



INSTITUTE OF
**PUBLIC
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Review of the Tax Practitioners Board

April 2019

Introduction

The Institute of Public Accountants (IPA) welcomes the opportunity to offer our “Review of the Tax Practitioners Board” submission. We look forward to working with the Government in providing feedback on the effectiveness of the Tax Practitioners Board and the *Tax Agent Services Act 2009* to ensure that tax services are provided to the public in accordance with appropriate professional and ethical standards and that consumers in receipt of such services are protected.

The IPA is one of the three professional accounting bodies in Australia, representing over 36,000 accountants, business advisers, academics and students throughout Australia and internationally. The IPA prides itself in not only representing the interests of accountants but also small business and their advisors.

We look forward to discussing in more detail the IPA’s submission and its recommendations. Please address any further enquires to Tony Greco, General Manager Technical Policy via tony.greco@publicaccountants.org.au

12 April 2019

Mr Nick Westerink
Individuals and Indirect Tax Division
The Treasury
Langton Crescent

PARKES ACT 2600

Via email: TPBreview@treasury.gov.au

Dear Mr Westerink

Review of the Tax Practitioners Board

The IPA welcomes the opportunity to provide this submission in response to the Government's review with respect to the effectiveness of the Tax Practitioners Board (TPB) and the operation of the *Tax Agents Services Act 2009* (TASA).

A large majority of Australian taxpayers rely on their registered tax agent or BAS agent to ensure that their tax obligations are met, As such; we are supportive of the regulatory framework that currently governs the provision of tax agent services to the community since its inception in 2009.

For some jurisdictions, the regulatory framework under the TASA has become a reference for those who currently do not have such a framework to govern the provision of tax services. For example, the United Kingdom is currently examining models for implementation of their own regulatory framework.

It was originally flagged in the explanatory memorandum to the TASA that a post-implementation review be undertaken three years after its introduction. Given that it has almost been a decade since the TASA was introduced, this initiative to review the TPB and the TASA is long overdue. Further, we consider this review to be timely and relevant following the financial services royal commission where the effectiveness of Australia's financial regulators has been the subject of scrutiny.

While the TPB has done its best within its financial and resourcing constraints to administer the TASA, there is always continued scope for improvement. This becomes more critical in light of changing nature of the tax profession (particularly in terms of demographic and technological advancement) and the heavy reliance placed by taxpayers on tax agent and BAS agent services. In this regard, our submission broadly addresses some of questions posed in the terms of reference which directly impact our members.

Executive summary

An overarching objective of the TASA and the governance framework of the TPB are to ensure that services provided by tax practitioners are provided to the public in accordance with appropriate standards of professional and ethical conduct which in turn, protects consumers of such services (i.e. the taxpayer).

In our view, in order to achieve this primary objective, aspects of the TPB which warrant further examination and consideration by the Government include:

- **Increased compliance activities:** Due to financial and resourcing constraints, it has become clear that the level of compliance activities by TPB to identify rogue agents, unregistered agents and promoters of tax schemes have largely been inadequate. This has not been helped by the increase workloads from new initiatives; the introduction and registration of tax (financial) advisers being one example. We consider that further compliance activities are necessary to level the playing field for tax practitioners and provide confidence in the tax system. In that regard, we recommend that the Government evaluate and consider additional funding to the TPB to improve tax practitioner compliance which will ultimately benefit the community. A well-functioning and regulated profession is critical to the tax system and is therefore of benefit to the broader community, such an increase in funding should primarily come direct from the public purse.

- **Imposition of civil penalties:** The current provisions under the TASA allow the imposition of civil penalties for certain breaches of the law by tax practitioners. However, in order for those penalties to be imposed, it is necessary under the law for an application to be made to the Federal Court of Australia with any collection and enforcement within the remit of the Commissioner of Taxation. The red tape imposed on the TPB in our view appears unnecessary and inhibits the effectiveness of the TPB. In our view, this aspect requires review by the Government as to whether it would be appropriate for additional powers to be granted to the TPB with respect to the imposition, enforcement and collection of civil penalties.
- **Perceived independence issue:** Notwithstanding that the TPB is an independent regulator of tax practitioners, that independence is tarnished by the perception that the TPB is connected to, or a part of, the Australian Taxation Office (ATO). This is due to the fact that the facilities and staff of the ATO are shared with the TPB (including enforcement and collection of penalties), and that the allocated budget for funding of the TPB forms part of the ATO's overall funding budget. In that regard, the Government should consider ways to practically separate the TPB from the ATO in order to address these perceived independence issues.
- **Registration fee increases:** The Government recently increased the three-year registration fee for tax agents from \$500 to \$675 commencing 1 July 2018. As part of the fee review, the "non-business" category of tax agent was scrapped (which previously only imposed a fee of \$250). Notwithstanding that the increase was set with the objective of providing additional funding to the TPB, this comes at a cost to tax practitioners and may result in costs being passed on to consumers. Further, older practitioners who are close to retirement may also withdraw their registration as rising costs no longer makes it financially viable to practice. It would be in the Government's interest to review the fee structure and in particular to reinstate the non-business category for this cohort of tax practitioners who pose minimal compliance risk. The removal of the "non-business" category has been viewed by many as an

increase by stealth. The justification provided was that the TPB needed to self-fund any additional revenue from the tax practitioner community by adopting a user pay principle. The additional funding was to better resource the TPB to undertake more compliance activities. Given the consumer benefits and protections afforded by TASA, it is arguable that some of the funding should be sourced directly from the Government rather than from tax practitioner community. We understand that the TPB have now been given more funding as part of Black Economy taskforce initiatives to undertake more compliance to reign in advisers who are facilitating clients in the black economy. There is already significant costs for those that operate smaller practices and which may, in turn drive up costs of advice to consumers. Smaller practitioners have commented on the high costs associated with maintaining a registration under TASA, which can include professional membership fees, indemnity insurance, CPD costs as well as renewal fees. Rising regulatory costs may hinder new entrants or squeeze existing tax practitioners out of the market. Over time this could lead to market concentration and reduced competition.

- **Professional indemnity insurance:** The TPB requires that tax practitioners maintain a minimum level of professional indemnity insurance cover; the amount subject to turnover of the practitioner's business. The minimum cover amount does not necessarily align with the requirements for those who are members of a professional associations/ accounting bodies (which typically requires cover of at least \$2 million). It would be in the Government's interest to consider whether the minimum cover currently imposed should be aligned with that imposed by the professional associations.
- **Wider range of professionals:** TASA needs to be more flexible to accommodate a wider range of professionals who may provide tax services. The TPB role also needs to adapt to emerging technology that enables more unregistered people to provide tax services.
- **Education requirements:** The TPB provided guidance on the education requirements for becoming a tax agent. At the time there was some

disagreement which was noted as part of the consultation process. In particular the requirement to have three approved commercial law modules in addition to two tax modules. It would be appropriate if the educational requirements are still fit for purpose.

- **Release of information to professional associations:** Under appropriate circumstances, it would be advantageous for the TPB to be empowered to release information to the professional associations in advance of sanctions that the TPB may impose on non-compliant tax professionals to enable the associations to undertake their own disciplinary actions against one of their members.

Some of the above salient issues are discussed in further detail at **Appendix 1** of this submission

We trust that you will find our submission of value. Please feel free to contact us directly should you require further clarification on any of the issues raised or other questions related to our submission.

Yours sincerely



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Appendix 1: Detailed discussion

Level of compliance activities

The TPB has, since its inception, commendably administered the operation of the TASA and ensured the compliance of tax practitioners within its funding and resourcing constraints. In our view, the limited resourcing has hamstrung the TPB's ability in undertaking compliance activities, particularly in identifying rogue agents whose actions are doing a disservice to the majority of agents and individuals in the community who are providing tax services unregistered.

By way of background, the TPB's 2017-18 Annual Report (the report) revealed that there are 77,749 registered tax practitioners¹ as at 30 June 2018. The report cites that the number of agents has tripled since the introduction of TASA in 2009, the introduction of the tax (financial) adviser being a significant factor for this increase.

Of that number of tax practitioners, the report shows that for that year, there were only 287 sanctions issued² (i.e. 0.369 per cent of the total agent population) and seven matters before either the Administrative Appeals Tribunal or the Federal Court of Australia which were in favour of the TPB. We understand that a fair proportion of rogue agents have been identified by way of referral, with the number of complaints or referrals made to the TPB for the last financial year totaling 1,528³ (representing 1.965 per cent of the total agent population).

Our main concern, based on the above statistics and from anecdotal evidence provided by our members, is whether the TPB is doing enough to identify and sanction rogue tax agents who are not abiding by the Code of Professional Conduct.

¹ This comprises of 42,561 tax agent, 15,638 BAS agents and 19,550 tax (financial) advisers.

² This comprises of 182 written cautions, 81 orders and 24 terminations.

³ This comprises of 1,023 from the public, 125 from registered tax practitioners, 120 from the ATO and 260 from other.

In particular, rogue agents who erroneously claim or over claim work-related deduction for their clients, those who are promoters of tax schemes and unregistered agents must be identified and sanctioned.

By way of example, we have received feedback on rogue agents in regional communities who have been deliberately and erroneously claiming travel expense deduction under the substantiation exception for fly-in, fly-out workers notwithstanding that these employees are paid a living-away-from-home allowance and are clearly not eligible to a deduction under those rules. The behaviour of these agents place those who are doing the right thing at a competitive disadvantage as most workers will gravitate (typically by word-of-mouth) to those tax agents who can obtain them a 'bigger' tax refund.

It has been of more recent times that there has been increased cooperation and collaboration between the TPB, the ATO and other regulatory in identifying such tax agents.

The above is one of many examples where a minority of rogue agents has adversely affected the credibility the majority who are doing the right thing. It is therefore clear that rogue and dishonest agents must be weeded out to protect the integrity of the tax profession and its consumers. It has also become apparent that over the years, the role of the TPB has been expanded with new initiatives, such a registration for tax (financial) advisers which have taken up significant administrative resourcing that could be otherwise be allocated to compliance activities.

To address this issue, we therefore recommend that the Government review the adequacy of its funding model to ensure that the TPB has sufficient resourcing in order for it to effectively conduct its compliance activities. We note that in the most recent 2019-20 Federal Budget, funds have been assigned to the corporate regulators and to the ATO for its anti-avoidance taskforce; however, the Government was silent on whether there would be further funding for the TPB (apart from the 2018-19 Federal Budget last year).

As the role of the tax agent is a critical cog in the functioning of the tax system, we consider that any additional funding to be a sound investment in improving taxpayer compliance and confidence in the tax system, particularly where there is a heavy reliance placed on tax practitioners by taxpayers.

TPB's powers to impose, enforce and collect civil penalties

In order to effectively deter tax practitioners from doing the wrong thing or for being unregistered, the TPB must be provided with appropriate powers of imposition and enforcement. As it currently stands, the powers of granted to the TPB, in our view, are ineffective when it comes to the imposition of civil penalties and enforcement for certain contraventions of the TASA.

When a tax agent fails to comply with the TASA, say it fails to meet the Code of Professional Conduct, the TPB may be able to impose an administrative sanction such as a written caution, or a suspension or a termination of the tax practitioner's registration. However, if the TPB wishes to impose a civil penalty for a breach of the TASA, it is required to apply to the Federal Court of Australia for an order to pay that penalty. Any penalty imposed by the Court is receivable and enforceable by the Commissioner of Taxation.

The need by the TPB to obtain an order from the Court imposes undue process and costs, particularly where the maximum civil penalty for the contravention is already contained under the law.

Under the tax law, civil penalties are typically imposed, enforceable and collected by the Commissioner of Taxation – in other words, there are no requirements for the Commissioner to obtain a Court order. For example, the penalty for making a false or misleading statement under tax law is determined by the Commissioner subject to the behavior that led to the shortfall (such 75% of the shortfall amount where there is an intentional disregard of the law).

Providing the TPB with powers to impose, enforce and collect civil penalties would without doubt remove the red tape that is currently in place. Such an approach would of course require safeguards such as providing a right of appeal for the penalty imposed.

We therefore recommend that the Government review the appropriateness of the civil penalty regime currently in place under the TASA and to evaluate whether there is scope for additional powers to be given to the TPB for imposition and enforcement of civil penalties in order to reduce red tape.

Perceived independence issues

The TPB operates as an independent regulator of tax practitioners and the provision of tax services. The perception of the TPB's independence is however hampered by the fact that its facilities and staff are shared with the ATO (including the enforcement and collection of civil penalties as noted above). Further, that perception of independence is also impacted by fact that funding for the operation of the TPB forms part of the ATO's overall budget.

Such a perception can impact the confidence that the tax agent community in the TPB, as it could be perceived the TPB and the ATO are one and the same. Other regulatory bodies such as the office of the Inspector-General of Taxation and Australian Small Business and Family Enterprise Ombudsman do not have such perception issues as they operate in their own right.

While the sharing of information between regulatory bodies is the norm and should be encouraged where beneficial, the dealings between the TPB and the ATO may be compromised where there are perceived independence issues.

In order for it to operate effectively, the TPB must be seen to operate as its own independent regulatory body from other government bodies. It would therefore be incumbent the Government to address these perceived independence issues so as

to provide confidence to the tax agent community and in turn, the wider Australian community.

Other salient TPB issues impacting tax practitioners

Registration fee increases

More recently the Government reviewed the registration fee structure for tax practitioners and has made changes which results in tax practitioners paying more for their registration.

Prior to 1 July 2018, there were two categories when it came to tax agent registrations – “business” and “non-business”. The fees for these categories were \$250 and \$500 respectively for three years.

From 1 July 2018, the non-business category has been removed and a single fee of \$675 applies to all tax agents irrespective of the tax agent’s status for a three-year period. For tax (financial) advisers and BAS agents, the fees have been increased to \$540 and \$130 respectively for the same period.

This fee increase was contained in the 2018-19 Federal Budget which, to our knowledge, was undertaken without any stakeholder consultation. The Government justifies this by citing that the increase in fees is to help the TPB to continue to meet its legislative responsibilities and protect consumers of tax services. Further, fees in future will also be increased by the consumer price index.

In light of these changes, for tax agents, fees have almost overnight increased by 35 per cent for agents in business and for those non-business agents’ fees have almost tripled increasing by 270 per cent. Inevitably, these significant and unforeseen fee increases have not been looked upon favourably by the tax agent community.

For those who are tax agents in business, this represents an unnecessary impost in addition to other expenses which are on the rise such as professional indemnity

insurance (see below), ASIC fees, software costs and other registration costs. To remain profitable, there is increased pressure for tax practitioners to pass on these costs to their clients in order to recoup their costs of doing business. Further, for the older cohort of tax agents who are reducing their workloads in the lead-up to retirement; additional fee increases, amongst other expenses, could lead to an earlier withdrawal from the profession as it no longer becomes financially viable to practice.

For those who have registered as non-business agents, the fee increase may discourage this cohort of agents from renewing their registration. Those such as academics, retired individuals and others whose roles may require registration as a tax agent (but who are not conducting a business themselves) should not be unduly penalised as they do not present a compliance risk. For the above reasons, the non-business category of agents in our view should be reinstated with the lower fee for this cohort.

As noted earlier, while we do not dispute the need to increase resourcing in ensuring that tax practitioners are compliant and the consumers are protected, this must concurrently be balanced against ensuring that registration costs do not operate as a barrier to entry for younger tax practitioners wanting to enter the profession nor act as a deterrent for those who are currently tax agents, where the cumulative impact of rising costs makes being in the profession less financially desirable. As noted, this is particularly the case for the large proportion of agents who are approaching retirement age.

Professional indemnity insurance

The TASA requires that those who register as a tax agent with the TPB must have the appropriate level of professional indemnity insurance. The basis for imposing such a requirement is to ensure that consumers are protected in the event that there is a loss suffered due to an act, omission, error as a result of tax services provided.

The minimum amount of professional indemnity insurance required is prescribed by the TPB is reproduced as follows:

Amount of cover

<i>Tier</i>	<i>Turnover (excluding GST)</i>	<i>Minimum aggregate amount of cover* (inclusive of legal and defence costs)</i>
1	Up to \$75,000	\$250,000
2	\$75,001 - \$500,000	\$500,000
3	Over \$500,000	\$1,000,000

**Please note that what is an appropriate amount of cover for you may in fact be more than what is set as the minimum requirement.*

The majority of tax agents would be members of a recognised professional association, the IPA being one such accredited body by the TPB. For most of these recognised professional associations, the minimum level of cover imposed is \$2 million regardless of the individual's turnover. The amount imposed by the TPB is short of the professional bodies.

We therefore recommend that the Government evaluate whether it would be appropriate for the minimum amount of insurance cover be increased so that it is aligned with the requirements of the professional associations.

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