



**Australian Government**  
**Australian Taxation Office**

# Review of the Tax Practitioners Board

ATO Submission in response to the Discussion Paper

## Introduction

The Australian Taxation Office (ATO) welcomes the opportunity to make a submission to the independent review into the effectiveness of the Tax Practitioners Board (TPB), *Tax Agent Services Act 2009* and associated regulation.

The ATO's purpose is to contribute to the economic and social wellbeing of Australians by fostering willing participation in the tax and superannuation systems. We seek to do this by building trust and confidence in these systems.

While there is a clear separation of responsibilities between the ATO and the TPB, both parties help maintain community confidence by promoting a capable and well-regulated tax profession. The ATO recognises the important role tax professionals play in assisting taxpayers comply with their tax obligations, and offers a wide range of services and support to help tax professionals interact with us and obtain the guidance they need.

However, we also understand that the actions of a small number of tax practitioners can undermine both the integrity of the tax profession, as honest practitioners compete with the offerings of egregious practitioners, and the tax system. It is therefore important that the TPB and ATO are equipped to deal with the broad range of behaviours that altogether contribute to the tax gap.

The ATO supports the direction of the review as set out in the Discussion Paper. We consider the preliminary views adopted by the review will enhance protections for consumers of taxation services through strengthening the integrity of the tax profession, and in turn, the tax and superannuation systems.

The views expressed below are informed by the Discussion Paper and submissions made in response to it. To the extent they are not raised or clarified in this submission, the ATO's views continue to be those expressed in the Discussion Paper.

The ATO looks forward to the Final Report and is committed to continuing its productive working relationship with the TPB.

## TPB Governance

### Independence of the TPB

The ATO supports the independence of the TPB. It is vital that as part of effective tax and superannuation systems that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct. The regulation of tax practitioners and the provision of tax agent services is the role of the TPB. While our functions are interconnected, this role is distinct to that of the ATO. The ATO therefore supports measures being put in place to address perceptions of a lack of independence between it and the TPB.

The ATO supports the review's preferred option to deal with the issue of independence, detailed at paragraph 3.22.3 of the Discussion Paper. This option would establish the Chair of the TPB as the relevant accountable authority under the *Public Governance, Performance and Accountability Act 2003* (PGPA Act), responsible for its own budget, reporting and annual performance statements.

To assist in keeping the operating costs of the TPB at a viable level, the ATO considers it appropriate to maintain the shared services arrangement between it and the TPB. The ATO considers that this arrangement will help facilitate the proposed secondment arrangement, which formalises the rights of the TPB with respect to its staff.

## The Board

With the shared services arrangement operating to improve perceptions of independence, the ATO reiterates its view as expressed at paragraph 3.15 of the Discussion Paper. The ATO suggests that the TPB be provided with the flexibility to delegate certain reviewable decisions to TPB staff. Currently, the TPB cannot delegate reviewable decisions to TPB staff and they must instead be made by at least three Board members. Reviewable decisions are decisions subject to review in the Administrative Appeals Tribunal, such as rejecting an application for registration.

The ATO supports the concept of the Board including representation from the wider community, as raised in paragraph 3.41 of the Discussion Paper. The ATO confirms that, even if the Chair of the TPB was to become the relevant accountable authority under the PGPA Act, we do not want an ATO officer to be a member of the Board.

## ATO relationship with the TPB

The ATO works closely with the TPB to share information about registered tax agent, BAS agent and tax (financial) advisor behaviours and conduct. The ATO acknowledges that the vast majority of tax practitioners comply with the laws. However, there are some that may operate in a manner detrimental to the integrity of the tax system.

Where we identify tax practitioners who we suspect operate contrary to their obligations under the TASA, we will refer them to the TPB for review. The ATO may also support the TPB by providing information we hold to aid investigations they may have initiated into the conduct of tax practitioners. We may also use this process where we require information the TPB may hold in relation to a matter we are investigating.

## Object of the TASA

At paragraph 3.48 of the Discussion Paper, the ATO expressed the view that the purpose or object of the TASA could specifically include upholding the integrity of the tax system. On reviewing the submissions received in response to the Discussion Paper, the ATO no longer holds that view. The ATO is concerned with upholding the integrity of the tax system. The TPB is concerned with the integrity of the tax profession. While integrity in the tax profession is an important contributor to integrity in the broader tax system, the TPB's role in upholding integrity in the profession is to protect the consumers of tax agent services. The ATO considers that this distinction is important given the concerns raised on the independence of the TPB.

## Joint TPB and ATO Integrated Plan and Memorandum of understanding

To ensure the independence of both agencies, the ATO is committed to working with the TPB to develop an integrated plan (see **Appendix A**) for our respective roles and responsibilities. The plan will set out both the ATO and TPB's strategic frameworks to identify joint priorities and outcomes. Joint priorities and outcomes will be tied to the ATO's Intermediary Engagement model (see **Appendix B**),<sup>1</sup> which provides a single framework for guiding tax agent interactions. Using this model, the integrated plan will inform the best way for the ATO and TPB to share data and intelligence and target high risk intermediaries in the tax profession.

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<sup>1</sup> Adapted from research conducted by Dr Elea Wurth, Australian National University, 2012 – *A will and a way: An analysis of tax practitioner preparation compliance*.

The plan must be fair and reasonable for tax agents. Our engagement strategies seek to improve levels of trust and confidence in both the tax profession and the tax and superannuation systems. The plan must therefore acknowledge that the majority of intermediaries do the right thing and that honest intermediaries must be protected.

The ATO and the TPB are working together to refresh the existing memorandum of understanding between them to support the integrated plan. This updated document will ensure that processes and procedures for working together are efficient and effective, and reflect three key principles: transparency, early engagement and partnership. The document will also ensure that the sharing of information complies with legislative requirements relating to protected information.

The ATO's Intermediary Engagement Model referred above (see **Appendix B**) provides a framework for defining and categorising behaviour across the population. The ATO uses this information to apply corresponding, tailored activities and interventions. The model provides a risk assessment for an intermediary:

- relative to their peers;
- at a given point in time; and
- based on three lenses: the behaviour of their client base, their business practices and their personal affairs.

The model has four categories, some of which have several sub-categories where behaviours manifest differently.

This model provides a common view and a shared understanding of behaviour across the agent population to the ATO, the TPB and the profession. This consistent view of behaviour can make collaboration with the TPB and the professional associations more effective.

## Information sharing

The ATO is committed to working with the TPB to enable them to achieve their purpose. The ATO recognises the integral roles of tax practitioners, professional associations and the TPB in supporting the tax and superannuation systems. The ATO and the TPB work closely together to strengthen this system and the integrity of the tax profession.

As administrators of the tax and superannuation systems, the Commissioner is in possession of information that the TPB need in order to undertake their role to regulate the conduct of registered tax practitioners and take action against unregistered preparers. One of the ways the ATO supports the TPB in achieving its outcomes is by identifying and referring instances of potential breaches of the TASA to the TPB for consideration and investigation.

The TPB Review, heightened activity from the TPB and increased collaboration between the ATO and TPB, is highlighting a level of uncertainty where the boundaries start and stop in respect of our separate but mutually beneficial roles. This is particularly in relation to information sharing, ranging from undertaking joint cases through to access and extraction of data from our systems, to the on-sharing of information with other regulatory agencies and bodies.

Under the current system, there are no legislative impediments in sharing information between the two agencies. Information sharing between the ATO and other agencies including the TPB is governed by provisions in the *Taxation Administration Act 1953* (TAA), general 'need to know' principles and also our obligations under the *Privacy Act 1988*.

In addition to formal referrals, the ATO also exchanges other information with the TPB in relation to:

- supplementary information or findings that relate to a previously submitted referral;

- non-evidence based referrals (for example Tax Integrity Centre matters); and
- any intelligence / findings that may assist the TPB to conduct risk analysis on tax practitioner behaviours

The ATO is continuing to raise awareness of the role and function of the TPB internally, to ensure that information obtained by the ATO as part of its Business As Usual functions can, where appropriate, also support the TPB in its investigations into breaches of the TASA. We are also focusing on developing a greater coordinated 'whole of ATO' approach to identify the risks posed by agents to ensure the effective use of ATO resources to address these risks.

We are making improvements to the information sharing process with the TPB to make it more streamlined and efficient. We acknowledge the recent significant improvements in the TPB approach to ensuring the integrity of the tax profession, evidenced by an increase in sanction outcomes and action taken in relation to ATO referrals to the TPB.

## Whistle-blowers

The ATO supports an amendment to our whistle-blower legislation in Part IVD of the TAA to include the TPB as a person to whom the Commissioner could disclose protected information. Without an amendment the ATO can only provide the TPB with the de-identified information, unless consent is obtained from the whistle-blower to disclose their identity. The ATO would only provide this information to the TPB if it was relevant in the operation of the TASA. However, in providing de-identified information there is a risk that the TPB, in conducting their own investigations on receipt of the information, could unintentionally disclose details of the whistle-blower. This is at odds with the provisions.

We also note that there is no provision that allows someone to blow the whistle directly to the TPB and obtain whistle-blower protection. The ATO believes that the TASA requires a regime similar to that in Part IVD of the TAA to enable protected disclosures to be made directly to the TPB relevant to the regulation of tax agents under the TASA. We support this happening, and would also request a similar ability to receive protected information from the TPB where it is relevant to the administration of the tax and superannuation system.

## Firm governance

In paragraph 4.17 of the Discussion Paper, the ATO supported the requirement for firms to provide details on their actual firm governance and control structures irrespective of their legal structure. The intent of this was to enable the ATO to look through firm structures when undertaking compliance activity, enabling it to target the behaviours of the controlling minds behind these firms.

On reviewing the submissions received in response to the Discussion Paper, the ATO accepts that there is scope for a more streamlined approach to obtaining the above information. The ATO now supports the issuing of a self-declaration by the registered tax practitioner. We propose that the practitioner would be required to declare whether they have engaged a person who, for example, has previously been de-registered by the TPB or committed a serious criminal offence. The ATO would be willing to assist Treasury in the design of such a process.

Guidance could be taken from the Legal Profession Uniform Law (NSW), which imposes legislative restraints on employing certain persons. Section 121 provides that a law practice must not have a 'lay associate' whom any principal or legal practitioner associate of the law practice knows to be a 'disqualified person' or 'a person who has been convicted of a serious offence', unless the lay associate is approved by the relevant authority.

In this context, a 'lay associate' is any associate who is not a legal practitioner and includes agents, employees, and persons who share receipts, revenue or other income arising from the law practice. A person is considered to be a 'disqualified person' if:

- their name has been removed from the Australian Roll of Lawyers;
- their practising certificate has been suspended or cancelled, or their renewal has been refused; or
- they are subject to an order prohibiting them from working for, or in, a law practice, managing an incorporated legal practice, or being a partner in a multi-disciplinary partnership.

We envisage that a self-declaration process would work in conjunction with a similar legislative provision, and would provide sufficient oversight to the TPB to focus on firm compliance while reducing the compliance burden for a large number of unaffected firms.

The ATO maintains its views on associates, as detailed in paragraph 5.36.1 of the Discussion Paper. The ATO considers that incorporating the above mechanism would be consistent with this view, and enable the TPB to effectively utilise the additional information obtained.

## Sanctions and safe harbour

### Administrative sanctions for the TPB

The ATO supports the review's preliminary views on sanctions, noting that:

- The concept of QA audits of controls in firms (paragraph 7.29.1 of the Discussion Paper) would interact well with the concepts around firm governance discussed above.
- Sanction efficacy would be increased through public visibility for the whole termination period, rather than the current 12 month period. This extended visibility is needed in order to help divert clients, potential new clients or business partners or new employers from engaging agents who have been subject to severe sanctions.
  - The ATO considers that this should form part of a wider communication strategy, which would involve the TPB, ATO, professional associations and other stakeholders able to effectively engage with affected groups.

The ATO supports the concept of the TPB being able to demand information before formally commencing an investigation. Such an approach, allied with changes to the TASA to prevent agents voluntarily de-registering before the commencement of an investigation, would improve the effectiveness of the TASA regime in dealing with the most egregious agents, such as the examples included in the Discussion Paper.

### Safe harbour and administrative penalty

The ATO has further considered and refined its views on a new administrative penalty regime, as detailed at paragraphs 9.14 to 9.19 of the Discussion Paper.

The ATO proposes it would administer an administrative penalty regime that applies to tax intermediaries who have demonstrated an intentional disregard of the tax law.

In practice, the proposed administrative penalty regime would target the highest risk of the four categories outlined in the intermediary engagement model which we identify as our 'intermediaries of threat'. This group comprises around 200 practitioners within the population and exhibit behaviours that undermine the integrity of the system by conducting

activity that is illegal and often involves a criminal element. Largely clients bear the full brunt of their intermediary's actions. Furthermore, this behaviour creates an inequitable playing field for the majority of tax practitioners who comply and promote positive compliance behaviour in their clients.

The aim of the penalty is deterrence and it will not apply to recklessness or a failure to take reasonable care by a tax intermediary. Tax intermediary is to be defined broadly to encompass persons involved in the preparation of a return, similar to the existing preparer penalty in the Canadian tax system.

We propose that the penalty will involve a civil standard of proof, but are open to having the onus of proving the penalty.

Perhaps most importantly, the ATO also proposes that an independent body or panel be involved to review cases before an administrative penalty becomes due and payable.

The administrative penalty would supplement a safe harbour regime extended to apply to recklessness and intentional disregard by the agent. While safe harbour and the current administrative penalty frameworks may be partly leveraged to design a new administrative penalty, we consider the new penalty could apply where safe harbour has not been satisfied by the taxpayer.

The administrative penalty would target tax intermediaries operating outside the system, who pose the greatest threat to the integrity of the tax system. The new penalty works in conjunction with the proposed range of administrative sanctions for the TPB, to target the range of behaviours contributing to the tax gap.

Law design would need to ensure that there is no more than a single pecuniary penalty arising from the same conduct. However, other sanctions (such as termination or permanent disbarment) could operate in conjunction with the new penalty to ensure both the tax system and consumers are protected.

## Legal professional privilege (LPP)

The ATO has expressed concerns that non-genuine LPP claims are being made by some tax practitioners to frustrate investigations, and some claims are not being particularised in a timely manner. The ATO has advised that it is seeing an increasing number of cases involving blanket LPP claims. The numbers of documents can be large. It is both the delay in identifying, and unwillingness to identify, which documents are subject to LPP that concerns the ATO. This is not a matter of abrogating LPP in ATO investigations.

We note that the Law Council of Australia and the ATO are developing a protocol in relation to LPP claims.

On reviewing the submissions received on LPP, the ATO considers that there is merit in the proposition that the Code of Conduct is better kept principle-based and that if it is too prescriptive, it will be less effective. It was also submitted that the protocol will in itself address the LPP issues raised by the ATO. While the protocol is clearly an important part of dealing with these issues, in the ATO's view, provisions like those in sections 69 and 70 of the *Australian Securities and Investments Commission Act 2001* would also assist in ensuring that LPP claims can be made, and disputes in relation to such claims can be resolved, in a timely manner. Such provisions, while maintaining existing substantive LPP rights, provide a means of ensuring that disputes can be brought before a Court in an appropriate timeframe. Provisions like those in sections 69 and 70 of the *Australian Securities and Investments Commission Act 2001* could be enacted in the *Tax Administration Act 1953*.

## Relationship with the professional associations

The ATO considers there to be potential for recognised professional associations, which have well developed codes of practice and supporting disciplinary processes, to have a greater role in supporting the TPB in regulating their registered tax practitioner members. Whether legislation to aid a free flow of information between the TPB and the professional associations is appropriate is a matter for Government.

We also consider there to be scope for professional associations to work with the TPB on the annual mandatory targeted CPD requirements of the association. In working together core skill areas can be developed which directly relate to the capabilities of the member and the actual tax agent services provided by their practice.

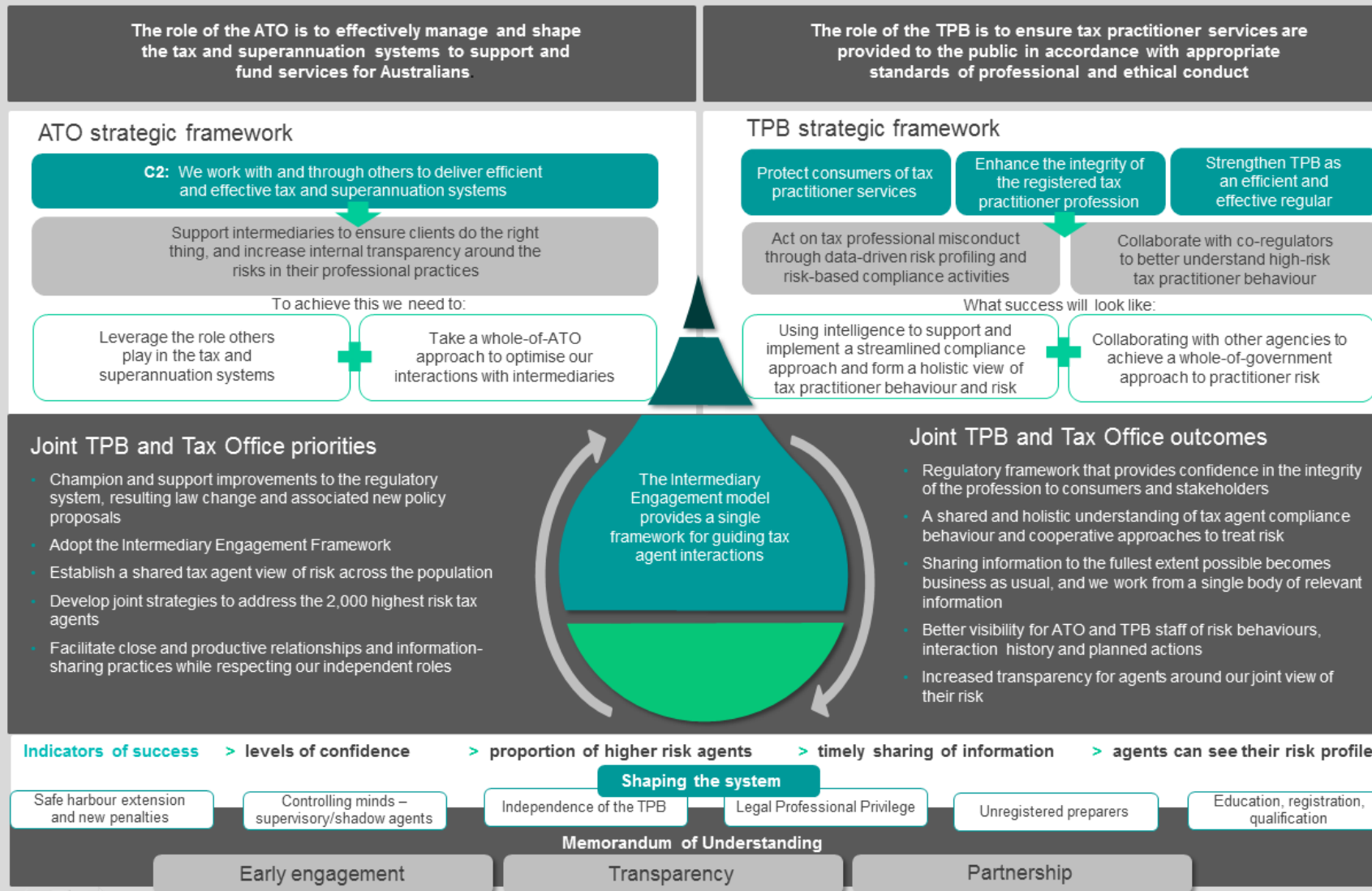


## Australian Taxation Office & Tax Practitioners Board

Working together

DRAFT FOR DISCUSSION

### Strengthening the integrity of the tax profession and the tax and super systems



## Appendix B

### Intermediary engagement model

The Intermediary engagement model provides a framework for defining and categorising behaviour across the population. Our goal is for the ATO and the TPB to use this information to apply corresponding, tailored activities and interventions. The model provides a risk rating for an intermediary:

- Relative to their peers,
- At a given point in time, and
- Based on three lenses: the behaviour of their client base, their business practices and their personal affairs

The model has four categories, some of which have several sub-categories where behaviours manifest differently.

#### BEHAVIOURS OF THREAT

Intermediaries in this category are conducting activity that is suspected to be illegal and may involve a criminal element. The impact of this behaviour is often borne by the intermediary's own clients and the Commonwealth.

Within this category we see unacceptable behaviour including:

- Perpetuate Fraud
- Evasion
- Theft
- Illegal activity and crime
- Misuse position of trust
- Unregistered preparer activity

#### BEHAVIOURS OF CONCERN

Behaviour is generally intentional and widespread across the client base:

- Development, promotion or use of non-compliant arrangements (schemes)
- Low transparency and high complexity in their own or client affairs
- Consistent failure to correctly ascertain client's state of affairs
- Provision of false or misleading advice
- Poor compliance in own and practice affairs

#### BEHAVIOURS OF INTEREST

Behaviour is generally emerging and the intermediary is at risk of entering a higher risk category. Within this category some intermediaries display opportunistic behaviours:

- Opportunistically exploiting areas they believe are not being monitored
- Opportunistically exploiting ambiguous/grey areas of the law.

Some intermediaries in this category display more lax behaviours:

- Internal controls are falling away or were never present
- Returns or statements made to the ATO may be incorrect
- Questioning is insufficient to highlight areas where clients have provided inaccurate information or failed to disclose

Some intermediaries display low capability in one or more areas (i.e. outside of their usual skillset or have not kept up to date with changes to law or policy)

#### BEHAVIOURS OF BEST PRACTICE

These intermediaries see themselves as consummate professionals, holding their own integrity and conduct to a high standard.

- Internal controls and practices are strong
- The intermediary has a strong technology foundation that allows efficient internal checks and balances and streamlines access to ATO systems or current law/policy
- Strong client selection policy where the intermediary is being instructed to take illegal or fraudulent positions or where a client's requirements are outside the knowledge or skill set of the intermediary
- Reasonable care taken to correctly establish the client's position
- Skills and knowledge kept up to date across the practice
- High levels of transparency and willingness to work with the ATO
- Honest mistakes may still be made but are rectified appropriately when the intermediary becomes aware of them

