



Curtin Law School

GPO Box U1987
Perth Western Australia 6845

Telephone +61 8 9266 7034
Facsimile +61 8 9266 3222
Email Dale.Pinto@cbs.curtin.edu.au
Web <http://cbs.curtin.edu.au>

19 April 2019

By email: TPBreview@treasury.gov.au

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

Dear Mr Westernik

Review of the Tax Practitioners Board and operation of the Tax Agent Services Act 2009 and the Tax Agent Services Regulations 2009

The Curtin Tax Clinic (CTC) welcomes the opportunity to make this submission concerning the Department of Treasury's review into the effectiveness of the Tax Practitioners Board (**TBP**) and the operation of the *Tax Agent Services Act 2009* (**the Act**) and the Tax Agent Services Regulations 2009 (**the Regulations**).

The CTC has had the benefit of reviewing the terms of reference in relation this review and propose to submit recommendations which broadly concern:

1. the legislative and governance framework associated with the Act and the Regulations; and
2. the function and purpose of the TPB with reference to their objectives.

A summary of our recommendations is as follows:

Recommendation 1: Expand or otherwise amend the eligibility criteria for registration as a tax agent in the Act and the Regulations to include, institutions which operate under the Governments National Tax Clinic Trial program and future iterations of same.

Recommendation 2: Ensure the TPB remains independent of the ATO.

Recommendation 3: Ensure proper resourcing for the TPB to discharge its core functions and objectives.

Recommendation 4: Enhance awareness of the TPB and its role in registering and regulating tax practitioners.

A comprehensive submission in support of our recommendations appears below.

Should you wish to discuss anything in relation to this submission please feel free to contact the authors below:

Annette Morgan [REDACTED] and Donovan Castelyn [REDACTED] particularly for recommendation 1; and

Professor Dale Pinto [REDACTED], particularly for recommendations 2, 3 and 4.

Yours sincerely

Professor Dale Pinto
Chair, Academic Board
Professor of Taxation Law
Discipline Lead, Taxation
Law
Curtin Law School
Faculty of Business and
Law

Annette Morgan
Clinic Director
Curtin Tax Clinic
Lecturer
Curtin Law School
Faculty of Business and
Law

Donovan Castelyn
Clinic Supervisor
Curtin Tax Clinic
Associate Lecturer
Curtin Law School
Faculty of Business and
Law

Background

Contextually, it is necessary to expand upon the operation of the CTC and its objectives as these each inform our position in respect of recommendation 1.

The CTC as established on 2 July 2018 and was founded with the intention of providing Curtin University students with an opportunity to apply their knowledge of taxation law and accounting in a practical work-oriented setting and in doing so, to assist members of the community with their tax-related issues.

The CTC holds a tax agent number (**TAN**) and is presently structured as a sole practice with Annette Morgan, Clinic Director, as the registered tax agent to meet the regulatory requirements of the Tax Practitioners Board (TPB). This framework enables the CTC to offer pro-bono taxation advice or services to unrepresented or partially represented taxpayers in relation to their taxation affairs and assists clients who are in dispute with the Australian Taxation Office (**ATO**).

The CTC is staffed by student volunteers - 2nd and 3rd year students studying a specialised taxation degree or LLB – who perform work under the direct supervision of the Clinic Director and the Clinic Supervisor.

The CTC offers a full suite of taxation services and delineates its operation across four major pillars: assistance, representation, education and advocacy (**AREA**). Each pillar informs the CTC's objectives and enables the student volunteers and staff to provide meaningful and necessary support to our clientele and the community at large.

Following the success of the CTC pilot, the Assistant Treasurer, the Hon Stuart Roberts, on 16 January 2019, announced support for, and funding of, a national trial of the initiative, which would see 10 universities across Australia, establish and operate various iterations of tax clinic model over the course of 12 months (**National Tax Clinic Trial**). The success of the National Tax Clinic Trial is likely to see the concept retained and perpetually funded by the Government.

As a number of these clinics are now in their formative stages, and with a view to having these clinics become a permanent institution in Australia, it is both timely and prudent to address some of the practical and legal obstacles posed by the Act and its Regulations.

Registration and the Act

A clear impediment to the on-going success of the clinic model, in so far as the clinics remain an establishment of their respective University's (which is both preferred and necessary), is the restriction on registration imposed by the Act and its Regulations.

At present the Act contemplates three classes of persons who are eligible for registration; individuals (s 20-5(1)(a)-(d)), partnerships (s 20-5(2)(a)-(d)) and companies (s 20-5(3)(a)-(e)).

Relevantly, neither definition contemplates registration by either a University – which, in most cases, operates as a statutory body corporate -, or a non-for-profit (**NFP**) organisation. We were informed of this position following correspondence with the TPB in early 2018, prior to formalising the operational structure of the CTC. As to the latter, it is relevant to note that Curtin University was not amenable to the CTC operating as a company during the pilot phase, despite the structures clear advantages when compared with the present arrangement. We expect this to be the case for most institutions identified in the National Tax Clinic Trial.

We acknowledge that registration is not strictly necessary where the service is provided without the contemplation of a fee or reward (s 20-1). However, the benefits and practical advantages of registration would greatly serve the clinics' objectives. These benefits mirror those derived through a company structure and include but are not limited to:

1. Streamlined access to the ATO and client information by virtue of the Tax Agent Portal (**TAP**);
2. Succession efficiencies when staff transition or retire from the role of Clinic Director;
3. Increased measures of accountability and professional standards which strongly align with consumer confidence in the service; and
4. Recognition as a trusted provider of tax agent services and acceptance of the concept by the tax fraternity.

A desire to have registrations extended to the clinics' was informed by our review the Low-Income Tax Clinics (**LITC**), a complementary clinical model offered in the United States (**US**). Discussions with the Director of their programme highlighted the many efficiencies associated with registrations, particularly in respect of dealing with the taxation authorities.

Recommendation 1

Against this background, we recommend the eligibility criteria for registration as a tax agent, as contemplated by s 20-5 of the Act be amended to include Universities or NFP organisations which operate a tax clinic, as part of the National Tax Clinic Trial or future iterations of same.

Practically, we suggest a qualified class of eligible persons be identified in s 20-5 at paragraph (5) of the Act. We would have this paragraph define in certain terms, eligible persons who qualify for the National Tax Clinic Trial or future iterations. We would also see the paragraph espousing the following conditions or something materially similar:

1. The Clinic must have a Clinic director or Clinic directors
2. The Clinic Director/s must be at least 18 years of age
3. The Clinic Director/s must be a fit and proper person
4. The institution must maintain professional indemnity (PI) insurance that meets the TPB requirements (please note for CTC the university insurance policy covers the activities of the Clinic)
5. The Clinic must have a sufficient number of registered individual tax agents to provide tax agent services and supervision on behalf of the Clinic
6. The Institution or Clinic Directors must not be under external administration
7. The Institution or Clinic Directors must not have been convicted of a serious offence involving fraud or dishonesty during the previous five years.

In so far as is necessary, we would also see Part 2 and schedule 2 of the Regulations amended to reflect the inclusion of this new class of persons.

Further recommendations

Having dealt with the legislative and governance framework associated with the Act and the Regulations as regards the CTC and the National Tax Clinic Trial we now turn our attention to the function and purpose of the TPB with reference to their objectives.

Independence and integrity of TPB

To ensure the integrity of the taxation profession in Australia, there needs to be an organisation that is an independent body to oversee the registration, education and regulation of those members associated with it.

The TPB has effectively fulfilled this independent role since its inception and should continue to do so going forward. Placing the role of the TPB back within the Australian Taxation Office will not allow for an independent arbiter in relation to the registration or regulations of tax agents.

At the moment if the ATO has concerns about a particular tax agent at least the review into those concerns can be carried out by an independent third party being the TPB, allowing the ATO to recognise tax agents they perceive to be doing the wrong thing and then having them disciplined by the ATO does not provide the level of independence of decision making that is desirable in such a regulatory system.

Other organisations such as the IGOT's office have maintained their own offices and independence with is well received in the community. Currently a lot of the secretarial work and other administrative tasks seem to be conducted by those on secondment to the TPB from the ATO and this can compromise the level of operational independence of the Board. Whilst it is acknowledged that the ATO and TPB must work together on removing tax professionals who are not maintaining a high standard of ethical behaviour, their relationship should be of only sharing of data.

The TPB should be adequately funded by the government to carry out their duties which allows for them to not be reliant on funds and staffing from the ATO to promote a truly independent organisation.

Recommendation 2

The following observations are proffered in support of continuing to keep the TPB independent:

When the TPB was established, it was clearly predicated on the basis that the regime would establish an independent national board to register tax agents and BAS agents and to monitor and enforce compliance with those standards (Explanatory Memorandum to the Tax Agent Services Bill 2008, paragraph 1.8).

1. To ensure that the Board has the requisite degree of independence from the ATO, it is funded via a Special Account (under section 20 of the FMA Act) through the annual appropriation to the ATO (Explanatory Memorandum to the Tax Agent Services Bill 2008, paragraph 5.30).

2. In this way the Board will operate with decision-making independence from the ATO but will rely on the ATO for administrative support (Explanatory Memorandum to the Tax Agent Services Bill 2008, paragraph 5.31).
3. When the regime which created the TPB was instituted, Treasury release exposure draft legislation and engaged in numerous consultation meetings with stakeholders. In response, Treasury received 114 submissions in response and the key issues raised were the need for greater clarity in the wording of various principles of the proposed Code and a need for independence of the Board from the ATO (emphasis added). These concerns were raised by practitioners, the legal, tax, and professional associations, the ATO and the existing State Boards (Explanatory Memorandum to the Tax Agent Services Bill 2008, paragraph 6.60).

It is strongly submitted that these concerns remain valid on a go-forward basis.

Funding and resourcing of the TBP

In recommendation 2 it was noted that the TPB should have adequate funding. This is necessary to ensure it carry out its core functions, namely registering and regulating tax practitioners.

Whilst the TPB has been very good at handling the registration of tax professionals and maintaining that tax agents comply with the necessary requirements for continuing professional development and professional indemnity insurance to hold their licences and promote education of tax professionals, there are some improvements that could be made in relation to other areas it is responsible for, especially its role in regulating tax professionals.

Recommendation 3

One improvement where additional funding could be used to increase level of staffing is in the area of investigations against tax agents not complying with their obligations so a quicker resolution for taxpayers can be achieved. A critical response team could also be used to deal with issues that need resolving immediately, as the longer a tax agent is not operating within the rules the more damage being caused to the public usually in the form of financial loss.

Outsourcing to an external body to overview discipline matters could also speed up the process both for the sake of the tax agent involved and the taxpayers or public to whom are affected by the actions that have brought about the discipline matter. Analogously, the ATO also use external resources to deal with disputes they may have with a taxpayer headed up by retired judges, so the concept could easily be incorporated into the TPB regime.

In short, without adequate funding and staffing resources, the TPB will not be able to effectively discharge its role of both registering and regulating the tax profession.

Awareness and exposure of the TBP

There needs to be greater public awareness of the TPB and for tax agents themselves to be aware of the wide ranging powers the TPB do have in relation to ensuring they comply with the Code of Conduct and what the consequences are of breaching the Code including the administrative penalties of cautions, orders, sanctions and terminations and also the more serious civil penalty regime that can apply under Div 50 of the Act.

Recommendation 4

A targeted education programme could be undertaken in both areas on a regular basis. The public need to know the TPB exists and that they can reach out to the TPB if they are having issues with a tax agent. Tax agents themselves need to have more respect for the powers of the TPB and to be reminded of their requirements under the Code of Conduct.

Conclusion

We offer the following concluding remarks to summarise our submission.

The recommendations contemplate the future of tax clinics within Australia and advocate for their inclusion in the legislation to ensure all government funded tax clinics are held in the same regard for the tax services offered of those offered by a taxation professional.

Additionally, our recommendations strike at the core of the terms of reference and ensure the longevity of the TPB and assure it the independence and powers it requires to meet its objectives.

In closing, we also wish to congratulate the work the TPB has done to date and for the bringing together of a taxation profession made up of many sectors under the same umbrella with the Code of Conduct, which gives tax professionals credibility in the public's eye.

We would be pleased to discuss any aspect of this submission in more detail and look forward to the outcomes of this important review.

-----oOo-----