

From: [Frederick John Morgan](#)
To: [TPBReview](#)
Cc: [REDACTED]
Subject: Fwd: Independent Review of the Tax Practitioners Board (TPB) & TASA 2009 - Response to Review's 1.8.19 Discussion Paper [What Lawyers want...]
Date: Wednesday, 14 August 2019 1:18:37 PM

Mr Keith James - Chair
Review of the Tax Practitioner's Board

Mr Nick Westerink
Secretariat - Treasury

Dear Mr James and Mr Westerink,

Independent Review of the Tax Practitioners Board (TPB) & TASA 2009 - Response to Review's 1.8.19 Discussion Paper [What Lawyers want...]

1. I thank the Review for its Discussion Paper and making itself available in consultation meetings - including the morning meeting, in Melbourne, on Monday 12 August 2019, which I attended.

2. I'm indebted to the Review's: Mr Neil Earle, for putting this 'pithy' question to me: 'what do lawyers want...?'

3. **What lawyers want** - I submit, is as follows.

(a) **Federal blindness to State/Territory laws and regulators** - must be 'peeled back'

- (i) Your Review is Federally appointed, tasked to review a Federal law (TASA), which regulates tax agents, in respect of their dealings with Federal 'taxation laws'. So it is appropriate that there be focus on the Federal sphere.
- (ii) But there is a State and Territory aspect, that is important and must not be ignored. It relates to the various statutes regulating the practise of lawyers and the regulators appointed under those statutes.
- (iii) The involvement of lawyers, in tax practise, is so prevalent that, they are accorded a very wide exemption, from the requirement to be registered, under s50-5(1)(e) of TASA. This is in recognition of the fact that Lawyers are regulated in their respective States and Territories, under their own dedicated laws, and have been, for over a century.
- (iv) Like TASA, those State and Territory laws exist, in the public interest, to assure the public that certain minimum standards of competence and ethical conduct will be met, when members of the public consult them.
- (v) The TPB, and the various Legal Regulators, are 'co-regulators' of tax practitioners.
- (vi) Therefore, it is wholly wrong to be blind as to these State and Territory laws and those regulators. They do, after all, work in tandem.
- (vii) To continue this blindness will be, to the detriment of the public's interest, in quality assuring the services of 'tax practitioners'. This blindness could allow some taxpayers to 'fall between the cracks'.
- (viii) For this reason, I submit that: 'what lawyers want', is the following.

(c) **Fit and Proper Person Test** (s 20-15 of TASA)

- (i) I submit that s20-45 of TASA to be changed, to expressly mention illegal

conduct, under the various State and Territory prohibitions, on 'unqualified legal practise' as relevant, to the 'fit and proper person' test, in s20-15(b)(i). As a result, this would become relevant to 'registration' (s2-5 & s20-25); 'renewal' (s20-50 & s20-25) and 'termination' (s40-5(1)(a)).

(ii) Then, the Application / Renewal form should have an express question about this - making an applicant declare that they have not been involved in such illegality.

(iii) It would aid, in this process, if there were express questions about the typical infractions, such as 'providing legal documents' and 'practice in State and Territory taxes'.

(iv) Any affirmative answers could form the basis of the TPB's discussions with Legal Regulators, which I submit should occur (see below).

(d) Code of Conduct (s30-10 of TASA)

(i) I submit that the Code of Conduct should contain an express item - that Agents do not breach State and Territory laws prohibiting unqualified legal practice.

(ii) If not that, then at the very least, the current requirement, to act 'lawfully and in a clients best interests' (s30-10(4)) should be administered, in a way that treats breach of these State and Territory laws, as material 'illegality'.

How this could not, already be the case, I am at a loss to explain.

(iii) Breach of such a requirement will open up the TPB's right to investigate (subdiv 60-E) and apply sanctions (subdiv 30-B) including: orders, suspension and termination of registration.

(d) Tax Advice & Representing Taxpayers in the AAT or Courts

(i) I submit that there to be an additional level of requirements to give 'advice' about 'taxation laws' and 'represent [taxpayers] in their dealings with the Commissioner' in the AAT or the Courts.

(ii) Both of these categories of activities are plainly fraught, in terms of non-lawyers having the necessary training and experience, to discharge their duties 'competently' (as required by the Code - s30-10(7)).

(iii) I will go so far as to submit, that the further requirement be, that the tax agent must be a qualified lawyer, with a practising certificate - albeit, perhaps a new category of certificate for practice, as a registered tax agent under TASA. This could be phased in, through suitable 'grandfathering'. Also, I note that practices that are effectively 'multi-disciplinary' can get a legal practising certificate by hiring and nominating a suitably qualified lawyer, who can then be responsible for the satisfactory delivery of legal work (under Part 3.7 of the *Legal Profession Uniform Law*, for instance).

(iv) The reason for this is that, I submit, there is no easy, obvious, safe or reliable way of specifying the amount of legal training and experience, that will discharge the varying levels of skill required, by the wide range of tax liabilities, and situations, that exist. Even the most basic CGT event: A1, operates if there is a 'change in ownership', with various sub-definitions, and the timing of the event depends on when 'the change of ownership occurred' and, if the event happened under a contract, the time when that contract 'was made'. All these are potentially difficult legal questions, and yet this is the most prevalent CGT event, in practise.

(v) Requiring full qualification, in the core legal skill, is entirely equivalent to ASIC preventing tax agents giving financial advice, without registration as a financial adviser, and the TPB preventing financial advisers giving tax advice, without being registered with it.

(vi) I trust the Review will have a kind of 'the King's got no clothes on'

moment here - and see the sense of what I submit.

(e) TPB liaise and cooperate with Legal Regulators

(i) Under the changes I recommend, the TPB would have its own disciplinary powers, and it might well want to exercise them, to protect the integrity of their registration system.

(ii) But the Legal Regulators have the more obvious duty to monitor and prosecute.

(iii) Both are operating in the public interest, to assure minimum quality of service.

(iv) And I submit that this public interest can be (and ought be) maximised, by the respective regulators liaising, cooperating and working together.

4. For the time being, this submission is my own. I understand that the Law Council of Australia and the Law Institute of Victoria are currently considering their position, including submissions along these lines.

[There is a copy of this submission, available to the public, at:

<https://taxtechnical.com.au/what-lawyers-want-a-submission-to-the-independent-review-of-tasa-and-the-tpb-arising-from-the-release-of-its-discussion-paper-and-my-earlier-submissions-about-non-lawyers-doing-legal-work/>]

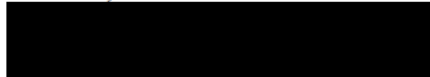
Cheers,

F John Morgan

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