL or limited AFSL to provide SMSF advice services. TPB tax agents (recognised accountants) were typically the main source of advice for SMSF trustees. Accountants who wished to provide SMSF services, such as establishment, were required to comply with the then targeted necessary education standards and spend considerable time and money applying for a license with ASIC.

The take up of the limited license regime has been relatively underwhelming.

Recently, FASEA's education standards did not consider limited licensed accounts. Individuals who wish to provide SMSF services under a limited license must now be qualified to a level of a fully



licensed financial adviser. The limited license regime is a legislated part of the regulatory framework that was ignored.

SMSF trustees who wish to seek basic SMSF advice are either required to spend significant money seeking financial advice from a licensed adviser or must self-advise. This means there are important unmet SMSF advice needs in the market.

Furthermore, the ASIC exemptions which are available to accountants are complex, blurred and do not provide protection to consumers for whom an SMSF is inappropriate or those seeking simple advice. In addition, licensed advisers who provide the same service that an accountant via an ASIC exemption provides are required to document this through costly statements of advice.

The outcomes from introducing limited licensing have not achieved their policy intent. Individuals have unmet needs, advisers face high regulatory costs and burden and accountants are strangled by regulation.

The SMSF Association does not propose a solution to this issue in this submission, nor is it advocating for a full return of the accountants' exemption.

However, we believe the framework must be reviewed to adequately work for both tax agents and TFAs. The issue to be resolved concerns how basic SMSF services fit into the entire financial sector regulatory framework for both accountants and financial planners. Essentially, the outcome should improve consumer protection, ensure unscrupulous advice is prohibited and ensure consumers are able to receive basic SMSF advice efficiently.

We believe this is a task that is of bigger remit than the TPB review and involves seeking input from ASIC, FASEA, professional bodies and consumers. Therefore, we strongly advise that the TPB review make a recommendation recognising this issue and that Government should seek to address the issues relating to SMSF advice at an overarching level as soon as possible.

Relationship with the Professional Associations

The TPB should be commended for the consultative approach it has with professional associations. This allows our views and experiences to be adequately heard by the TPB with regularity. We support the current model of consultation to continue.

With regards to the pathway of registration through a professional association, the SMSFA supports removing this due to the benefits in overall simplicity rather than because it limits our cooperation with the TPB. Not only will this remove another form of registration as stated earlier in our submission but it will also remove the regulatory burden involved with the annual declaration process for professional associations.

We do not agree with the premise that the TPB should be a regulator of the professional bodies, their codes or CPD as the Paper states. Rather the professional bodies are a source of industry intelligence, feedback and information.

With regards to issues around duplication and simplicity, consultation should be undertaken with the professional bodies as a whole to reduce regulatory burden. For example, the TPB, in



consultation with the professional bodies, should be the minimum CPD standard setter for what it considers is to be the requirement for tax professional development. It would then be up to the professional bodies to tailor their CPD requirements for the purposes of streamlining. Despite the initial lack of consultation with FASEA, which was problematic, this was the process professional bodies subsequently followed after FASEA finalised their CPD requirements.

We also support information sharing between the bodies and the TPB being improved, subject to privacy laws.

Powers to refer conduct-related matters to professional bodies could be enhanced to allow for disciplinary action to be taken earlier. Often information is shared too late in the process to provide effective and agile discipline or not shared at all. If the TPB and professional bodies are able to inform each other through appropriate channels when there is a belief that a breach has occurred this will further enhance the disciplinary options available to both the TPB and professional bodies.

We also believe that any consideration for a professional code monitoring approach should be delayed until the financial adviser code monitoring body has been implemented to see how effective this approach is. Our preliminary view is that this not required for the tax professions monitoring of the TASA code.

Future Landscape

The SMSF Association recognises the need to consider the future direction of tax provision services and how these services will be supplied.

We would suggest that the TPB Review look to ASIC for information regarding their view to regulating 'robo' financial advice. Similarities can be drawn with how these companies provide financial advice online with how the tax profession may provide services in the future.

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

Without further details of the new disciplinary body it is hard to comment on this issue. However, at a minimum we would suggest that any new disciplinary body should have some form of connection with the TPB.

If you have any questions about our submission please do not hesitate in contacting us.

Yours sincerely,

A handwritten signature in black ink that reads 'John L Maroney'. The signature is fluid and cursive, with a large initial 'J' and 'M'.

John Maroney
CEO
SMSF Association



ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have more than \$750 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.