Australian Bookkeepers Association

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Response to Discussion Paper to Assess the Effectiveness of the TPB and TASA in Regulating Tax Practitioners

Australian Bookkeepers Association (ABA) welcomes the opportunity to respond to the TPB's invitation for feedback.

About ABA

Australian Bookkeepers Association (ABA) is a non-profit organisation which provides representation and educational options for bookkeepers Australia-wide. ABA is accredited as a recognised BAS Agent Association and represents its members in various Government arenas including at ATO BAS Agent Advisory Group meetings, and Tax Practitioner Board consultative forums.

Our Interest in this Issue

As a registered BAS Agent Association, our members are primarily BAS Agents. As such, they are subject to the Tax Agent Services Act 2009 (TASA), which is presided over and enforced by the Tax Practitioners Board (TPB). We therefore have a keen interest in the effectiveness of the TPB and the TASA in regulating tax practitioners which is the focus of this discussion paper.

We now address various questions posed by the discussion paper:

TPB GOVERNANCE

Independence from the ATO

We welcome the discussion paper's acknowledgement at paragraph 3.21 that the current arrangements regarding the TPB's independence from the ATO are not adequate and do not meet the observations of the Ethics Centre. The status quo cannot remain.

Ideally, of the proposed options put forward at paragraph 3.22, option 2 should be adopted. While we support aspects of the TPB's preferred option 3 – namely having its own budget and reporting and establishing the Chair of the TPB as the independent accountable authority – this option does in our view have its limitations, including the preference at paragraph 3.28 of continuing to staff the TPB with ATO secondees. This is problematic for the following reasons:

- **Skillset** - Predetermining that the majority of TPB staff be seconded from the ATO may not result in the best candidate filling an available position. Prospective employees need to have the best skillset/experience for the particular vacancy, noting that the two organisations have very different objectives. Hence ATO employees' skillsets may be too narrow for particular TPB vacancies. All told, that a prospective employee comes from the ATO should not of itself be a factor that is given significant weight, if any. The TPB should be free to source the best person for the job – whether from the ATO or not.

- **Mindset** – The TPB's core objective is to protect the fee-paying consumer from substandard tax practitioners. This is achieved by:
    - educating consumers
    - registering tax practitioners only where they have met education and experience requirements, and have complied with the Code of Conduct contained in TASA
    - sanctioning non-compliant practitioners.

  This is very different from the ATO's core objective of administering the taxation system fairly. TPB employees need to foster the TPB's core objectives and perform their roles through this

prism. This shift in mindset may not be an easy one for former ATO employees who may have an ingrained, negative view of practitioners shaped by practitioner-facing roles or practitioner interactions. To this end, at the very least we call on the discussion paper to support the recommendation from the Ethics Centre that the TPB have an induction program for its staff – emphasizing the importance of being independent.

- Irrespective of any measures put in place, sourcing staff from the ATO will always leave some perception of a lack of independence.

Further, as we noted in our initial submission, to operate optimally, the TPB needs to have the support and respect of the various stakeholders. Central to this, is that the TPB is independent, and perceived to be independent. To this end, we welcome and fully support the TPB's proposals (at paragraph 3.24 and 3.25) to address perceptions of a lack independence. However, this does not address (nor does anywhere else in the discussion paper's 'preliminary views') our concerns raised in our initial submission around when the ATO and TPB work together. This concern is when in doing so the TPB is acting truly independently (and is perceived to be doing so). Some examples of recent close dealings between the ATO and the TPB include:

- The ATO and TPB work very closely together on joint projects, such as the current crackdown on tax practitioners' outstanding personal tax obligations
- Joint informational presentations
- Safe harbour referrals – opaque process
- Referrals by the ATO to the TPB for potential TASA breaches.

Additionally, as it goes to issues around employee independence, we recommend that for transparency reasons that the MOU referred to at paragraph 3.28.1 be made publicly available.

Membership of the board

We welcome the discussion paper's preliminary view of having a diverse Board – with practitioner experience, information technology experience, community involvement, business experience etc. To help achieve this, we recommend that the discussion paper considers supporting ensuring that a BAS agent (or former BAS agent) is present on the Board at any given time. While this is currently the case (in the form of Debra Andersen) there was a period after Russell Smith left the Board, that there was no BAS agent representation. BAS Agents now comprise more than 20% of the practitioner population, and face issues unique to them. Board insight into these issues is imperative.

Object of the TASA

Given that the TASA is now more than a decade old, a review of its purposes is welcome. We certainly support its current stated purpose – "to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct". In achieving this purpose, consumers are protected. However, we disagree with the discussion paper's preliminary view to add that the upholding of integrity of the tax system is also a purpose/objective of TASA. As with consumer protection, one of the welcome by-products of achieving the current purpose of TASA is to assist in upholding the integrity of the tax system. However, this is not the actual purpose, the motivation, of why TASA was introduced. Adding this as an express purpose of the TASA, confuses purpose with by-product, and gives an undue weight to tax compliance rather than the regulation of overall practitioner behaviour and standards which is the overwhelming, core purpose of the TASA.

COMMUNITY AWARENESS

TPB visibility

1. Consumer Awareness

It's pleasing that the TPB is expanding its support to consumers through communications that directly target that segment. This needs to be an ongoing commitment with accompanying funding. Professional associations and tax practitioners are near unanimous in the view that there is a significant lack of awareness among consumers of the existence of the TPB, let alone its objects and functions. With consumer protection sitting at the heart of TASA, this objective is failed if the consumers that the TPB seeks to protect are lacking in awareness of the TPB.

The task of raising consumer awareness of the TPB cannot logically fall to professional associations as they do not have contact with or know the identity of the end-user of tax practitioner services (i.e. the consumer). This is in contrast to the ATO who does have knowledge of exactly which individuals and businesses use the services of tax practitioners. It is therefore pleasing that at paragraph 4.4 the discussion paper contemplates that the TPB leverage its relationship with the ATO to enhance community awareness of the TPB's existence and role.

Nor is it the role of already over-burdened tax practitioners to make consumers aware of the TPB's existence and role. Indeed, there is an inherent conflict with practitioners making clients aware of the body that they should go to if they wish to make a complaint about them! We touched upon this conflict in our original submission in respect of tax practitioners making clients aware of the Safe Harbour regime – what incentive is there for the practitioner to make clients aware, if Safe Harbour cases are going to be referred to the TPB for unknown and possible adverse repercussions?

2. Transparency

At paragraph 4.7, we welcome the acknowledgement of the lack of transparency and visibility around TPB complaint processes. When information is provided to the TPB on tax practitioner conduct or indeed on unregistered parties providing tax practitioner services, it's disheartening for the complainant to not be informed of the progress of their complaint including the outcome. This acts as a disincentive to make future complaints and therefore misconduct may not be brought to the TPB's attention.

Public register

1. Greater detail

We cautiously support greater transparency on the register in terms of publishing reasons for sanctions, disqualification, and termination. This would ensure that minor relatively infractions (such as lodging annual declarations a day or two late) that result in sanctions are distinguished from more serious misconduct that would actually have a material bearing on whether a consumer would choose to engage a particular practitioner (such as intentionally disregarding the law, or failing to take reasonable care).

2. Removing the time requirement

If the TPB's position of removing the time limit on how long certain information appears on the register is adopted, this may result in 'sanction publishing'. That is, if a practitioner is suspended for one-month, and that sanction remains on the register indefinitely as seemingly proposed by the TPB, then the sanction becomes much longer than the short one-month period. While this may be appropriate for serious breaches of the Code of Conduct, it would be a disproportionate punishment where the infraction is relatively minor compared to the current 12-month publication timeframe.

We submit that if the TPB's position is adopted (removal of the 12-month publication time limit), then this change must be accompanied by greater detail on the nature of the sanction.

3. Does there need to be greater visibility over firm governance arrangements?

This information should be provided to the TPB in the event that the TPB makes an enquiry or conducts an investigation of a firm. We are opposed to requiring firms to provide this information upfront as part of their registration (or renewal) requirements. Doing so may impose a compliance burden on firms, including the need to update this information every time governance arrangements are altered. Furthermore, the information provided by a firm may never even be used by the TPB (i.e. a firm may never be subject to investigation or enquiry) which further calls into question imposing this compliance impost upfront.

REGISTRATION, EDUCATION AND QUALIFICATIONS

Qualifications and experience requirements

> *5.2 Is the period of time required for relevant experience appropriate? Should it be increased or decreased?*

The period of time is insufficient. Under current rules, members of professional associations can meet the 1,000 hour requirement by undertaking just five hours of BAS Agent-like work per week, or one hour per day. This is manifestly inadequate.

> *5.3 Should the TPB be given the flexibility to determine what, and how much time is required, for experience to be relevant?*

Yes, as a general principle the best outcomes are achieved by judging each case on its merits – rather than imposing blanket requirements. Decision makers, in this case the TPB, need to be armed with flexibility. In this context, rather than the current inflexible numerical hour requirement, there needs to be qualitative component to ensure that any experience is 'relevant'.

Also, currently there is no focus on the breadth of experience that a BAS Agent must have, but merely the amount. Does an aspiring BAS Agent who has acquired all of their relevant experience by undertaking work relating to a narrow range of BAS provisions (such as PAYGW, for example), or for a narrow range of client types, have the breadth of experience to practice as a BAS Agent (free to provide any kind of BAS service to any client type)?

> *5.4 Are the eligibility requirements for a company or partnership to become registered appropriate? Are the eligibility requirements for a company or partnership to become registered appropriate*?

We have no issue with the current requirements. However, further guidance around 'sufficient numbers' of registered agents would be welcome, acknowledging that it is impossible to be prescriptive as each case must be judged on its merits.

> *5.5 Should the registration period be converted to an annual period (rather than every three years)?*

We would conditionally oppose this change. This would impose a significant administrative burden on an already under-resourced TPB in assessing annual renewals of more than 78,000 practitioners. Annual renewals would also impose a further impost on practitioners, for marginal TPB benefit considering that annual declarations are already in place. From recent TPB case law, we understand that making false claims on an annual declaration can result in severe sanctions including de-

registration. With this annual declaration safeguard already in place, the current renewal timeframe we believe is adequate.

That said, there may be some benefit in adopting annual renewals for new practitioners. This would provide a greater ability to monitor inexperienced practitioners who may, generally speaking, be more prone to errors or Code of Conduct breaches than experienced practitioners. This would, in turn, increase consumer protection.

> *5.7 Should the primary educational qualification for a BAS agent be increased to a diploma level qualification?*

The focus on diploma versus certificate is misguided and distracts from the main issue, being that the qualification be fit for purpose.

It's reasonably widely acknowledged among professional associations (including Australian Bookkeepers Association) that the key BAS Agent qualification of the Certificate IV Financial Services (Bookkeeping) or (Accounting) is by itself inadequate in terms of equipping bookkeepers to practice as BAS Agents given the breadth of services that can be offered by BAS Agents, and the complexity of certain services, for example, GST and payroll.

Further, the qualification requirements do not evolve sufficiently. For example, Taxable Payments Annual Reporting (TPAR) was introduced on 1 July 2012 to help expose cash economy activity in the building and construction industry. Given its success in that industry, the TPAR regime has been extended to several other industries since, and now is a key tool in the ATO's fight against the black economy. However, if a BAS Agent completed their Certificate IV prior to 1 July 2012, they would likely have no formal training in the TPAR regime, and yet are free to provide this as a BAS services.

The qualification needs to be contemporary, and needs to be delivered by quality Registered Training Organisations (RTOs), not dumbed down to a price. As a way forward, we propose:

1. A review of existing Certificate IV material with recommendations to be made on whether it is fit for purpose
2. A fresh review of desired learning, and agreement on content that is required
3. Only then, decide on the type of qualification – certificate or diploma?
4. Review of rigour around the deliverers of these qualifications, with a view to perhaps approving certain providers who meet the standard or sanctioning substandard providers.

Fit and proper person

> *5.9 We invite submissions on our preliminary views regarding being a fit and proper person.*

We make the following comments regarding expanding the fit and proper person requirements:

- If the current five-year time limit was to be expanded it should only be in respect of particularly serious misconduct – such as serious criminal offences, or particularly serious taxation offences, or those involving high levels of fraud or dishonesty. Otherwise, a practitioner is always hostage to their past (no matter how long ago) and therefore reformation and redemption by the practitioner is marginalized, as is incentive to make good.
- In including as a consideration whether the individual was involved in the business of a terminated or suspected tax practitioner, the level of involvement would need to be carefully investigated so as to avoid guilt by mere association.
- We oppose the inclusion of 'upholding the integrity of the tax system'. This is an ill-fit with the other objective factors used to assess the 'fit and proper' person requirement, and as the discussion paper notes is already inferred in paragraph 20-15(a) of the TASA.

CODE OF PROFESSIONAL CONDUCT

A dynamic code

> *6.1 We invite submissions on our preliminary views regarding making the Code a more dynamic instrument.*

We fully support the position put at 6.10 in making the Code of Conduct more dynamic and nimble by enabling the TPB to amend the Code following a period of public consultation, rather than the current protracted process of needing Parliament to pass amendments to the TASA.

This would replicate the agility that the Board has to expand the definition of 'BAS service' by legislative instrument rather than being dependent on Parliament to amend the TASA.

SANCTIONS

> *7.1 We invite submissions on our preliminary views*

We have reservations around the discussion paper's views at 7.29.7 whereby it suggests giving the TPB power to take quick action by issuing infringement notices for certain breaches of the Code of Professional Conduct. Currently as at 7.10 a formal investigation must be conducted which can last up to six months. Any issuing of infringement notices must only be after practitioners are afforded procedural fairness, which at a minimum requires that they be interviewed so as to provide their version of events or present a defense. At the very least this proposal should be parked until there has been proper, industry-wide consultation as to how such a system should work. Issues such as protecting the public from "bad" practitioners need to be balanced against procedural fairness and the cost/inconvenience for "good" practitioners.

UNREGISTERED AGENTS

We support the TPB's position that it be given powers to deal with unregistered agents, this goes to the hear of consumer protection. That the only current recourse is to apply to the Federal Court for the imposition of a civil penalty and/or injunctive relief (costly, protracted, and time consuming) does not adequately deal with the threat posed by unregistered agents to the profession and consumers. We support giving the TPB the power to issue infringement notices and enforceable undertakings and the subsequent publication of these on a publicly available register, given the level of threat posed to consumers.

SAFE HARBOUR

Our previous concerns

We again re-iterate our views around consumer awareness and the transparency aspects of Safe Harbour which do not seem to have been addressed in the preliminary views of the discussion paper at 9.24 to 9.28.

Despite affected taxpayers (those who use a tax practitioner and have a penalty imposed for lack of reasonable care, or for failing to lodge on time) generally being notified of their Safe Harbour rights on their amended Notices of Assessment there is a lack of awareness among taxpayers of the existence of these provisions. This goes to issues of consumer protection. Taxpayers are less protected from administrative penalties and failure to lodge on time penalties caused by tax practitioners, if they are not aware of the provisions designed to protect them. Without an awareness of the provisions, taxpayers will not apply for Safe Harbour. Generally therefore there is no recourse or protection for the taxpayer under these provisions unless tax practitioners instigate them.

In most cases, it falls to tax practitioners to make clients aware of Safe Harbour. However, what incentive is there for the practitioner to do this if, in the event that Safe Harbour is granted, the matter

may then be referred by the ATO to the TPB for them to consider whether there has been a breach of the Code of Conduct?

Under the provisions, Safe Harbour cannot be granted where there is evidence of recklessness or intentional disregard of the law (but rather, only where there is a lack of reasonable care from the tax practitioner). The ATO state on their website that where Safe Harbour is granted, the matter may then be referred to the TPB to consider whether there has been a breach of the Code of Professional Conduct. However, the decision by the ATO whether or not to grant Safe Harbour cannot be appealed. Therefore, tax practitioners may be referred to the TPB without any avenue of appeal, and) without having demonstrated recklessness or intentional disregard of the law (as Safe Harbour is not available in those cases). Not only in this potentially unfair, but it again acts as a disincentive for tax practitioners to make clients aware of the Safe Harbour provisions.

The ATO should be more transparent around Safe Harbour referrals and make their referral guidelines clear. Perhaps, to reassure tax practitioners, they could publish a list of actions/mistakes that will not be referred to the TPB. This would then incentivise tax practitioners to make clients aware of the Safe Harbour provisions in those instances at least. The TPB should also be more transparent with practitioners as to what they do with Safe Harbour practitioner referrals they receive from the ATO.

To raise Safe Harbour awareness, perhaps a fact sheet (or suggested Engagement Letter paragraph) could be produced and made available to tax practitioners as best practice, much like Fair Work's Information Statement for Employees.

9.1 We invite submissions on our preliminary views

We do not support the introduction of an administrative penalties on tax practitioners for instances of recklessness or intentional breaches. Penalties for such egregious conduct should be in the form of current TPB sanctions such as suspensions of registrations, for example, not financial sanctions imposed by another Government body. It is not the role of the ATO to apply administrative or financial penalties on practitioners – this sits with the TPB, otherwise the TPB starts to become redundant and the independence of the ATO is in question.

Further, serious penalties such as those contemplated by the ATO in the discussion paper, need to be preceded by evidence gathering and procedural fairness – not a subjective penalty levied by the ATO.

Yours sincerely

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