



27 August 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

The Curtin Tax Clinic (**CTC**) welcomes the opportunity to make this submission concerning the Department of Treasury's preliminary views with respect to the ongoing operation of tax clinics as outlined in the Discussion Paper (**DP**) on pages 42 to 43.

The CTC wishes to make a submission with respect to Consultation Point (**CP**) 5.10 and reserve comment on CP 5.11.

A summary of our recommendation is as follows:

Recommendation 1: The eligibility criteria for registration **should be amended** so that universities and not-for-profit organisations that run tax clinics are able to register.

A comprehensive submission in support of our recommendation appears below.

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

Yours sincerely

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Background

In respect of our submission, we note that we have previously provided context to the operation and objectives of the CTC in our submission dated 19 April 2019 (refer Annexure A). To this end, we wish to elaborate on the following points, which are in contention to Treasury's preliminary views expressed at paragraph 5.45 of the DP:

Role and services of tax clinics

The provision of services by tax clinics is distinct from the Australian Taxation Office's (**ATO**) Tax Help Program and is not limited to non-complex matters.

Respectfully, Treasury has mischaracterised the role and substance of tax clinics, what they are and what they aim to do. Accordingly, we respectfully disagree with Treasury's current description of the role and function of tax clinics articulated at paragraph 5.45 of the DP. We note that the tax clinics provide a service distinct from the ATO Tax Help Program which is more akin to the role and services provided by a boutique taxation firm or aligned with services offered by a tax agent ombudsman. An example of such services may be illustrated in the matter of Client A.

Example – Client A

Client A presented to the CTC in October 2018 seeking assistance with an active ATO prosecution regarding failure to lodge 5 income tax returns and 15 business activity statements across a 5-year period. Client A had previously operated a ceiling business with their then partner managing a majority of the business' affairs.

Following the breakdown of Client A's marriage, the business ceased its operation and Client A became a single-parent responsible for the care of 4 dependent children aged 6 years and above. The culmination of Client A's marriage breakdown, loss of income and increased responsibilities resulted in Client A experiencing bouts of depression and elevated stress.

The CTC assisted Client A to bring their taxation affairs up-to-date; naturally resulting in a substantial tax liability. During the course of assistance, the CTC identified that the ATO had been prosecuting the wrong entity. Accordingly, with the help of pro-bono legal advisors, all 20 charges were dropped against Client A and a \$20,000 court-imposed fine was reversed.

Given Client A's personal circumstances and reliance on Centrelink benefits, they were in no position to pay the accumulated tax debt. Consequently, the CTC successfully negotiated with the ATO to have their debt non-pursued. Following resolution of Client A's ATO prosecution and finalisation of their taxation affairs, both Client A's mental and physical health dramatically improved and they were able to return to the workforce.

The scope of services provided by the CTC is not limited to non-complex matters. A major component of the CTC's work is related to advisory and advocacy services, two distinct features when compared with the ATO Tax Help Program.

- Advisory in the context of the CTC extends, but is not limited to the provision of tax-related advice in respect of capital gains tax, residency, tax offsets and credits, small business entities, deceased estates and trusts.
- Advocacy in the context of the CTC extends, but is not limited to the provision of pro-bono legal assistance in relation to ATO prosecutions, Director Penalty Notices and negotiations with the ATO.

With respect to the complex matters, a majority of these issues are primarily referred to the CTC by organisations such as community legal service centres, mental health or homeless assistance organisations, legal and accounting firms, the Inspector-General of Taxation and/or the ATO Prosecution department. In resolving these issues, it is also common for the CTC to work in tandem with its industry partners on a pro-bono basis.

Accordingly, the nature of these advisory and advocacy roles traverses the spectrum of complexity. Admittedly, as with most practices, we acknowledge that a majority of the matters dealt with by the CTC may constitute non-complex scenarios.

- Non-complex in the context of the CTC extends, but is not limited to matters that are compliance-based such as myGov assistance, work-related deduction enquiries and/or the preparation of income tax returns.

Yet another crucial point of distinction is that the CTC predominately assists taxpayers with the preparation and lodgement of *prior year* taxation returns where there has been a demonstrated history of poor compliance with taxation affairs.

The CTC may extend its services to the preparation and lodgement of *current year* taxation returns only where instructed to do so by court order or where the taxpayer requires further education. In most cases however, the CTC will not lodge current year taxation returns in favour of educating and encouraging those taxpayers to do it themselves through online means, such as the myGov portal or any appropriate alternate method available. The CTC still assists those taxpayers with the preparation of their current year taxation return, however its involvement in this process is limited. Over the past year of operation, the CTC has observed that this approach promotes and encourages future compliance with taxation affairs.

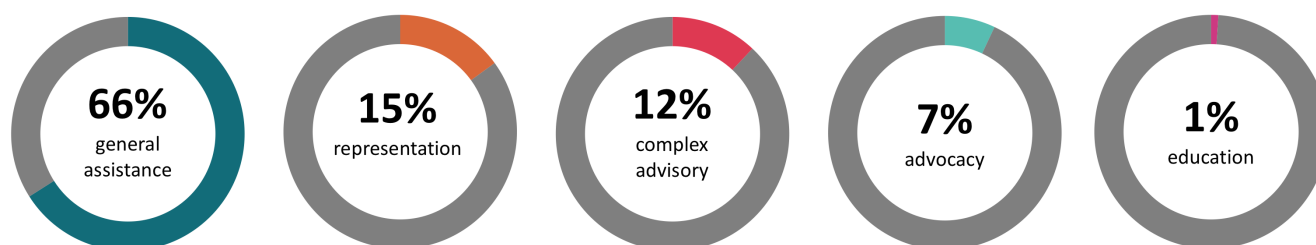
Example – Repeat clients

Following inception in July 2018, the CTC assisted and advised numerous clients on matters concerning the preparation and lodgement of their first income tax return and/or business activity statement while conducting trade as a small business (e.g. Uber, micro online sales platforms).

Frequently, these taxpayers were educated on matters including but not limited to, goods and services tax, income tax and allowable deductions. Assistance was provided to enable and ensure those taxpayers would be confident in completing their own tax return or business activity statement(s) moving forward into later income years.

As the CTC enters its second year of operation, the CTC has observed many of these same taxpayers seeking the CTC's review in relation to tax returns and/or business activity statements that they have prepared themselves. The ambit of the CTC's review is to ensure the respective returns have been accurately prepared by the taxpayer prior to them lodging the return on their own.

By way of illustration, through the months of July 2018 to July 2019 in which the CTC served 265 clients, the distribution of non-complex to complex matters is provided below:



A majority of the CTC's complex matters involve prosecution by the ATO, are debt-related or require the expertise of a technical specialist in the area concerning the particular matter. It is common for these matters to then require input from various industry partners operating in that particular field.

Regardless of the classification of these matters, a theme which transcends the CTC's ability to assist all its clients is access to information via the ATO Tax Agents Portal (**ATO Portal**) and the ability for the CTC, through its tax agent number, to communicate with the ATO. Failing access to the ATO Portal or the ability to communicate with the ATO by virtue of the tax agent number, the services provided by the CTC would be severely impeded.

Professionals engaged with tax clinics

As a minor point of contention, we note that the tax clinics are not limited to engaging the services of retired tax agents. Whilst it is true that some of the programs, and clinics, might engage retired tax agents, there is often scope and opportunity for those looking for transitional arrangements to provide their services to the clinics. This may include, but is not limited to, those returning to work following prolonged absence such as long service or maternity leave, industry professionals or university lecturers seeking to get involved with a new initiative and assist the local community. Accordingly, there are numerous instances where tax clinics can be utilised to engage or retain taxation professionals in order to operate the clinics in a supervisory capacity or facilitate the endeavours of tax clinics.

Accordingly, it is imperative to note that the tax clinics can be heavily distinguished regardless of the similarities apparent between them and the ATO Tax Help Program.

Recommendation

Against the foregoing contextual background, we note that none of the services previously mentioned would have been possible but for registration as a tax agent, or at least, the provision of those services would have been severely impeded.

To this end, in support of paragraph 5.51 and in contention to Treasury’s preliminary views expressed at paragraph 5.52, particularly with respect to Treasury’s comments surrounding the burdensome and unnecessary nature of allocating volunteer-run tax clinics registration as tax practitioners, we make the following recommendation:

The eligibility criteria for registration **should be amended** so that universities and not-for-profit organisations that run tax clinics are able to register.

Benefits and limitations of current and proposed approach

Whilst tax clinics make use of student volunteers, the clinics are also (or should be) appropriately staffed and supervised by registered tax practitioners. Commonly, these practitioners would be registered as tax agents in their individual capacity, on behalf of the respective tax clinic, to enable the clinic to provide the services described above. This arrangement has several noticeable deficiencies and limitations, which are represented below:

<p>Individual registration</p> <p><i>(current approach)</i></p>	<p>Benefits</p> <ul style="list-style-type: none"> ➤ Somewhat more expeditious than the proposed approach (refer below).
	<p>Limitations</p> <ul style="list-style-type: none"> ➤ <i>Limited capacity for succession</i> – if holder of the tax agent registration is to transition to alternate employment the clients do remain with the tax clinic.¹ Consequently, all clients leave with the departure of the respective tax agent. ➤ <i>Inefficiencies in transferring existing clients to new agent(s)</i> – as a consequence of the above, there would be an administrative burden placed on tax clinics to transfer existing clients from the departing tax agent. These administrative delays may impact the ability for a tax clinic to act on behalf of clients. As observed by the CTC, many cases involve

¹ This results in the rather unusual position where clients are not represented by the tax clinic, but rather by the individual tax agent who holds the relevant registration.

	<p>large debt issues or ATO prosecutions where it is essential that communication can occur expeditiously and frequently between the ATO and the tax clinic on behalf of the client.</p> <ul style="list-style-type: none"> ➤ <i>Difficulty progressing matters</i> – if holder of the tax agent registration is not present there are limitations to assisting clients and resolving their matters as the ATO, in most cases, will only speak with the registered tax agent who is often listed as the only client contact. ➤ <i>Limited ability to communicate or otherwise deal with the ATO</i> – if holder of tax agent registration is absent there is limited ability to communicate with the ATO as per the comments made above. ➤ <i>Liability annexes to individual tax agent rather than tax clinic</i> – indemnity has to be sought against the tax agent’s personal name, as well as additional insurance for the university operating the tax clinic, as is the case for the CTC. ➤ <i>Confidentiality issues</i> – if the registered tax agent has additional clients, other than just the tax clinic clients, there is a heightened risk of client contamination and unintended confidentiality breaches (i.e. a student volunteer or other staff member could view the details of taxpayers that they are otherwise not authorised to view).
<p>University or not-for-profit registration <i>(proposed approach)</i></p>	<p>Benefits</p> <ul style="list-style-type: none"> ➤ <i>Increased capacity for succession</i> – tax clinic clients will annex to the tax clinic rather than an individual tax agent. ➤ <i>Increased ability for autonomy</i> – supervised student volunteers and other staff working in a tax clinic can communicate with the ATO on behalf of the tax clinic’s clients. ➤ <i>Ability to pool qualified supervisors</i> – tax clinics can nominate supervisors registered with the Tax Practitioners Board to authorise and lodge tax returns and other documents, to increase efficiency and reduce delays otherwise experienced with the current approach. ➤ <i>Increased funding prospects</i> – universities are likely to be more willing to allocate funds towards the activities of its tax clinic to ensure it is complying with the Tax Agent Services Act and accordingly, universities are likely to be encouraged to take a more active role in the oversight of its tax clinic. ➤ <i>Increased participation</i> – tax professionals wanting to donate their time to assist in tax clinics are likely to be more willing to do so knowing that there is limited personal liability.

	<p>➤ <i>Increased confidence and willingness to contribute to tax clinics</i> – with proper registration and accountability of tax clinics under the umbrella of a university or not-for-profit (as a qualified deductible gift recipient), members of the profession or community wishing to contribute are more likely to do so knowing that the application of funds will be utilised for tax clinic endeavours rather than for alternate means.</p>
	<p>Limitations</p> <p>➤ Willingness of universities or not-for-profits to participate in the scheme.</p>

Despite the above-mentioned limitations and inefficiencies, the clinics continue to produce significant results for the community. The ability to enable universities or not-for-profit organisations to register as tax agents would greatly assist in combatting the inefficiencies currently experienced and streamline the services offered by tax clinics.

Access to the ATO Portal

As demonstrated, the benefits in having access to the ATO Portal are immense. ATO Portal access is not only beneficial in order to see information related to a particular client, but also in dealing with the ATO to be able to act on behalf of the client in a somewhat autonomous capacity (i.e. without the client present). It is the ATO’s mandate to only deal with the individual taxpayer themselves or a registered tax agent or their employee(s).

We do not propose that universities should have equivalent or identical privileges to individuals or other entities that are able to register as tax agents. Whilst this is ideal, this point would need to be discussed with the appropriate authorities further.

Accordingly, we propose that universities should hold a licence or tax agent registration that is subject to the same regulations as the Tax Practitioners Board. This would enable universities, through their proxy in the tax clinic, to be able to deal with the ATO on behalf of the clinics/clients freely and readily.

Again we acknowledge that registration is not strictly necessary where the service is provided without the contemplation of a fee or reward. 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 ATO Portal;
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 community.



Conclusion

We offer the following concluding remarks to summarise our submission.

The recommendation contemplates the future of tax clinics within Australia and advocates for their inclusion in the legislation to ensure all government funded tax clinics are held in the same regard for the tax services they offer as those offered by a taxation professional.

We would be pleased to discuss any aspect of this submission in more detail and look forward to the outcomes of this important review. We would also kindly extend an invitation to members of the Review Committee to attend the CTC at their convenience so that they can experience, first hand, the operation and scope of the initiative.

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Annexure A

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19 April 2019

By email: TPBreview@treasury.gov.au

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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:

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Professor Dale Pinto (Dale.Pinto@cbs.curtin.edu.au) or [REDACTED], particularly for recommendations 2, 3 and 4.

Yours sincerely

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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.

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