2022-2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (2023 MEASURES NO. 1) BILL 2023

EXPLANATORY MEMORANDUM

(Circulated by authority of the Assistant Treasurer and Minister for Financial Services, the Hon Stephen Jones MP)

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	***Definition***
AASB	The Australian Accounting Standards Board
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ATO	Australian Taxation Office
AUASB	The Auditing and Assurance Standards Board
BAS	Business activity statement
Bill	Treasury Laws Amendment (2023 Measures No. 1) Bill 2023
Budget Time	7:30pm, by legal time in the Australian Capital Territory, on 25 October 2022
Commissioner	Commissioner of Taxation
Corporations Act	*Corporations Act 2001*
Financial Advisers Register	Register of Relevant Providers
FRC	The Financial Reporting Council
GST Act	*A New Tax System (Goods and Services Tax) Act 1999*
IAASB	International Auditing and Assurance Standards Board
ICCPR	International Covenant on Civil and Political Rights

Abbreviation	***Definition***
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFRS Foundation	The International Financial Reporting Standards Foundation
ISSB	The International Sustainability Standards Board
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
Licensee	Australian financial services licensee
Special Account	TPB Special Account
TAS Act	*Tax Agent Services Act 2009*
TPB Review	Independent Review of the TPB
TPB	Tax Practitioners Board

General outline and financial impact

Schedule 1 – Registration of providers and assisted decision making

Outline

Schedule 1 to the Bill amends the Corporations Act to:

- allow ASIC to approve applications from one or more licensees to register on the Financial Advisers Register the same relevant provider, and
- allow assisted decision-making to be used for any purpose for which ASIC may make decisions in the performance or exercise of ASIC's functions or powers to register a relevant provider.

The amendments are technical in nature.

Date of effect

Schedule 1 to the Bill will commence on the day after Royal Assent.

Financial impact

Nil.

Human rights implications

Schedule 1 to the Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 6.

Compliance cost impact

The amendments in Schedule 1 to the Bill do not have a compliance cost.

Schedule 2 – Sustainability standards

Outline

Schedule 2 to the Bill provides the AASB with functions to develop and formulate sustainability standards. It clarifies the AUASB's function to develop and maintain relevant auditing and assurance standards for sustainability purposes. It also empowers the FRC to provide strategic oversight and governance functions in relation to the AASB's and AUASB's sustainability standards functions.

Date of effect

Schedule 2 to the Bill will commence the day after Royal Assent.

Proposal announced

Schedule 2 to the Bill partially implements the Restoring Treasury's Capability on Climate Risks and Opportunities – modelling and reporting standards measure from the 2022-23 October Budget.

Financial impact

Nil.

Human rights implications

Schedule 2 to the Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 6.

Compliance cost impact

The amendments in Schedule 2 to the Bill are expected to have minimal regulatory impact.

Schedule 3 – Government response to the Review of the Tax Practitioners Board

Outline

Schedule 3 to the Bill implements the following recommendations of the TPB Review to:

- update and modernise the objects clause of the TAS Act (Recommendation 2.1);
- create financial independence for the TPB from the ATO (Recommendation 3.1);

- require tax practitioners to not employ or use a disqualified entity without the TPB’s approval, or enter an arrangement with a disqualified entity (Recommendation 4.6);
- convert to an annual registration period (Recommendation 4.7); and
- enable the Minister to supplement the existing Code of Professional Conduct to ensure that emerging or existing behaviours and practices by tax practitioners are properly addressed (Recommendation 5.1).

These recommendations are intended to improve the effectiveness and independence of the TPB, enhance community confidence, and support high standards in the tax profession whilst streamlining the regulation of tax practitioners.

Date of effect

The amendments in Part 1 of Schedule 3 to the Bill apply from the first quarter following Royal Assent. The amendments in Part 2 of Schedule 3 to the Bill apply from 1 July 2024. The amendments in Part 3 of Schedule 3 to the Bill apply from 1 July 2023.

Proposal announced

Schedule 3 to the Bill partially implements the recommendations included in the Government’s Response to the TPB Review released on 27 November 2020.

Financial impact

There are no financial impacts for four of the five recommendations. The TPB’s registration fees will require further consultation with industry and accordingly the financial impact of Recommendation 4.7 is unquantifiable.

Regulation impact statement

The TPB Review has been certified as a process and analysis equivalent to an Impact Analysis. The full text of the TPB Review has been provided at Attachment 1.

Human rights implications

Schedule 3 to the Bill raises human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 6.

Compliance cost impact

Schedule 3 to the Bill is expected to have a low increase in compliance costs. It is expected that the measure will increase regulatory costs for businesses by approximately $400,000 per year.

Schedule 4 – Off-market share buy-backs

Outline

Schedule 4 to the Bill improves the integrity of the income tax system by aligning the tax treatment of off-market share buy-backs undertaken by listed public companies with the tax treatment of on-market share buy-backs. It also amends the income tax law in respect of selective share cancellations to ensure alignment of tax treatment across capital management activities for listed public companies.

Date of effect

The amendments made by Schedule 4 to the Bill apply to buy-backs and selective share cancellations undertaken by listed public companies that are first announced to the market after Budget Time.

A buy-back or selective share cancellation is announced to the market (if the announcement is made before the buy-back or cancellation occurs) when the buy-back or cancellation has been disclosed to the approved stock exchange on which the shares or membership interests are listed, and that notification has been released to the market as required by the rules of that stock exchange.

For buy-backs and selective share cancellations undertaken by listed public companies that are not announced to the market, or the announcement is made after the buy-back or the cancellation, the amendments apply to those buy-backs that occur after Budget Time.

Proposal announced

Schedule 4 to the Bill fully implements the 'Improving the integrity of off-market share buy-backs' measure from the 2022-23 Budget.

Financial impact

Schedule 4 to the Bill is estimated to have the following impact on receipts over four years to 2025-26 ($m):

2022-23	2023-24	2024-25	2025-26
..	150.0	200.0	200.0

.. not zero, but rounded to zero

Human rights implications

Schedule 4 to the Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 6.

Compliance cost impact

Schedule 4 to the Bill is expected to have minimal regulatory impact.

Schedule 5 – Franked distributions funded by capital raisings

Outline

Schedule 5 to the Bill amends the ITAA 1997 to prevent certain distributions that are funded by capital raisings from being frankable. This ensures that arrangements cannot be put in place to release franking credits that would otherwise remain unused where they do not significantly change the financial position of the entity.

Date of effect

The amendments in Schedule 5 to the Bill apply to distributions made on or after 15 September 2022.

Proposal announced

Schedule 5 to the Bill fully implements the '*Tax integrity—franked distributions funded by capital raisings'* measure from the 2016-17 MYEFO. The change to the application date of the measure has not previously been announced.

Financial impact

Schedule 5 to the Bill is estimated to have the following impact on receipts over 5 years to 2026-27 ($m):

2022-23	2023-24	2024-25	2025-26	2026-27
10.0	10.0	10.0	10.0	10.0

Human rights implications

Schedule 5 to the Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 6.

Compliance cost impact

Schedule 5 to the Bill has moderate compliance costs for affected entities.

Chapter 1: Registration of providers and assisted decision making

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Outline of chapter

1.1 Schedule 1 to the Bill amends the Corporations Act to:

- allow ASIC to approve applications from more than one licensee to register on the Financial Advisers Register the same relevant provider, and
- allow assisted decision-making to be used for any purpose for which ASIC may make decisions in the performance or exercise of ASIC's functions or powers to register a relevant provider.

1.2 These amendments will improve the operation of the registration process and are technical in nature.

Context of amendments

1.3 The *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Act 2021* introduced into the Corporations Act a requirement for all relevant providers to be registered on the Financial Advisers Register. The obligation to register enhances transparency and improves the accountability of relevant providers.

1.4 A relevant provider is an individual who is authorised to provide personal advice to retail clients about relevant financial products. A relevant provider may be an individual who is:

- a licensee;
- an authorised representative of a licensee; or
- an employee or director of a licensee, or an employee or a director of a licensee's related body corporate.

1.5 Relevant providers who are also a licensee are required to apply to ASIC to be registered.

1.6 Other relevant providers who are not also a licensee require a licensee to apply for them to be registered. Their registration as a relevant provider will remain in force until the licensee who applied for their registration no longer authorises the person to provide financial advice on the licensee's behalf, or disciplinary action is taken against the relevant provider which cancels their registration or bans them from providing financial advice.

1.7 From 1 July 2023, it will be an offence for a relevant provider to provide financial advice while unregistered. Offences also apply to licensees if a relevant provider whom they have authorised provides financial advice while unregistered.

1.8 Schedule 1 makes a number of amendments to address a technical limitation by enabling ASIC to approve applications to register the same relevant provider when the relevant provider has an existing registration in force. This is relevant in circumstances where a relevant provider is authorised by more than one licensee to provide financial advice. These amendments are necessary to minimise the risk of an inadvertent breach of the law.

Detailed explanation of new law

Multiple registrations of relevant providers

ASIC may approve multiple registrations

1.9 Part 1 to Schedule 1 permits ASIC to approve an application from a licensee to register a relevant provider, including when the relevant provider has an existing registration in force. These amendments are technical in nature and ensure the obligation to register a relevant provider operates efficiently.

1.10 A relevant provider who is also a licensee is required to apply to ASIC for their own registration on the Financial Advisers Register. When the application requirements are satisfied, ASIC must approve and register the person on the Financial Advisers Register. There is no substantive change to these provisions.
[Schedule 1, item 11, subsection 921ZC(1) of the Corporations Act]

1.11 A licensee may apply to ASIC to register a relevant provider who they have authorised to provide personal advice to retail clients about relevant financial products. If the application is made in accordance with section 921ZB, the amendments provide under new subsection 921ZC(1A) that ASIC must record in the Financial Advisers Register that the relevant provider is registered in relation to the licensee.
[Schedule 1, items 10 and 11, section 921ZB and subsection 921ZC(1A) of the Corporations Act]

1.12 To avoid all doubt, the amendments provide that a relevant provider may be registered multiple times in relation to different licensees. An explanatory note is included under the new subsection to confirm that the relevant provider may provide financial advice on behalf of multiple licensees, as long as the relevant provider is registered in relation to one of them.
[Schedule 1, item 11, subsection 921ZC(1B) of the Corporations Act]

1.13 While the amendments enable ASIC to approve an application by one or more licensees to register the same relevant provider, it is not a requirement that every licensee who may authorise the relevant provider to provide financial advice on their behalf must register that relevant provider. If a relevant provider has a registration in force on the Financial Advisers Register, the relevant provider can provide financial advice on behalf of a second licensee who has authorised them.
[Schedule 1, item 11, subsections 921ZC(1A) and (1B) of the Corporations Act]

1.14 The amendments limit the risk of an inadvertent breach of the law if the licensee who registered the relevant provider ceases to authorise them. Without these amendments, when the licensee who registered a relevant provider revokes their authorisation, the relevant provider could become unregistered and unknowingly give advice while authorised by another licensee.

1.15 A number of consequential amendments have been made to provisions in Division 8C of Part 7.6 of the Corporations Act to give effect to new subsection 921ZC(1A). These amendments relate to when ASIC must refuse an application to register the relevant provider, their obligation to provide written notice about the outcome of an application, and the relevant provider's period of registration.
[Schedule 1, items 12 to 16 and 19, sections 921ZC and 922Q of the Corporations Act]

1.16 Other consequential amendments ensure the correct cross referencing of provisions or provide an updated section heading.
[Schedule 1, items 5 to 9 and 17, sections 921Z, 921ZA, 921ZB and 921ZD of the Corporations Act]

When a registration is in force

1.17 The amendments clarify the period that a registration is in force and the effect of certain events on registrations where there is more than one registration for a relevant provider.

1.18 Registration comes into force when ASIC records the relevant provider in the Financial Advisers Register. The registration will continue in force until the earliest of the following events occur:

- a registration prohibition order or banning order relating to the relevant provider comes into force; or
- the licensee who applied to register the relevant provider stops authorising them to provide financial advice.

[Schedule 1, item 18, section 921ZE of the Corporations Act]

1.19 The amendments clarify that for relevant providers registered in relation to licensees, a registration prohibition order or banning order will apply to all registrations for that relevant provider. However, if a licensee stops authorising the relevant provider, the registration for the relevant provider will only cease in relation to that licensee and any other registrations for that relevant provider will continue to be in force.
[Schedule 1, item 18, section 921ZE (Note 2) of the Corporations Act]

1.20 Additional amendments have been made to clarify that any orders made by a Financial Services and Credit Panel, such as a registration suspension order and registration prohibition order, will have effect on all current and future registrations in relation to that relevant provider.
[Schedule 1, items 1 to 4, section 921L of the Corporations Act]

Assisted decision making

1.21 Part 2 of Schedule 1 amends the Corporations Act to allow ASIC to use assisted decision-making processes for any purpose for which ASIC may make decisions in the performance or exercise of ASIC's functions or powers to register a relevant provider under Division 8C of Part 7.6 of the Corporations Act. The new law enables ASIC to use a wide variety of processes and technologies for this purpose (including computer applications and systems) and a decision made using such a process is taken to be a decision of ASIC.
[Schedule 1, item 25, section 921ZF of the Corporations Act]

1.22 The requirement for relevant providers to be registered requires ASIC to make a large number of decisions in response to registration applications. ASIC is required to decide for each registration application that it receives, either to approve or refuse the application.

1.23 The use of assisted decision-making processes, including computer automated and computer-assisted decision making, enables ASIC to deliver a high standard of service in an effective and efficient manner. The new law provides a sound legislative basis to ensure these benefits can be realised. The decision-making process lends itself to automation because the circumstances in which ASIC must approve or refuse an application are prescribed.

1.24 The new law includes provisions to promote the appropriate use of assisted decision-making processes. For example:

- the use of such processes must be arranged by ASIC and used under its control;
- any decision made by such processes must comply with all of the requirements of the legislative provisions under which the decision was made. This means, for instance, that any review mechanism applicable to the decision remains in place; and
- ASIC may change a decision made by an assisted decision-making process if it is satisfied that the decision is wrong. In this circumstance, a person would not need to request a review of the incorrect decision because ASIC is able to change the decision on its own motion.

[Schedule 1, item 25, section 921ZF of the Corporations Act]

Commencement, application, and transitional provisions

1.25 The amendments commence on the day after Royal Assent.

1.26 Schedule 1 repeals section 1684L as this section is now obsolete. ***[Schedule 1, item 20, section 1684L of the Corporations Act]***

1.27 Section 1684L provided that the offence provisions in sections 921Y and 921Z, which deal with providing financial advice when unregistered, were to commence from 1 January 2023. These provisions are omitted by the *Corporations Amendment (Registration of Relevant Providers) Regulations 2022* until 30 June 2023. Sections 921Y and 921Z, as amended by this schedule, apply to the provision of financial advice by a relevant provider on or after 1 July 2023.

1.28 The amendments provide transitional arrangements to ensure any existing registrations, or applications for registration, that are made before the commencement of the amendments will continue in force and may be dealt with in accordance with the provisions as amended. Transitional arrangements also provide that any registration suspension orders, registration prohibition orders or action by a Financial Services and Credit Panel continue in force and have effect as if the orders were made having regard to the provisions as

amended.
[Schedule 1, item 24, Part 10.69 of the Corporations Act]

1.29 In addition, minor technical amendments are made to a transitional provision in Part 10.57 of the Corporations Act to ensure it operates as was intended by the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021*. The amendment will ensure a relevant provider who had a pending application to be a registered tax (financial) adviser with the TPB (the Board) before 1 January 2022, and whose registration was subsequently granted by the Board, is appropriately transitioned and registered on the Financial Advisers Register.
[Schedule 1, items 21 to 23, Section 1684U of Corporations Act]

1.30 The amendment has a necessary and appropriate retrospective application to apply on or after 1 January 2022 to allow those granted registration after 1 January 2022 by the Board to be recorded on the Financial Advisers Register as registered. This application provision is beneficial and necessary to achieve the original intent as explained the Explanatory Memorandum to the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021*, and will minimise the administrative burden for effected relevant providers.
[Schedule 1, item 24, section 1699H of Corporations Act]

Chapter 2: Sustainability standards

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Outline of chapter

2.1 Schedule 2 to the Bill provides the AASB with functions to develop and formulate sustainability standards. It clarifies the AUASB's function to develop and maintain relevant auditing and assurance standards for sustainability purposes.

2.2 It also empowers the FRC to provide strategic oversight and governance functions in relation to the AASB's and AUASB's sustainability standards functions.

Context of amendments

2.3 Growing awareness of the financial risks and opportunities of climate change and broader sustainability issues has prompted a range of international financial system responses. Many key markets for Australian companies are introducing measures to improve transparency, manage systemic risks and align capital flows towards climate and sustainability goals. A common and important component of this is company disclosure of sustainability and climate-related financial risks and information.

2.4 To help meet the market demand for consistent international disclosure, the IFRS Foundation has set up the ISSB to develop comprehensive and consistent global standards for sustainability reporting, including climate-related disclosures. The ISSB concluded consultation on two draft standards in July 2022:

- *IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information;* and
- *IFRS S2 Climate-related Disclosures.*

2.5 The AASB consulted on the ISSB exposure drafts to gather feedback to provide input into the ongoing work of the ISSB and inform the AASB as to its proposed approach to sustainability reporting in Australia. The feedback expressed a strong demand from Australian businesses, investors, financial institutions, and users and preparers of financial information, for Australian sustainability standards to align with the final ISSB recommended standards.

2.6 The IAASB is developing an overarching standard for assurance on sustainability reporting. It has signalled that a suite of standards for assurance on sustainability reporting that provide more specificity than an overarching standard will likely need to be developed over time.

2.7 The ASIC Act currently does not explicitly grant the AASB and the AUASB the function to develop and formulate sustainability standards and associated auditing and assurance standards. This is necessary to support the Government’s commitment to ensure entities provide Australians and investors with greater transparency and accountability in relation to their climate-related plans, financial risks, and opportunities. The proposed sustainability standards would provide general guidance, assisting relevant industry to prepare systems and processes for eventual transition to mandatory climate-related financial disclosures. They would also be flexible enough to accommodate future global developments in other sustainability reporting.

Summary of new law

2.8 The amendments confirm the AASB, AUASB and FRC as the entities responsible for:

- formulating sustainability standards;
- developing auditing and assurance standards for sustainability purposes; and,
- providing strategic oversight, respectively.

2.9 This measure leverages the existing bodies' experience to facilitate the development of sustainability standards while longer-term governance arrangements for sustainability-related financial reporting, including climate disclosure, are developed and implemented.

Comparison of key features of new law and current law

Table 2.1 Comparison of new law and current law

New law	*Current law*
The AASB may formulate sustainability standards.	The AASB does not have a specific function to formulate sustainability standards.
The AUASB may formulate auditing and assurance standards for sustainability purposes.	The AUASB does not have a specific and express function in relation to sustainability.
The FRC has oversight of the process of developing sustainability standards, in addition to accounting standards and auditing standards.	The FRC does not have a specific function in relation to oversight of sustainability standards.

Detailed explanation of new law

2.10 The Australian financial reporting system will be extended to include the development and assurance of sustainability standards.

2.11 This allows the AASB to establish, in the first instance, non-binding reporting requirements for sustainability that will, as far as is practicable, align with significant international developments, including the standards under development by the ISSB. The FRC will have oversight of sustainability standard-setting processes and governance of the standard-setting bodies.

Objects of the financial reporting system

2.12 The amendments extend the main objects of Part 12 of the ASIC Act to facilitate the:

- development of sustainability standards that require the provision of financial and other related information that:
  - allows users to make and evaluate decisions about allocating scarce resources; and

  - assists directors to discharge their obligations in relation to financial reporting; and
  - is relevant to assessing performance, financial position, financing and investment; and
  - is relevant and reliable; and
  - facilitates comparability; and
  - is readily understandable; and,
- Australian economy by having sustainability standards that are clearly stated and easy to understand.

[Schedule 2, item 2 and 3, paragraph 224(a) and subparagraph 224(b)(iii) of the ASIC Act]

2.13 The object to facilitate the development of accounting standards and sustainability standards that require the provision of financial information also extends to the provision of other related information. An example of other related information for the purposes of sustainability standards may include emissions reporting. This ensures consistency and clarity of the AASB functions for both accounting and sustainability standards.
[Schedule 2, item 2, paragraph 224(a) of the ASIC Act]

2.14 Sustainability standards include standards relating to climate. For example, the ISSB is developing a standard for climate-related disclosures as well as general requirements for disclosure of sustainability-related financial information.
[Schedule 2, item 4, section 224 (Note) of the ASIC Act]

The role of the AASB

2.15 The AASB will have additional functions in relation to sustainability standards.

2.16 The AASB can develop conceptual frameworks for the purpose of evaluating proposed sustainability standards and international sustainability standards. These conceptual frameworks do not have the force of standards.
[Schedule 2, item 15, paragraph 227(1)(a) of the ASIC Act]

2.17 The AASB can formulate sustainability standards.
[Schedule 2, item 16, paragraph 227(1)(ca) of the ASIC Act]

2.18 The standards formulated do not have legal effect but may be applied or adopted by some other authority. This means that the standards developed and issued by the AASB are not enforceable until further legislative changes are made to apply the standards.
[Schedule 2, item 18, section 227 (Note 3) of the ASIC Act]

2.19 The legislative note clarifies that the framework within which the AASB is to formulate and make accounting standards and sustainability standards is set out in section 224 and Division 2 of Part 12 of the ASIC Act.
[Schedule 2, item 18, section 227 (Note 4) of the ASIC Act]

2.20 The AASB can participate in and contribute to the development of a single set of sustainability standards for world-wide use.
[Schedule 2, item 17, paragraph 227(1)(d) of the ASIC Act]

2.21 The AASB may formulate a sustainability standard by issuing the text of an international sustainability standard. International sustainability standards are made by the ISSB, or another international body specified by the regulations. Sustainability standards include standards relating to climate. Standards made in Australia can therefore align with the climate-related disclosure and sustainability standards developed by the ISSB.

[Schedule 2, item 1 and 19, subsections 5(1) and 227(4) of the ASIC Act]

2.22 However, text of an international sustainability standard may be modified if necessary to consider the Australian legal or institutional environment and to ensure that any disclosure and transparency provisions in the international standard are appropriate to that environment.
[Schedule 2, item 19, subsections 227(5) of the ASIC Act]

2.23 The AASB may distribute a draft international sustainability standard for consultation, whether or not modified.
[Schedule 2, item 19, subsection 227(6) of the ASIC Act]

The framework for making sustainability standards

2.24 Division 2 of Part 12 of the ASIC Act has been extended to set out the framework within which AASB is to make sustainability standards. The same framework applies to accounting standards.
[Schedule 2, item 22, section 227C of the ASIC Act]

2.25 In formulating sustainability standards, the AASB must have regard to the suitability of a proposed standard for different types of entities. The AASB may apply different sustainability requirements to different types of entities.
[Schedule 2, item 25, subsection 229(3) of the ASIC Act]

2.26 A failure to comply with the framework for making or formulating standards does not affect the validity of the standard. This applies to both sustainability standards and accounting standards.
[Schedule 2, item 28, section 234 of the ASIC Act]

2.27 Provisions relating to the framework for making accounting standards and sustainability standards have been amended and restructured to improve readability.
[Schedule 2, item 21, 23, 24, 26 and 27, Division 2 of Part 12 (heading), subsections 228(1) and (2), subsection 229(1), subsection 231(1) and subsection 231(2) of the ASIC Act]

Administration of the AASB

2.28 The procedures of the AASB are amended to account for sustainability standards. A meeting of the AASB (or part of a meeting) that concerns the contents of a sustainability standard or an international sustainability standard must be held in public.
[Schedule 2, item 29, subsection 236A(2) of the ASIC Act]

2.29 The qualification requirements for the appointment of members of the AASB has also been amended to account for sustainability standards. A person must not be appointed unless they have knowledge of, or experience in, business, accounting, law, government, science, sustainability or climate change.
[Schedule 2, item 30, subsection 236B(3)]

The role of the AUASB

2.30 The AUASB functions are expanded to include formulating auditing and assurance standards for sustainability purposes.
[Schedule 2, item 20, paragraph 227B(1)(b) of the ASIC Act]

Administration of the AUASB

2.31 The qualification requirements for the appointment of members of the AUASB has similarly been amended to account for sustainability standards. A person must not be appointed unless they have knowledge of, or experience in, business, accounting, law, government, science, sustainability or climate change.
[Schedule 2, item 31, subsection 236F(4) of the ASIC Act]

The role of the FRC

2.32 The law expands FRC’s oversight and governance powers to account for the development of sustainability standards.

2.33 The FRC has broad oversight of the processes for developing sustainability standards in Australia. These standards replicate FRC’s existing standards functions in relation to accounting standards and auditing standards.
[Schedule 2, item 5 and 8, paragraph 225(1)(a) and subsection 225(1A) of the ASIC Act]

2.34 Provisions relating to the role of the FRC have been amended and restructured for readability.
[Schedule 2, item 5, 6, 7, 9 to 14, paragraph 225(1)(a), (d) and (e), subsection 225(2)(heading), paragraph 225(2)(c), (e) to (h), subsection 225(2A) (heading), paragraph 225(2A)(c), (e) to (h) of the ASIC Act]

Confidentiality

2.35 The FRC, the AASB, the Office of the AASB, the AUASB and the Office of the AUASB must take all reasonable measures to protect from unauthorised use or disclosure information given to it in confidence. Disclosure of information to bodies that set international sustainability standards is taken to be authorised.
[Schedule 2, item 32, paragraph 237(2)(c) of the ASIC Act]

Commencement

2.36 Schedule 2 will commence the day after Royal Assent.

Chapter 3: Government response to the Review of the Tax Practitioners Board

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Outline of chapter

3.1 Schedule 3 to the Bill amends the TAS Act to ensure that tax agent services and BAS services provided to the public are of an appropriate ethical and professional standard and to enhance the financial independence of the TPB from the ATO. To achieve this, Schedule 3 to the Bill implements the following recommendations of the TPB Review to:

- update and modernise the objects clause of the TAS Act (Recommendation 2.1);
- create financial independence for the TPB from the ATO (Recommendation 3.1);

- require tax practitioners to not employ or use a disqualified entity without the TPB's approval, or enter an arrangement with a disqualified entity (Recommendation 4.6);
- convert to an annual registration period (Recommendation 4.7); and
- enable the Minister to supplement the existing Code of Professional Conduct to ensure that emerging or existing behaviours and practices by tax practitioners are properly addressed (Recommendation 5.1).

3.2 Legislative references are to the TAS Act unless otherwise stated.

Context of amendments

3.3 In 2019, the Government announced an independent review into the effectiveness of the TPB and the TAS Act, to ensure that tax agent services are provided to the public in accordance with appropriate professional and ethical standards.

3.4 On 27 November 2020, the Government released the final report of the TPB Review and its response to it. The Government's response forms part of the Government's wider commitment to improve the effectiveness of the TPB, who are responsible for the registration and regulation of tax practitioners. Implementation of the recommendations will uphold confidence and support high standards in the tax profession.

3.5 The Government supports 20 of the TPB Review's 28 recommendations in full, in part or in-principle and seeks to achieve three key objectives:

- to increase the independence and effectiveness of the TPB;
- ensuring high standards in the tax profession; and
- streamline the regulation of tax practitioners.

3.6 Schedule 3 to the Bill implements recommendations through legislative changes.

Detailed explanation of new law

3.7 These amendments implement the Government's commitment to ensuring high standards of ethics and competency in the tax profession. This has been achieved by creating a stronger, more independent and effective TPB through the implementation of recommendations from the TPB Review.

Updated and modernised objects clause

3.8 This provision implements recommendation 2.1 of the TPB Review, and updates and modernises the object of the TAS Act, to support public trust and confidence in the integrity of the tax profession and the tax system. This is in addition to the current object which is to ensure that tax agent services are provided to the community in accordance with appropriate standards of professional and ethical conduct.
[Schedule 3, item 1, section 2-5 of TAS Act]

3.9 As tax professionals play a key role in providing tax agent services to the community at large, there is a need and an expectation to hold them to a high standard, so that the public's trust and confidence in the integrity of the tax profession and the tax system is maintained.

3.10 This amendment also rephrases the wording of the objects clause to reflect that the TPB is a more mature organisation that is no longer in its start-up phase, making them more contemporary and aligning more closely with the TPB's current role and responsibilities. The amendments also highlight the TPB's role to ensure consumer protection to clients of tax practitioners.
[Schedule 3, item 1, subsection 2-5(2) of TAS Act]

Establishing a special account for the TPB

3.11 In accordance with Recommendation 3.1 of the TPB Review, a Special Account has been established for the TPB, meaning funding for the TPB will largely be independent from the ATO. A Special Account enables a special appropriation to be made specifically for the TPB, for the purposes identified in the TAS Act. This dispenses with the need for yearly discussions with the Commissioner and provides the TPB with greater financial independence and the ability to control its own budget and manage its regulatory functions. This option still allows the TPB and ATO to continue utilising their existing synergies and shared services which reduces overall costs and allows both bodies to benefit from information sharing.
[Schedule 3, item 14, subsection 60-145(1) of TAS Act]

3.12 The creation of a TPB Special Account also supports the TPB's ongoing financial independence from the ATO. These provisions represent increased independence for the TPB as they will be legally entitled to an established amount, in comparison to the current process where the ATO has the final decision regarding the portion of its annual departmental budget allocated to the TPB.

3.13 Financial independence aligns with the overall purpose of the TPB Review, to recognise the TPB as having distinct functions and powers from the ATO, and having responsibility for regulating tax practitioners with consistency whilst limiting undue influence from the ATO. Similar to the objects clause, this provision supports tax practitioner and community confidence in the TPB's regulation of the profession.

3.14 The Special Account is established within the standalone TAS Act, which is compliant with section 80 of the *Public Governance, Performance and Accountability Act 2013*. Specific reporting requirements will apply to ensure the proper administration of the Special Account.
[Schedule 3, item 14, subsection 60-145(2) of TAS Act]

3.15 This amendment outlines the amounts that will be set aside specifically for the TPB and will be credited to the Special Account to increase its balance. This will primarily consist of any fees collected by the TPB on behalf of the Commonwealth (excluding penalties or penalty related payments) and be supplemented by additional amounts which must be appropriated by the Parliament for the purposes of the Special Account.
[Schedule 3, item 14, section 60-150 of TAS Act]

3.16 In practice, the TPB will be primarily funded by the registration and renewal fees received from tax practitioners. The Commissioner must also credit amounts appropriated by the Parliament for the purposes of the TPB to the Special Account.

3.17 This furthers the financial independence of the TPB from the ATO for two reasons. First, the TPB will operate on a partial cost-recovery basis (reflecting the services it provides). Secondly, the Commissioner will not have discretion about the amount which should be credited to the Special Account. That is, the Commissioner will not be able to withhold amounts appropriated by the Parliament for the TPB's purposes, which are specifically identified in the Portfolio Budget Statements.

3.18 The provision setting out the purposes of the Special Account governs the purposes for which money standing to the credit of the Special Account can be spent, decreasing its balance. The accountable authority for management and administration of the Special Account (in this instance, the Commissioner) is responsible for ensuring that funds from the Special Account are not used for purposes outside the scope established in this provision.

3.19 Primarily, the Special Account is to pay for all costs associated with the functions undertaken by the Board under the TAS Act and cover the salaries and wages for all TPB employees. This includes indirect costs that the ATO incurs (such as accommodation costs, and the expenses of administering the Special Account) in relation to the TPB's operations. The balance of the Special Account can also be reduced without requiring a real or notional payment. This allows for the repayment of any savings to the Budget.
[Schedule 3, item 14, section 60-155 of TAS Act]

3.20 The amendments provide that any application fees for registration which have been received prior to the commencement date but must be refunded after commencement, should be debited from another appropriation, and not from the Special Account. This avoids the potential for the Special Account to

commence with a negative balance as it ensures that only fees which have been initially credited into the account, may then be refunded, and debited out from the account.
[Schedule 3, item 15 of TAS Act]

Requiring tax practitioners to not employ or use a disqualified entity without TPB approval, or enter an arrangement with a disqualified entity

3.21 Tax practitioners play an important role in ensuring a high standard of tax agent and BAS services are provided to the public. The statutory requirements imposed on tax practitioners (i.e., registration, meeting education standards and an ongoing compliance with the Code of Professional Conduct) assure the general public that only accredited professionals are eligible to handle complex tax affairs. Tax practitioners need to demonstrate and maintain a certain degree of competence in the provision of tax agent services.

3.22 Like many other professions, tax practitioners need to utilise the wider workforce to provide their services and assist the general public with meeting their compulsory tax law obligations.

3.23 Recommendation 4.6 is anchored in concerns about insufficient internal governance practices leading to tax practitioners employing or using people who are unsuitable to provide tax services on their behalf. This increases the risk of sub-standard tax advice and tax fraud by or on behalf of taxpayers which diminishes the integrity of the tax system.

3.24 In particular, there is an identified gap in the regulation of tax services whereby entities who would not qualify to be registered as a tax practitioner (e.g., an applicant whose registration application was rejected for not meeting fit and proper requirements) are nevertheless able to provide tax services under the auspices of a registered tax practitioners.

3.25 Recommendation 4.6 is being implemented by introducing the following obligations:

- new obligations under the Code of Professional Conduct for tax practitioners to ensure that :
  - they do not employ or use entities who meet the definition of a ‘disqualified entity’ to provide tax agent services on their behalf, unless approved by the TPB; and
  - they do not enter an arrangement with a disqualified entity in connection with providing tax agent services; and
- an entity who meets the definition of a ‘disqualified entity’ must disclose their disqualified status to the tax practitioner if:

- they are being employed or used to provide tax agent services on behalf of the tax practitioner; or
- they are entering an arrangement with a tax practitioner in connection with providing tax agent services.

3.26 These amendments ensure that the entities employed or used by tax practitioners in the provision of tax services, have the appropriate ethical and professional attributes to be employed in the tax profession. The amendments mirror the requirements that currently apply in respect of legal practitioners and their employees and associates in Victoria and New South Wales.

3.27 The amendments are intended to facilitate compliance with, and preserve the integrity of, the taxation system. They are designed to reduce the possibility of tax fraud and evasion by or on behalf of taxpayers (e.g., claiming unsubstantiated deductions) in response to the identified gap in the law, as well as protect consumers from services being provided by inappropriate entities.

Disqualified entity

3.28 The definition of a ***disqualified entity*** is partially based on the objective criteria which is currently utilised to determine whether individuals are 'fit and proper' in sections 20-15 and 20-45 of the TAS Act. In addition to this, it includes anyone who has:

- committed a serious offence, as defined in the ITAA 1997;
- been subject to sanctions by the TPB;
- had their registration terminated, suspended, or refused for reasons other than work experience and qualifications; or
- found to have breached the Act by the TPB or Court.

By assessing entities against similar criteria to registered tax practitioners, the overall standard of tax services and the profession will increase.
[Schedule 3, items 4 and 7, subsection 45-5(2) and subsection 90-10(1) of TAS Act]

Tax practitioners cannot employ or use a disqualified entity without the TPB's approval

3.29 Registered tax and BAS agents are required to comply with a new ongoing obligation under the Code of Professional Conduct. Tax practitioners must not employ or use an entity to provide tax agent services on their behalf, if they know or ought to reasonably know that they are a disqualified entity, unless they have received approval from the TPB.
[Schedule 3, items 2 and 4, subsections 30-10(15) and 45-5(1) of TAS Act]

3.30 As part of their Code of Professional Conduct obligations, tax practitioners are required to consider the following:

- who are the individuals or entities who have been employed or used or seek to be employed or used by the registered tax practitioner to provide tax agent services on their behalf; and
- whether any of those individuals or entities meet the definition of a disqualified entity.

Tax practitioners would likely need to assess the following entities who are or will be used in providing tax agent services: employees, associates or contractors. However, this list is illustrative only and depends on the specific facts and circumstances of each tax practitioner and the people and entities they employ or use in their business.

3.31 Individuals who only provide peripheral services to assist a tax practitioner are not included in the scope of these amendments. For example, administrative support staff who are only responsible for the administrative management of client files and data would not be considered as providing tax agent services on behalf of a tax practitioner.

3.32 Further, individuals or entities who are included in the scope of those who are ‘used’ to provide tax agent services are those that would share in the revenue and income received from the services provided under the tax practitioner. This is intended to avoid imposing sanctions on those providing tax agent services for no fee or reward, in line with paragraph 50-5(1)(c).

3.33 Tax practitioners who fail to comply with this obligation under the Code of Professional Conduct may face further disciplinary action from the TPB from the existing sanctions in the TAS Act (i.e., written cautions, orders, suspension, or termination of registration (see Subdivision 30-B)). Please see diagram 3.1 for an illustration of this provision.

3.34 The combination of an ongoing Code of Professional Conduct obligation and administrative sanctions acts as a strong deterrence to tax practitioners from employing or using those with a disqualified status.

3.35 A tax practitioner meets the Code of Professional Conduct requirement where the tax practitioner has sought and received approval from the TPB for the disqualified entity’s employment or use of their services. The exemption for this obligation provides an opportunity for a disqualified entity to continue employment in the tax profession and allows the TPB to review the matter before making a final decision on the employment of the disqualified entity.

3.36 Tax practitioners are expected to implement new onboarding requirements, information gathering and employee reporting processes to determine whether their staff and people they use are disqualified entities and if notification and approval by the TPB is necessary. This ensures that employees and contractors used by tax practitioners must meet the standards set by the new laws.

3.37 Due to the overlap between these provisions and the existing section 50-25 provision, an exemption has been added to section 50-25 to ensure that civil penalties will not apply to tax practitioners who employ or use a deregistered entity but have received approval from the TPB for the entity under section 45-5. The Government is further considering the graduated sanctions potentially applicable under the TAS Act and the suitability of section 50-25 within the TAS Act will be determined at a later date.
[Schedule 3, item 5, subsection 50-25(3) of TAS Act]

Tax practitioners cannot provide tax agent services in connection with an arrangement with a disqualified entity

3.38 In addition to the obligation on tax practitioners to not employ or engage disqualified entities, they also have an ongoing obligation to not provide tax services in connection with an arrangement with an entity that they know, or ought reasonably to know, is a disqualified entity.
[Schedule 3, item 2, subsection 30-10(16) of TAS Act]

3.39 An arrangement is defined widely in accordance with section 995-1 of the ITAA 1997 to include a range of agreements or undertakings between the tax practitioner and the disqualified entity that is connected with the tax practitioner providing tax agent services.

3.40 This second Code of Professional Conduct obligation intends to prevent arrangements where the disqualified entity is operating through the tax practitioner. For example, this would cover arrangements where a disqualified entity benefits from an arrangement where the tax practitioner derives fees from providing tax agent services. This may occur in scenarios where the disqualified entity is acting as the controlling mind of the tax practitioner and continues their operations using the registered tax practitioner's credentials.

3.41 This Code of Professional Conduct obligation places an onus on registered tax and BAS agents to be aware of the entities that are connected to the tax agent services they are providing. If the tax practitioner breaches this obligation, they may face sanctions under Subdivision 30-B. Please see diagram 3.1 for an illustration of this provision.

3.42 As noted above, disqualified entities have an obligation under sections 45-10 and 45-15 to notify tax practitioners of their status if arrangements they have or seek involve the tax practitioner provides tax agent services in connection with an arrangement between the parties.

Disqualified entities must notify tax practitioners of their status

3.43 A disqualified entity has the obligation to notify the tax practitioner of their status if:

- they seek or continue employment or engagement to provide tax agent services, or become a disqualified person in the course of their employment or engagement; and
- they seek or continue an arrangement in connection with a tax practitioner in connection with the provision of tax agent services or become a disqualified person in the course of an arrangement.

3.44 Under the first notification requirement, disqualified entities must notify their potential or current employer that they satisfy the definition outlined in subsection 45-5(2) either prior to entering, renewing, or extending their employment or engagement with a tax practitioner to provide tax agent services on their behalf. Alternatively, if they become a disqualified entity during the course of employment or engagement, notification must occur within 30 days of the entity knowing or when they ought to have known they are disqualified. This disclosure must be made in writing. ***[Schedule 3, item 4, subsection 45-10(1) and section 45-15 of TAS Act]***

3.45 Following the provision of notice by a disqualified entity, it is the tax practitioner’s responsibility to contact the TPB and seek approval to employ or use the individual or entity to provide tax agent services on their behalf. A note has been included under subsection 45-5(1) indicating that approval should be sought in these circumstances.

3.46 The first notification requirement is intended to prevent disqualified entities from working under registered tax practitioners unless authorised by the TPB. The notification requirement on disqualified entities will achieve this intent by putting the tax practitioner on notice about their disqualified status. This effectively prohibits disqualified entities from entering or continuing their employment or engagement under a tax practitioner, without the TPB’s approval.

3.47 Under the second notification requirement, a similar notification must be made by disqualified entities prior to entering, renewing, or extending an arrangement with a tax practitioner in connection with providing tax agent services, or if they become a disqualified entity in an existing arrangement, within 30 days of the entity knowing or when they ought to have known they are disqualified. ***[Schedule 3, item 4, subsection 45-10(2) and section 45-15 of TAS Act]***

3.48 This requirement links with the Code of Professional Conduct obligation at subsection 30-10(16), as notification by disqualified entities in this scenario will trigger tax practitioners to take action or face potential sanctions for breach of their Code of Professional Conduct obligation.

3.49 If a disqualified entity fails to provide written notice to the tax practitioner, prior to commencing or during the provision of tax agent services or where there is an arrangement with the tax practitioner, the TPB can apply to the Federal Court to seek civil penalties of up to 250 penalty units for individuals and 1,250 penalty units for body corporates. Please refer to diagram 3.2 below

for an illustration of these notification requirements.
[Schedule 3, item 4, subsections 45-10(3) and 45-15(3) of TAS Act]

3.50 These penalties aim to encourage disqualified entities to disclose their status to employers and tax practitioners and remain transparent about issues which may impact the quality of services provided on a tax practitioner's behalf or services provided by tax practitioners under the influence of a disqualified entity. Further, in scenarios where the TPB becomes aware of a disqualified entity who has not notified the tax practitioner in the performance of their duties under the TAS Act or the *Tax Agent Services Regulations 2022,* the disclosure of this information to the tax practitioner will be exempt from the secrecy provisions in the TAS Act. Accordingly, by requiring disqualified entities to disclose their status both prior and throughout their engagement, the TPB is able to remain informed and effectively limit the provision of tax agent services by disqualified entities they deem inappropriate to work or operate within the tax system.

Approval processes for the TPB

3.51 When a tax practitioner applies to the TPB in writing to seek approval to employ or use a disqualified entity, in accordance with their obligations under sections 30-10(15) and 45-5, they must submit an application form and any documents required by the TPB. This application form and documentation is used by the TPB to assist their approval process to determine whether to allow a disqualified person or entity to be employed or used by a registered tax or BAS agent.
[Schedule 3, item 4, subsection 45-5(3) of TAS Act]

3.52 The amendments outline the circumstances which must be considered by the TPB as part of their approval process. The three key factors outlined in the law are intended to ensure the TPB considers the specific nature of the disqualification in connection with the role which would be or currently is undertaken by the disqualified entity. This is particularly important due to the wide range of offences which are included within the definition for a disqualified entity. It also provides all disqualified individuals and entities greater certainty and consistency in the decision-making process undertaken by the TPB.

3.53 These factors are not exhaustive and the TPB is still required to consider any other matters relevant to their decision. The TPB have the flexibility to exercise their expertise in the area and include other factors which they deem as relevant to determining whether to approve a disqualified person or entity for employment with a tax practitioner.
[Schedule 3, item 4, subsection 45-5(6) of TAS Act]

3.54 The TPB's decision-making process must be concluded within 60 days, or a longer period agreed between the TPB and the tax practitioner. If no decision is made by the TPB in the relevant time period, the TPB is deemed to have

rejected the application for the disqualified entity to be employed or engaged. These timeframes ensure that both applicants for new roles and tax practitioners are able to receive confirmation in a timely manner on whether the applicant can be engaged to provide tax agent services.
[Schedule 3, item 4, subsections 45-5(4) and (5) of TAS Act]

3.55 After an application has been approved or rejected, the TPB is required to notify the tax practitioner in writing of the outcome within a reasonable period. If the application is rejected, the TPB is required to provide reasons to the tax practitioner in relation to why the disqualified entity cannot be used to provide tax services. This process provides clarity for tax practitioners and to disqualified entities to understand why they are unable to pursue a livelihood in the taxation industry and will assist applicants who request an administrative review under section 70-10.
[Schedule 3, item 4, subsection 45-5(7) of TAS Act]

3.56 When notifying the applicant of the TPB's decision, a 'no invalidity' clause is included, meaning a failure to notify applicants in a reasonable period or provide reasons for the rejection of the application, will not invalidate the decision made by the TPB to approve or reject an application. A similar clause is included in sections 20-30 and 40-20 of the TAS Act relating to the notification of registration and termination.

3.57 Despite this 'no invalidity' clause, the following still apply in relation to applications for approval of a disqualified entity:

- the TPB is still required to make a decision in the 60-day period or longer timeframe as decided between the tax practitioner and TPB;
- the three key factors outlined in subsection 45-5(6) must be considered by the TPB when processing applications; and
- applicants may apply to the Administrative Appeals Tribunal for merits review or judicial review following these decisions.

3.58 This clause is necessary in relation to application approvals, as it ensures that an administrative issue will not impact a permissive decision which allows disqualified entities to work in the tax industry. Without the inclusion of a 'no invalidity' clause, there is potential that a minor administrative issue will prevent the hiring or continued employment of a disqualified entity, as their engagement to provide tax agent services cannot occur without approval from the TPB.

3.59 Further, the clause also provides certainty to tax practitioners and disqualified entities in scenarios where their application has been rejected, as disqualified entities are prima facie unable to provide tax agent services without TPB approval. As such, this clause which upholds the decision to reject an application where there is an administrative error merely provides finality to the question of whether the disqualified entity can be employed and creates no additional barriers to these entities.

3.60 By ensuring an administrative failure does not impact the validity of the TPB's decision-making, the underlying purpose of the notification and approval process is not compromised as disqualified entities who have not been approved by the TPB are continued to be excluded from providing tax agent services. Overall, this limits the potential risk of misconduct and tax fraud and maintains high standards within the tax profession.

Merits review of the application

3.61 The decision to reject an application seeking approval for a disqualified entity to be employed or used to provide tax agent services can be appealed by tax practitioners to the Administrative Appeals Tribunal. This avenue provides for merits review of the TPB's decision by the tax practitioner to the Administrative Appeals Tribunal, who can provide a determination on whether the correct decision was initially made.
[Schedule 3, item 6, subsection 70-10(ha) of TAS Act]

Application and transitional provisions for Recommendation 4.6

3.62 The amendments for Part 1, which includes Recommendations 4.6, commence from the first 1 January, 1 April, 1 July or 1 October to occur after the day the Bill receives the Royal Assent.

3.63 Application and transitional provisions have been included to appropriately capture both existing and new employees or entities who may be disqualified and provide tax practitioners and regulators with sufficient time to implement Recommendation 4.6.

3.64 A transitional period for the notification requirements and the delayed application of the Code of Professional Conduct requirement has been allowed to ensure sufficient time for:

- tax practitioners to implement internal processes to confirm whether their existing workforce consists of disqualified entities;
- existing employees and entities to disclose that they are disqualified to the relevant tax practitioner; and
- the TPB to have time to establish the systems and operations necessary for the notification and approval process and administrative guidance.

Application and transitional rules in relation to the notification requirements

Application rules for disqualified entities applying from commencement

3.65 The disclosure requirement in sections 45-10 and 45-15 apply from the commencement date for:

- any disqualified entities seeking to be employed or used to provide tax agent services;

- any disqualified entities seeking to enter into an arrangement with a tax practitioner in connection with providing tax agent services;
- if an entity becomes a disqualified entity after commencement.

Transitional rules for disqualified entities existing on commencement

3.66 An existing disqualified entity refers to all employees, associates, contractors, or entities who have been employed or used to provide tax agent services, or have arrangements in force with a tax practitioner, prior to the commencement date, and fulfill the definition of a disqualified entity on the date of commencement.

3.67 The transitional rules provide that notice must only be provided within 30 days from the date that is 12 months after commencement (‘the transitional period’) for existing disqualified entities who provide tax agent services on behalf of a tax practitioner or are in an arrangement with a tax practitioner to provide tax agent services.
[Schedule 3, item 4, subsection 45-20 of TAS Act]

3.68 This means that where the existing disqualified entity is still employed or engaged, or still under an arrangement with a tax practitioner, immediately before the conclusion of the transitional period, the disqualified entity has 30 days after 12 months from the commencement date to give notice.

3.69 If they fail to provide notice within 30 days after the transitional period, civil penalties may be applicable to the disqualified entity. If an existing disqualified entity breaches their obligation to disclose their status to their tax practitioner after the transitional period, individuals could face up to 250 penalty units and body corporates could be penalised up to 1,250 penalty units.
[Schedule 3, item 4, subsection 45-20(3) of TAS Act]

3.70 This transitional period ensures no civil penalties are applicable for existing disqualified entities for at least one year after commencement.

3.71 Comparatively, a 12-month transitional period does not apply for any entities who become a disqualified entity after the commencement date, or in other words, all entities who are not existing disqualified entities on the commencement date. These disqualified entities must provide notice within 30 days of becoming aware of their disqualified status.

Application rules for tax practitioners in relation to the Code of Professional Conduct

Application from commencement

3.72 For tax practitioners who will enter, renew, or extend a contract or arrangement with a new entity after the commencement date, the ongoing obligations in the Code of Professional Conduct under subsections 30-10(15) and (16) apply to the tax practitioner from the commencement date.
[Schedule 3, subitem 9(1) and 9(2), subparagraph (1) and (2) of TAS Act]

Application from 12 months from commencement

3.73 From 12 months after the commencement date, registered agents must also ensure they do not continue to employ or have an arrangement in force with an existing disqualified entity. If an existing disqualified entity is still employed without approval from the TPB, or an arrangement is still in force, the obligations and sanctions under the Code of Professional Conduct will become applicable 12 months from commencement.
[Schedule 3, subitem 9(3), subparagraph (3) of TAS Act]

3.74 This means that the new Code of Professional Conduct obligation is deferred for tax practitioners for their existing disqualified entities by 12 months from commencement. This provides sufficient time for the tax practitioner and the TPB to implement the relevant information gathering and approval processes.

Acquisition of property

3.75 To the extent that the operation of subsections 30-10(15) and (16), or any other provisions which relate to subsections 30-10(15) and (16) would result in an acquisition of property from a person otherwise than on just terms within the meaning of section 51(xxxi) of the Constitution, the relevant provision will not have any effect. All other provisions in the TAS Act will continue to operate as normal.
[Schedule 3, subitem 9(4), subparagraph (4) of TAS Act]

Diagram 3.1 Application of Code of Professional Conduct obligations on tax practitioners

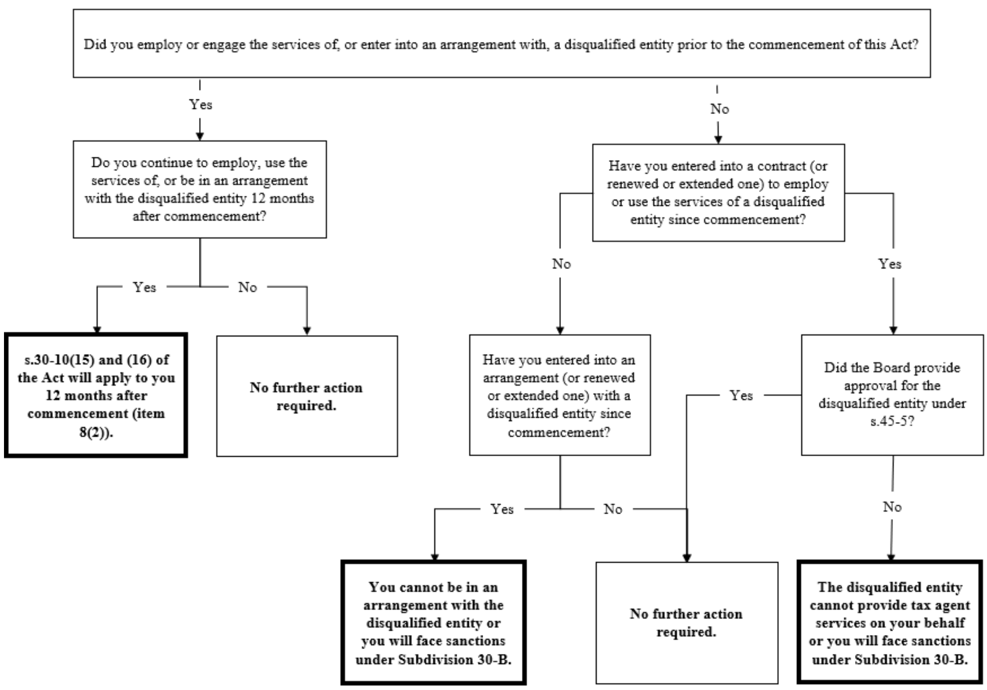
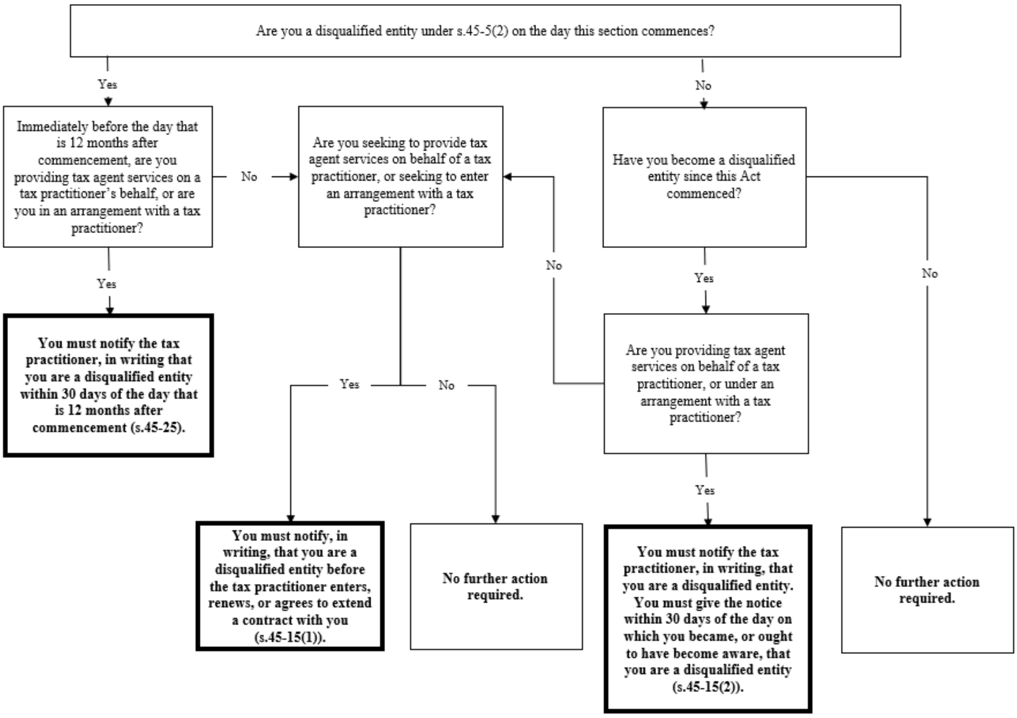


Diagram 3.2 Obligations on disqualified entities under Part 4A



Convert to an annual registration period

3.76 These provisions implement Recommendation 4.7 of the TPB Review and convert the registration period from at least every three years to at least every year. The update to an annual registration period will align with tax practitioners' other regulatory obligations such as maintaining professional indemnity insurance. It will ensure that the TPB has greater ongoing visibility of tax practitioner registrations, increases the sector's integrity, and ensures a level playing field. It will also increase consumer confidence that tax practitioners continue to meet the ongoing registration requirements of the TAS Act.
[Schedule 3, items 10 and 12, section 20-1 and subsection 20-25(4) of the TAS Act]

3.77 To accommodate for the shorter renewal period, the maximum time permitted for the TPB to process and determine the outcome of an application has been reduced to four months. Within this four-month timeframe, the TPB must decide whether to accept the new registration application, and if the applicant does not receive a final decision in this timeframe, the registration application is considered to be rejected by the TPB. Renewal of tax practitioners' registration will continue to be active until a final decision is made by the TPB.
[Schedule 3, item 11, subsections 20-25(2) and (3) of the TAS Act]

3.78 These changes only apply to registration or renewal applications submitted on or after 1 July 2024, ensuring there is no retrospective effect of these amendments.
[Schedule 3, item 13 of the TAS Act]

Enable the Minister to supplement the existing Code of Professional Conduct

3.79 Section 30-10 sets out the legislated Code of Professional Conduct for all registered tax practitioners. The Code of Professional Conduct sets out the professional and ethical standards that registered tax practitioners are required to comply with. It outlines the duties that registered tax practitioners owe to their clients, the TPB and other registered tax practitioners in their professional capacity.

3.80 The amendments implementing Recommendation 5.1, enable the Minister to specify, in a legislative instrument, additional obligations that registered tax agents and BAS agents must comply with. The Minister can specify additional obligations on subjects that are already referred to in the Code of Professional Conduct in the TAS Act as well as obligations on new subjects relating to the personal and professional conduct of registered tax agents and BAS agents.
[Schedule 1, items 2 and 3, subsections 30-10(17) and 30-12(1) of the TAS Act]

3.81 This provision cannot be used to reduce any existing obligations under the Code of Professional Conduct in the Act. To the extent that a determination made by the Minister conflicts with the Code, the conflicting provisions have no effect.
[Schedule 1, item 3, subsection 30-12(2) of the TAS Act]

3.82 The purpose of the power is to create a proactive regime where changes to the tax profession environment can be promptly adapted to by the Minister through regulations. The Code of Professional Conduct is to be a more dynamic instrument that can adjust to changes in a more contemporary manner than is permitted in the TAS Act.

3.83 The legislative instrument process also ensures appropriate consultation with key stakeholders and parliamentary oversight, while also creating a proactive regime where emerging changes to behaviours and practice can be promptly adapted to by the regulator.

Further amendments

3.84 This instrument extends the definition of a BAS service under section 90-10 of the TAS Act, to also include services related to the superannuation guarantee charge which is listed at section 5 of the *Tax Agent Services (Specified BAS*

Services No. 2) Instrument 2020. This ensures consistency as the definition has been moved into the primary law and clarifies the definition of a BAS service.
[Schedule 3, item 8, subsection 90-10(1) of the TAS Act]

Commencement, application, and transitional provisions

3.85 The amendments for Part 1, which includes Recommendations 2.1, 4.6 and 5.1 commence from the first 1 January, 1 April, 1 July or 1 October to occur after the day the Bill receives the Royal Assent.

3.86 The amendments implementing Recommendations 2.1 and 5.1 apply in accordance with the commencement date set for Part 1.

3.87 The amendments implementing Recommendation 4.6 apply in accordance with the rules set out above.

3.88 The amendments for Part 3, including those implementing Recommendation 3.1, commence on 1 July 2023.

3.89 The amendments implementing Recommendation 4.7 apply in accordance with the commencement date set for Part 2, namely 1 July 2024.

3.90 The amendments implementing Recommendation 3.1 apply in accordance with the commencement date set for Part 3, namely 1 July 2023.

Chapter 4: Off-market share buy-backs

Table of Contents:

Outline of chapter

4.1 Schedule 4 to the Bill improves the integrity of the income tax system by aligning the tax treatment of off-market share buy-backs undertaken by listed public companies with the tax treatment of on-market share buy-backs. It also inserts new provisions into the income tax law in respect of selective share cancellations to ensure the income tax treatment across capital management activities for listed public companies are aligned.

Context of amendments

4.2 The share buy-back provisions provide different income tax treatment for shareholders who participate in share buy-backs undertaken by companies off-market compared with those undertaken on-market. Part of the purchase price in respect of an off-market share buy-back can be taken to be a dividend in the hands of the shareholder. For on-market buy-backs, no part of the purchase price is taken to be a dividend for shareholders.

4.3 References in this Chapter to legislation are to the ITAA 1936 unless otherwise stated.

4.4 For both off-market and on-market share buy-backs, the buy-back and any subsequent share cancellation is disregarded for the purposes of determining whether an amount is assessable income, deductible, or gives rise to a capital gain or loss for the company. This ensures a buy-back is tax neutral for the company.

4.5 The share buy-back provisions apply equally to non-share equity interests in the same way as they apply to shares. A shareholder who participates in a buy-back is therefore referred to as the seller.

Current tax treatment of off-market buy-backs

4.6 For off-market buy-backs generally, the part of the purchase price in respect of the buy-back that is not debited against the company's share capital account or non-share capital account is treated as a dividend paid to the seller as a shareholder (or equity holder) by the company out of profits on the day that the buy-back occurs (see subsection 159GZZZP(1)).

4.7 The seller is treated as having received the full purchase price as consideration for the sale of the share or non-share equity interest for the purposes of determining whether an amount is assessable income, deductible, or gives rise to a capital gain or loss for the seller (see subsection 159GZZZQ(1)). The purchase price that the seller is taken to have received as consideration for the sale of the share or non-share equity interest is increased to market value (as if the buy-back had not occurred) if the buy-back was undertaken at a discount (see subsection 159GZZZQ(2)).

4.8 That increased purchase price is adjusted to exclude any amount that constitutes an assessable dividend for the seller and may be further adjusted to prevent a seller (that is a corporate tax entity) from making or increasing a loss as result of the seller being entitled to a tax offset under Division 207 of the ITAA 1997 (see subsections 159GZZZQ(3) to (9)).

4.9 This results in the seller being assessed on the deemed dividend, typically under section 44, and on either the revenue gain or loss, or capital gain or loss, the seller makes from selling the share or non-share equity interest under the buy-back.

Current tax treatment of on-market buy-backs

4.10 For on-market buy-backs, no part of the purchase price in respect of the buy-back is taken to be a dividend (see section 159GZZZR). The seller is taken to have received the purchase price in respect of the buy-back as consideration for the sale of the share or non-share equity interest for the purposes of determining whether an amount is assessable income, deductible, or gives rise to a capital gain or loss for the seller (see section 159GZZZS).

4.11 To improve the integrity of the imputation system, a franking debit arises in the franking account of the company that undertakes an on-market buy-back. The amount of the franking debit is equal to the franking debit that would have arisen for the company if the buy-back had been undertaken off-market. This ensures that shareholders continue to benefit from imputation credits proportionate to their shareholding in the company after the buy-back occurs (see item 9 of the table in subsection 205-30(1) of the ITAA 1997).

Non-alignment of off-market and on-market buy-backs

4.12 The buy-back provisions in Division 16K were inserted into the income tax law in 1990. Changes to the income tax laws law since the commencement of Division 16K now makes the distinction between off-market and on-market buy-backs for listed public companies inappropriate.

Comparison of key features of new law and current law

Table 4.1 Comparison of new law and current law

New law	***Current law***
Where a listed public company undertakes an off-market buy-back of a share or non-share equity interest, no part of the purchase price in respect of the buy-back is taken to be a dividend.	Where a company undertakes an off-market buy-back of a share or non-share equity interest, part of the purchase price in respect of the buy-back may be treated as a dividend in the hands of shareholders depending on whether the company debits any part of the purchase price to its share capital account or non-share capital account.
If a listed public company undertakes an off-market buy-back, a franking debit may arise in the company's franking account. The amount of the debit is equal to the debit that would have arisen if the company were not a listed public company and the purchase were a frankable distribution (because the whole or part of the purchase price were not debited to the company's share or non-share capital account) that was franked at the company's benchmark franking percentage, or at a franking percentage of 100% if the company doesn't have a benchmark franking percentage for the franking period.	If any part of the purchase price in respect of an off-market buy-back undertaken by a company is taken to be a dividend and the company chooses to frank that dividend, a franking debit arises in the company's franking account. The purchase price will be taken to be a dividend to the extent that is not debited to the share capital account or non-share capital account of the company, which will constitute a frankable distribution. The amount of debit is equal to the frankable distribution franked to the company's benchmark franking percentage for the franking period.
A distribution by a listed public company that is consideration for the cancellation of a membership interest in itself as part of a selective reduction of capital is unfrankable.	A distribution by a company that is consideration for the cancellation of a membership interest in itself as part of a selective reduction of capital is a dividend to the extent that it is not debited to the share capital account or non-share capital account of the company. This dividend is a frankable distribution.

New law	***Current law***
If a listed public company makes a distribution that is consideration for the cancellation of a membership interest in itself as part of a selective reduction of capital, a franking debit may arise in the company's franking account. The amount of the debit is equal to the debit that would have arisen if the company were not a listed public company and the distribution were a frankable distribution (because the whole or part of the purchase price were not debited to the company's share or non-share capital account) that was franked at the company's benchmark franking percentage, or at a franking percentage of 100% if the company doesn't have a benchmark franking percentage for the franking period.	If a company makes a distribution that is consideration for the cancellation of a membership interest in itself as part of a selective reduction of capital, that distribution constitutes a dividend to the extent that the distribution is not debited to the company's share or non-share capital account. This dividend is a frankable distribution, and a franking debit arises in the company's franking account if the company chooses to frank that dividend. The amount of the debit is equal to the frankable distribution franked to the company's benchmark franking percentage for the franking period.

Detailed explanation of new law

4.13 Schedule 4 to the Bill amends the share buy-back provisions in Division 16K of the ITAA 1936 to align the income tax treatment of off-market share buy-backs undertaken by listed public companies with on-market share buy-backs. Such alignment ensures listed public companies can no longer use off-market purchases and selective reductions of capital to take advantage of the concessional tax status of shareholders as part of their capital management activities. Schedule 4 to the Bill also amends the income tax treatment for selective reductions of capital which may be used to achieve similar outcomes.

4.14 The amendments apply in respect of buy-backs undertaken by 'listed public companies' using the definition of that term in subsection 995-1(1) of the ITAA 1997. ***[Schedule 4, item 10, subsection 6(1) of the ITAA 1936 definition of 'listed public company']***

4.15 As Division 16K of the ITAA 1936 applies in respect of buy-backs of both shares and non-share equity interests, the amendments also cover such interests. Shareholders and non-share equity holders are referred to in the existing provisions as 'sellers'.

Tax treatment of off-market buy-backs

4.16 Similar to on-market buy-backs, the amendments ensure that no part of the purchase price in respect of an off-market buy-back undertaken by a listed public company is taken to be a dividend. ***[Schedule 4, items 2 and 3, sections 159GZZZP and 159GZZZPA of the ITAA 1936]***

4.17 Under subsection 159GZZZQ(1), sellers who participate in an off-market buy-back are taken to have received (or to be entitled to receive) as consideration for the sale of the share, or non-share equity interest, an amount equal to the purchase price in respect of the buy-back. This treatment applies for the purposes of determining whether an amount is assessable income, deductible or gives rise to a capital gain or capital loss for the seller.

4.18 Where the buy-back is undertaken at a discount, subsection 159GZZZQ(2) increases the amount of consideration that the seller is taken to have received (or to be entitled to receive) in respect of the sale of the share or non-share equity interest to what the market value would have been disregarding the buy-back.

4.19 As no part of the purchase price in respect of an off-market buy-back undertaken by a listed public company is taken to be a dividend, subsections 159GZZZQ(3) to (9) do not apply. These subsections adjust the amount of consideration the seller is taken to have received (or to be entitled to receive) for the sale of the share or non-share equity interest under the buy-back to exclude that part of the purchase price that constitutes an assessable dividend (disregarding dividends that are non-assessable non-exempt income under the withholding tax provisions and the conduit foreign income provisions). That amount of consideration the seller is taken to have received (or to be entitled to receive) may be further adjusted to prevent a seller that is a corporate tax entity from making a loss as result of the seller being entitled to a tax offset under Division 207 of the ITAA 1997. Schedule 4 to the Bill ensures these provisions have no application given no part of the buy-back purchase price for an off-market buy-back undertaken by a listed public company constitutes a dividend.
[Schedule 4, items 4 and 5, subsections 159GZZZQ(3) and (3A) of the ITAA 1936]

4.20 As a result, sellers who participate in an off-market buy-back undertaken by a listed public company are not assessed on any part of the purchase price as a dividend. Rather, each seller will be assessed on any revenue gain or loss, or capital gain or loss, that results on the sale of the share or non-share equity interest.

Franking debit for off-market buy-backs undertaken by listed public companies

4.21 To improve the integrity of the imputation system, and to align the income tax treatment of off-market share buy-backs undertaken by listed public companies with that of on-market share buy-backs, listed public companies that undertake an off-market buy-back are required to debit their franking account by an amount equal to the part of the buy-back price not debited to the company's share capital account.
[Schedule 4, item 8, item 9A of the table in subsection 205-30(1) of the ITAA 1997]

4.22 The amount of the debit is worked out by assuming that the company were not a listed public company and the purchase were a frankable distribution because the whole or part of the purchase price was not debited to the company's share or non-share capital account. The amount of the debit is equal to debit that would arise if that frankable distribution were franked at the company's benchmark franking percentage, or at a franking percentage of 100% if the company doesn't have a benchmark franking percentage for the franking period.
[Schedule 4, item 8, item 9A of the table in subsection 205-30(1) of the ITAA 1997]

4.23 This rule improves the integrity of the imputation system by ensuring that shareholders continue to benefit from imputation credits proportionate to their shareholding in the company after the buy-back occurs.

Franking debit for on-market buy-backs

4.24 The amount of the franking debit that arises in the franking account of a company that undertakes an on-market share buy-back is equal to the franking debit that would have arisen for the company if the on-market buy-back had instead been an off-market buy-back and all or part of the purchase price was subsequently treated as a dividend that is franked to the company's benchmark franking percentage for the franking period, or to 100% if the company does not have a benchmark franking percentage for the period (see item 9 in the table in subsection 205-30(1) of the ITAA 1997). As section 159GZZZPA precludes any part of the off-market purchase price being treated as a dividend for buy-backs undertaken by listed public companies, in determining the franking debit that would have arisen in the franking account of a listed public company had the buy-back instead been off-market, it is necessary to assume that the company were not a listed public company, otherwise no franking debit could arise.
[Schedule 4, items 3, 6, and 7, subsection 159GZZZPA of the ITAA 1936, item 9 of the table in subsection 205-30(1) of the ITAA 1997]

Selective share cancellations

4.25 To ensure alignment across the capital management activities of listed public companies, Schedule 4 to the Bill inserts a new paragraph in the list of unfrankable distributions in section 202-45 of the ITAA 1997. This is an integrity measure designed to prevent companies using selective reductions of capital as an alternative way to take advantage of the concessional tax status of shareholders as part of their capital management activities, as a consequence of these amendments.

4.26 A distribution by a listed public company that is consideration for the cancellation of a membership interest in itself, as part of a selective reduction of capital, is unfrankable.
[Schedule 4, item 19, paragraph 202-45(k) of the ITAA 1997]

4.27 The reference to a 'selective reduction of capital' is intended to be broad and to take its ordinary meaning, so as to include reductions of capital effected through selective cancellations of non-share equity interests and other reductions of capital that in substance result in a disproportionate cancellation of membership interests.
[Schedule 4, item 19, paragraph 202-45(k) of the ITAA 1997]

Franking debit for selective share cancellations

4.28 Similar to the amendments to off-market buy-backs undertaken by listed public companies, Schedule 4 to the Bill inserts a new item in the franking debit table in subsection 205-30(1) of the ITAA 1997 to impose a franking debit in a listed public company's franking account in respect of selective reductions of capital.

4.29 If a listed public company makes a distribution that is consideration for the cancellation of a membership interest in itself, as part of a selective reduction of capital, a franking debit arises in the company's franking account. The amount of the debit is equal to the debit that would have arisen if the company were not a listed public company and the distribution were a frankable distribution (because the whole or part of the purchase price were not debited to the company's share or non-share capital account) that was franked at the company's benchmark franking percentage, or at a franking percentage of 100% if the company doesn't have a benchmark franking percentage for the franking period.
[Schedule 4, item 20, item 9B of the table in subsection 205-30(1) ITAA 1997]

4.30 This rule ensures alignment of tax treatment for capital management activities undertaken by listed public companies and further improves the integrity of the imputation system by ensuring that imputation credits flow to members of listed public companies proportionate to their membership interests.

Other amendments

4.31 Schedule 4 to the Bill also makes minor technical amendments to related provisions in the ITAA 1997.

4.32 Specifically, Schedule 4 to the Bill inserts the definition of 'listed public company' in subsection 6(1) to refer to the definition of that term in subsection 995-1(1) of the ITAA 1997. Consequential amendments are made to remove references in the ITAA 1936 to the definition of 'listed public company' in the ITAA 1997.
[Schedule 4, items 10, 11 and 12, subsection 6(1) definition of 'listed public company', paragraph 6BA(6)(a) and subsection 45D(2) of the ITAA 1936]

4.33 Schedule 4 to the Bill also amends paragraph 202-45(c) of the ITAA 1997 to clarify that the reference to 'that Act' in that paragraph, and subsequently in paragraphs 202-45(g) and (h), is a reference to the ITAA 1936. While these provisions have always referred to the ITAA 1936 the repeal of the preceding paragraphs in section 202-45 of the ITAA 1997 resulted in this reference becoming inaccurate.
[Schedule 4, item 13, 16 and 17 paragraph 202-45(c) and subparagraphs 202-45(g)(i) and 202-45(h)(i) of the ITAA 1997]

4.34 Schedule 4 to the Bill also amends paragraph 202-45(f) and (j) of the ITAA 1997 to clarify that the references in those sections are to sections of the ITAA 1997. Schedule 4 to the Bill also amends 202-45(d) to clarify the reference to distribution in paragraph 202-45(d).
[Schedule 4, items 14, 15 and 18 paragraphs 202-45(d), 202-45(f) and 202-45(j) of the ITAA 1997]

Commencement, application, and transitional provisions

4.35 The amendments commence on the first 1 January, 1 April, 1 July or 1 October to occur after the day this Bill receives the Royal Assent.

4.36 The amendments made by Schedule 4 to the Bill apply to buy-backs and selective share cancellations undertaken by listed public companies that are first announced to the market after 7:30pm, by legal time in the Australian Capital Territory, on 25 October 2022 (Budget Time).

4.37 A buy-back or selective share cancellation is announced to the market (if the announcement is made before the buy-back or cancellation occurs) when the buy-back or cancellation has been disclosed to the approved stock exchange, on which the shares or membership interests are listed, and that notification has been released to the market as required by the rules of that stock exchange.

4.38 For buy-backs and selective share cancellations undertaken by listed public companies that are not announced to the market, or the announcement is made after the buy-back or the cancellation, the amendments apply to those buybacks that occur after Budget Time.

Chapter 5: Franked distributions funded by capital raisings

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Outline of chapter

5.1 Schedule 5 to the Bill amends the taxation law to prevent certain distributions that are funded by capital raisings from being frankable. This ensures that arrangements cannot be put in place to release franking credits that would otherwise remain unused where they do not significantly change the financial position of the entity.

Context of amendments

The imputation system

5.2 The imputation system has the effect of allowing income tax paid by Australian corporate tax entities to be taken into account when determining the taxation of their Australian tax resident members on the distributed profit of the entity. When an Australian corporate tax entity distributes profits to its Australian tax resident members, it can also pass on a credit for income tax it has paid. This is done by franking the distribution. Most Australian tax resident members that are individuals or superannuation funds can then claim a refundable tax offset equal to the amount of the franking credit.

5.3 A *corporate tax entity* is a company, a corporate limited partnership, or a public trading trust (see section 960-115).

5.4 *Distribution* is defined in section 960-120, and generally includes:

- for a company, a dividend;
- for corporate limited partnership, a distribution to a partner in the partnership; and
- for a public trading trust, a unit trust dividend.

5.5 A franking entity is the entity that is generally entitled to frank a frankable distribution (see sections 202-5 and 202-40). However, a franking entity cannot frank a distribution if it is an unfrankable distribution under section 202-45. The object of the frankable distribution rules is to ensure that only distributions equivalent to realised profits can be franked (see section 202-35).

The effect on a member of an entity receiving a franked or unfranked distribution

5.6 The rules about the effect of receiving a franked distribution are in Division 207.

5.7 Broadly, Australian tax resident individuals, complying superannuation funds and certain trusts that directly or indirectly receive a franked distribution must include the amount of the franking credit and distribution in their assessable income and are entitled to a tax offset equal to the amount of the franking credit (see section 207-20). Other entities that receive franked distributions must also gross up the amount of the distribution, but rather than directly receiving a tax offset are instead able to pass this offset to their shareholders, partners or trustees. For corporate tax entities the tax offset can be passed on as the entity receives an equivalent credit in their own franking account and for trusts and partnerships the credit is received via the rules for distributions flowing indirectly to entities.

5.8 If an entity makes a franked distribution in certain circumstances associated with tax avoidance or manipulation of the franking system, the distribution does not receive the benefits of franking (i.e. it does not entitle any entity to a franking credit or to a tax offset - see section 207-145).

5.9 If an entity is unable to frank a distribution and makes an unfranked distribution instead, the receiving entity includes the amount of the distribution in its assessable income, but it is not entitled to a tax offset.

Summary of new law

5.10 Schedule 5 to the Bill adds distributions funded by capital raising to the list of distributions that are unfrankable.

5.11 A distribution by an entity is funded by capital raising if, broadly:

- the distribution is not consistent with an established practice of the entity of making distributions of that kind on a regular basis;
- there has been an issue of equity interests in the entity or another entity; and
- it is reasonable to conclude in the circumstances that:
  - – the principal effect of the issue of any of the equity interests was to directly or indirectly fund all or part of the distribution; and
  - – any entity that issued or facilitated the issue of any of the equity interests did so for a purpose (other than an incidental purpose) of funding the distribution or part of the distribution.

Detailed explanation of new law

5.12 Schedule 5 to the Bill amends the ITAA 1997 to include a new item to make certain distributions funded by capital raising unfrankable. ***[Schedule 5, items 1 and 2, paragraph 202-45(ea) and section 207-159 of the ITAA 1997]***

5.13 Direct or indirect recipients of affected distributions are not entitled to a tax offset and the amount of the franking credit is not included in the assessable income of the recipient. The distribution is also not exempt from withholding tax under section 128B of the ITAA 1936.

5.14 The amendments provide that a distribution by an entity is funded by capital raising if:

- the distribution is not consistent with an established practice of the entity of making distributions of that kind on a regular basis;
- there is an issue of equity interests in the entity; and
- it is reasonable to conclude, having regard to all relevant circumstances, that:
  - – the principal effect of the issue of any of the equity interests was to directly or indirectly fund all or part of the distribution; and
  - – an entity that issued or facilitated the issue of the interests did so for a purpose of funding all or part of the distribution.

[Schedule 5, item 2, subsection 207-159(1) of the ITAA 1997]

5.15 These amendments are an integrity measure. They prevent entities from manipulating the imputation system to facilitate the inappropriate release of franking credits. They prevent the use of artificial arrangements under which capital is raised to fund the payment of franked distributions (including by way of non-share dividends) to shareholders to enable the accelerated release of franking credits. This addresses concerns raised in Taxpayer Alert TA2015/2 issued by the Commissioner.

5.16 The imputation system has long had integrity rules to protect the imputation system from schemes entered into for a more than incidental purpose for someone to receive an inappropriate imputation benefit. This measure addresses arrangements that are entered into for a purpose (other than an incidental purpose) and with the principal effect of accelerating the release of franking credits to members of entities in circumstances that cannot be explained by existing distribution practices, and which are typically artificial or contrived. The absence of any meaningful change to the financial position of the entity will usually be a feature of such arrangements. Under these arrangements, the flow of franking credits to shareholders does not align with the ordinary commercial and normal profit distribution policies of entities. The arrangements may involve entities with significant franking credit balances relative to their recent or accumulated earnings or share capital that utilise capital raisings to fund unusually large franked distributions compared to their usual practice.

Established practice

5.17 The first requirement for the amendments to apply to make a distribution unfrankable is that the distribution must not be consistent with an established practice of the entity of making distributions of that kind on a regular basis. ***[Schedule 5, item 2, paragraph 207-159(1)(a) of the ITAA 1997]***

5.18 This requirement can be satisfied either if the entity has no established practice of making distributions of that kind, or if it does have such a practice, the distribution is not made at a time or in a manner that accords with that practice.

In determining whether an established practice of making distributions exists and what it involves, regard must be had to the nature, timing and amount of past distributions, any explanations made by the entity for making distributions, as well as the franking credits attached to them and the extent to which past distributions are franked. Any other relevant factors can also be taken into account. Both existing entities and new entities that begin operation on or after 15 September 2022 can demonstrate an established practice of distributions.
[Schedule 5, item 2, subsection 207-159(2), subitem 3(2) of the ITAA 1997]

5.19 In many circumstances these factors are likely to be conclusive of the existence of an established practice. For example, if an entity has paid a dividend of the same amount to the same class of shareholders at the same time each year for many years, then the entity will have a practice of making such distributions and the next annual payment on the same basis will be part of the practice. Similarly, if an entity has never previously made a distribution, then the entity will not have a practice of making distributions.

5.20 Any practice involving the sort of mischief the amendments seek to prevent does not protect future distributions even if the practice existed prior to the date of application of these amendments. This is achieved by providing that the past distribution practice of an entity cannot be established from a franked distribution or a distribution that would be franked made either before on or after 15 September 2022 if these amendments do not apply to treat it as unfrankable.
[Schedule 5, item 2, subsection 207-159(3) and subitem 3(2) of the ITAA 1997]

5.21 Broadly, this requirement ensures that this integrity rule does not affect ordinary established distributions that have been made on a regular basis and are not made as part of artificial arrangements designed to accelerate the distribution of franking credits to shareholders.

5.22 Regard must also be had to any explanation for the previous distribution put forward by the entity. This includes guidance and commitments made to markets or shareholders about those distributions in addition to public statements or statements to third parties explaining the amount, timing or commercial rationale for past distributions. This will require an evaluation of the plausibility of the statement or representation in all the circumstances to ensure that it does not form part of an arrangement designed to accelerate the release of franking credits from an entity without changing its financial position.

5.23 An examination of statements and other disclosures and representations is most likely to be relevant when considering if past distributions are sufficiently connected to constitute an established practice, or in seeking to determine if changes are sufficiently significant to represent a break from established practice.

5.24 The matters referred to above such as explanations, guidance and commitments are not exhaustive. Any other relevant statements and representations must be taken into account in determining if this requirement concerning established practice is satisfied.

Issue of equity interests

5.25 The second requirement for a distribution to be unfrankable as a result of the amendments is that there must have been an issue of equity interests (i.e. a capital raising) by the entity or any other entity.
[Schedule 5, item 2, paragraph 207-159(1)(b) of the ITAA 1997]

5.26 This requirement is broad. The issue of equity interests can occur before or after the distribution. The entity issuing the equity interests does not need to be a company for income tax purposes. The nature and extent of the relationship between the entity that makes the distribution and the entity that issues the equity interests (if different) must be taken into account when considering whether the capital raising has funded the distribution. Typically in arrangements to which the amendments apply there will be a significant level of connection between the entities. Despite its broad scope it is necessary for the other requirements to be met before the integrity rule applies.

Effect and purpose of the issue of equity interests

5.27 The final requirement for a distribution to be unfrankable is that it must be reasonable to conclude that, having regard to all of the relevant circumstances, the issue of an equity interest or interests must have (whether directly or indirectly):

- had the principal effect of funding the distribution or part of a distribution; and
- been undertaken or facilitated by at least one entity for the purpose of achieving that result.

[Schedule 5, item 2, paragraph 207-159(1)(c) of the ITAA 1997]

5.28 This is the key requirement that tests whether the capital raising by the issue of equity interests has funded the distribution.

5.29 The 'purpose' test is based on similar tests in the anti-avoidance rules in the ITAA 1936 (including in section 177EA of that Act). The principal effect test is based on the similar test in the general anti-avoidance rule in Division 165 of the GST Act.

5.30 The principal effect test is satisfied if, having regard to all of the relevant circumstances, it is reasonable to conclude that the principal effect of the issue of equity interests was funding the making of all or part of the distributions.

5.31 If an issue of equity interests has a number of effects, one of which is directly or indirectly funding all or part of a franked distribution, then this test will only be satisfied if this was the principal effect of the issue of equity interests.

5.32 The purpose test is satisfied if, in all the relevant circumstances, it is reasonable to conclude the entity that issued the shares or an entity that facilitated the issue of the shares did so for a purpose of generating funds for the making of all or part of the distribution.

5.33 It is not necessary that the relevant purpose be the sole, dominant or primary purpose of the entity, only that it was more than incidental to some other purpose. Further, it is not necessary that the purpose is a purpose of the entity that issued the equity interest. It is only necessary that an entity that was involved in facilitating the issue of the equity interests did so with such a purpose. This ensures that, for example, while it is unlikely to apply where there is no connection or relationship with another entity, the purposes of advisers and related parties can be taken into account. It ensures there is no incentive to engage in artificial arrangements on behalf of other entities.

5.34 In many cases the outcome of these tests would be expected to be the same. Generally, if equity interests are issued as part of an artificial arrangement designed to distribute franking credits, the arrangement would both be entered into for the purpose, and have the principal effect, of funding a franked distribution. The difference between the two tests is that the ‘principal effect’ test looks at the outcome, while the ‘purpose’ test looks at the intention. The inclusion of the two tests ensures the provisions apply in a targeted way and require that both the intention and the effect of a capital raising is to fund a distribution.

5.35 In some circumstances entities may seek to conceal artificial arrangements by combining them with activities undertaken for legitimate purposes. For example, an entity may combine a distribution funded by capital raising with an ordinary dividend or, alternatively, issue equity interests to both raise capital for genuine commercial or regulatory purposes and to fund a distribution. To address such arrangements, the tests are satisfied where the equity only partly funds the distribution.

5.36 Even if the test is satisfied only in relation to some of the capital raised from an issue of equity interests or part of a franked distribution, the entire distribution ceases to be able to be franked. This is to deter entities entering into these arrangements.

Considerations in determining effect and purpose

5.37 Schedule 5 to the Bill identifies a number of matters that must be taken into account when determining the principal effect of the issue of equity interests and the purpose of an entity involved in an issue of equity interests. ***[Schedule 5, item 2, subsection 207-159(4) of the ITAA 1997]***

5.38 These matters include the time or times at which the equity interests were issued relative to the time of the franked distribution, the amount of the equity interest compared to the distribution and any other distributions made before or after the franked distribution by the same entity. ***[Schedule 5, item 2, subsection 207-159(4)(a), (b) and (j) of the ITAA 1997]***

5.39 Each matter on its own may not be determinative—merely delaying a distribution or capital raising, or raising a different amount will not prevent a distribution being funded or partly funded by a capital raising where other factors make clear it was undertaken for this purpose and it has had this effect. However, alignment between the timing or amount is a matter that supports the existence of the required effect and purpose. Likewise, the making of other distributions may provide important context in evaluating the effect and purpose of the distribution in question.

5.40 One of the matters is the extent to which, following the issue of equity interests and making of the distributions, there has been a net change in the financial position of the entity making the distribution and any related parties. ***[Schedule 5, item 2, paragraph 207-159(4)(c) of the ITAA 1997]***

5.41 If there has been no substantial net change in the financial position of the entity following the distribution, then this strongly supports the conclusion that the effect and purpose of the issue of equity interests was to fund the distribution.

5.42 The matters to be considered also include the use of the funds raised by the issue of equity interests and the reasons for the issue of equity interests. Having regard to these matters ensures that the context surrounding the issue of equities is taken into account.

5.43 For example, where the issue of equity interests and the distribution both took place in the context of a sale or acquisition of a significant part of the business carried on by an entity, then a closer examination of the facts and circumstances would be required which may suggest a clear commercial motivation unrelated to the franking of distributions. ***[Schedule 5, item 2, paragraphs 207-159(4)(d) and (e) of the ITAA 1997]***

5.44 How the funds raised are used will often be significant in determining the effect and purpose of the issue of equities. In cases where the funds raised are used to make a distribution, it is likely that the effect and purpose of the issue would be to fund the distribution unless there is a clear commercial purpose such as raising capital to fund an acquisition that is ultimately unsuccessful. However, the immediate use of the funds is not determinative. Even if all of the funds raised by an issue of equity interests are quarantined and used for a specific purpose, this may serve to free other funds to be distributed that would otherwise have been required to be used for that purpose. In such cases both the effect and purpose tests may be satisfied.

5.45 Similarly, the reasons for the issue of equity interests will also often be significant, particularly when determining the purpose of an entity involved in an issue of equity interests. Where there are clear commercial reasons for issuing equity (other than access to franking credits) that explain the features and manner of the issue, then it is not likely that the purpose of the issue is to fund a franked distribution.

5.46 The measure can apply if there has been an equity issue by the entity making the distribution or another entity. Accordingly, the amendments ensure that the nature and extent of the relationship between the entities must be taken into account in deciding if the measure applies. Subject to other factors, the measure potentially applies where the equity issue by another entity was undertaken so as to facilitate the making of the distribution. ***[Schedule 5, item 2, paragraph 207-159(4)(h) of the ITAA 1997]***

5.47 The matters to be considered also include how the history of the amount of franking credits in the franking account maintained by the entity making the distribution compares to the history of profits and share capital of the entity. ***[Schedule 5, item 2, paragraph 207-159(4)(g) of the ITAA 1997]***

5.48 Where the entity has a large amount of franking credits relative to its profits and/or share capital then this would suggest that the arrangement to make special distributions to shareholders that require capital raising from shareholders is artificial in nature and may attract the operation of the measure.

5.49 A further matter to be considered is the extent to which there is correspondence between the parties that were entitled to participate in the issue of equity interests mentioned and the parties that were entitled to receive the relevant distribution. Where the arrangement involves the raising of equity from the same or substantially the same members receiving the franked distributions, this suggests that the arrangement may be artificial in nature. This is because it does not materially change the economic position of the entity or its members other than to release the franking credits. However, all factors must be considered including if capital was raised for a genuine commercial purpose. ***[Schedule 5, item 2, paragraph 207-159(4)(i) of the ITAA 1997]***

5.50 The matters also include the extent to which the capital raising is underwritten.

5.51 The extent and nature of underwriting arrangements for an issue of equity interests is an important indication of whether the capital raised from the issue is guaranteed either by express written agreement or by an agreed understanding between the parties, which may inform its effect and purpose. ***[Schedule 5, item 2, paragraph 207-159(4)(f) of the ITAA 1997]***

5.52 The specifically listed matters are not exhaustive. Any other relevant considerations must also be taken into account in determining if the

requirement is satisfied.
[Schedule 5, item 2, paragraph 207-159(4)(k) of the ITAA 1997]

Example 5.1 – Capital raising funds special dividend

A company raises new capital of $7m from shareholders via a share issue. A special dividend of $7m is made to the company's shareholders a month later, being a distribution outside of the ordinary dividend cycle of the company and significantly larger than normal dividends payments despite no significant change in profits for the company. There has not been any significant change in shareholders during this period. The dividend is paid out of profits and is fully franked.

It would be reasonable to conclude that the principal effect and purpose tests are satisfied in relation to the arrangement because:

- the financial position of the company is largely unaffected, other than the change to the franking account balance of the company, as an amount equivalent to the cash raised is paid as dividends;
- there is close correspondence between the parties that contributed to the capital and the parties receiving the benefit of the franked dividends;
- the dividend per share is significantly larger than normal dividends despite no significant change in the profits of the company; and
- the capital raising and distribution are temporally close.

Example 5.2 – Underwritten dividend reinvestment plan funds special dividend

Company A has a large balance of franking credits in its franking account. It announces a once off fully franked special dividend. Shareholders in Company A are given the option of opting into the company's dividend reinvestment plan in respect of the special dividend. Under the dividend reinvestment plan, shares are issued by Company A at a discount of 2.5% of the market price of Company A's shares. The dividend reinvestment plan is fully underwritten by Company B (in the event of a shortfall if shareholders elect to receive cash rather than additional shares).

The company pays out $40m in fully franked dividends. Just over half of Company A's shareholders elect to receive the special dividend in additional shares. Accordingly, Company A raises $40m through the take-up of the dividend reinvestment plan by those shareholders choosing additional shares and the issue of the remainder of shares to Company B representing the dividend reinvestment plan participation shortfall (the portion of the special dividend paid to shareholders in cash) as part of the arrangement as underwriter.

In the absence of evidence that the capital raising was for a purpose other than to fund the special dividend it would be reasonable to conclude that the principal effect and purpose tests are satisfied in relation to the arrangement because:

- the company paid a fully franked dividend to its shareholders without materially changing its financial position (the outgoing funds from the dividend payment being offset by the income funds from the capital raising) and the only impact was the reduction in its franking account balance;
- the dividend reinvestment plan is fully underwritten which ensures that no change in financial position occurs; and
- the capital raising and distribution are temporally close.

Example 5.3 – Return of surplus cash after unsuccessful acquisition

A company makes an offer to shareholders to subscribe for 1 new share for every 100 shares currently held to raise capital with the express intention of funding a proposed acquisition. The acquisition does not go ahead and the funds raised contribute to the general pool of funds available to the company. After 12 months the company pays a special fully franked dividend to its shareholders, being a distribution outside of its ordinary dividend cycle and funded by the surplus cash resulting from the acquisition not going ahead.

There is no significant change in the resulting financial position of the company from the capital raising and the payment of a special fully franked dividend other than in relation to franking credits. However, it is clear in all the circumstances that there is a genuine commercial purpose for the capital raising to make an acquisition and when this was unsuccessful, the surplus cash was returned to shareholders. Accordingly, there is an insufficient linkage between the capital raising and the special dividend for the purpose test to be satisfied in relation to this arrangement.

Example 5.4 – Arrangement in accordance with established practice

An APRA regulated body issues $10,000,000 in hybrid instruments (equity interests) to investors to ensure its regulatory capital requirements are satisfied. The funds raised contribute to the general pool of funds available to the company.

After six months, the company pays a distribution of $3,000,000 with franking credits attached on existing shares and other equity interests. The company regularly pays such dividends and has a longstanding practice of paying such distributions to its members generally every six months.

The company's capital increased by $10,000,000. After six months, its cash position is reduced by $3,000,000 as a result of the dividend.

The measure does not apply as the company has a longstanding established practice of paying such dividends to its members. Regardless, it is clear that there is a genuine commercial purpose for the capital raising to meet capital regulatory requirements. Accordingly there is an insufficient linkage between the capital raising and the payment of the dividend for the purpose test to be satisfied in relation to this arrangement.

Commencement, application, and transitional provisions

5.53 Schedule 5 to the Bill commences on the first 1 January, 1 April, 1 July or 1 October to occur after the day the Bill receives Royal Assent. ***[Clause 2]***

5.54 The amendments made by Schedule 5 apply to distributions made on or after 15 September 2022. This aligns with the release of the exposure draft for the measure for public consultation on 14 September 2022. ***[Schedule 5, subitem 3(1) of the ITAA 1997]***

5.55 The amendments clarify that in determining if an established pattern of distribution exists both past practice before 15 September 2022 and on and after this date may be taken into account. This confirms that both entities that have been in operation prior to 15 September 2022 and those new entities that are established on or after this date can establish a pattern of distributions that can be taken into account in considering if the amendments apply. ***[Schedule 5, subitem 3(2) of the ITAA 1997)]***

5.56 The amendments apply retrospectively, broadly in line with the release of the exposure draft for public consultation. This affects those entities that have made or received affected distributions, contrary to the measure.

5.57 Retrospective application from 15 September 2022 is necessary because the measure prevents artificial and contrived arrangements set up to inappropriately access franking credits that were not intended under the imputation system. Allowing such activity to be entered into before the passage of the legislation without any consequences under the law would encourage the implementation of such arrangements during this period. Although the measure applies retrospectively, affected parties were generally aware of how the measure would apply following the release of the exposure draft law on 14 September 2022. Changes to the amendments following release of the exposure draft law clarify the scope of the measure to address a number of issues raised in consultation that the measure could be argued to apply more widely than intended.

Chapter 6: Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Treasury Laws Amendment (2023 Measures No. 1) Bill 2023

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Schedule 1 – Registration of providers and assisted decision making

Overview

6.1 Schedule 1 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

6.2 Schedule 1 to the Bill amends the Corporations Act to:

- allow ASIC to approve applications from one or more licensees to register on the Financial Advisers Register the same relevant provider in circumstances where the relevant provider has a registration in force; and
- allow assisted decision-making to be used for any purpose for which ASIC may make decisions in the performance or exercise of ASIC functions or powers to register a relevant provider.

6.3 These amendments are technical in nature and intended to ensure the requirement for a relevant provider to be registered operates efficiently, while reducing the risk of inadvertent breaches of the law.

6.4 The amendments further provide transitional arrangements to ensure any existing registrations, or applications for registration, that are made before the commencement of the amendments will continue in force and may be dealt with in accordance with the provisions as amended. Transitional arrangements also provide that any registration suspension orders, registration prohibition orders or action by the Financial Services and Credit Panels continue in force and have effect as if the orders were made having regard to the provisions as amended.

6.5 In addition, minor technical amendments are made to a transitional provision in Part 10.57 of the Corporations Act to align with the provisions policy intent introduced in the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021*. The amendment will ensure that relevant providers who had a pending application before 1 January 2022, and whose registration was subsequently granted by the TPB are recorded as registered on the Financial Advisers Register. The amendment has a necessary and appropriate retrospective application to on or after 1 January 2022 to allow relevant providers granted registration after 1 January 2022 to be smoothly transitioned and recorded on the Financial Advisers Register. This application provision is beneficial and necessary to achieve the original intent as explained in the Explanatory Memorandum to the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021*, and will minimise the administrative burden for relevant providers and ASIC.

Human rights implications

6.6 This Schedule does not engage any of the applicable rights or freedoms.

Conclusion

6.7 This Schedule is compatible with human rights as it does not raise any human rights issues.

Schedule 2 – Sustainability standards

Overview

6.8 This Schedule is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

6.9 This Schedule amends the ASIC Act to provide the AASB with functions to develop and formulate sustainability standards. It clarifies the AUASB's function to develop and maintain relevant auditing and assurance standards for sustainability purposes. It also empowers the FRC to provide strategic oversight and governance functions in relation to the AASB's and AUASB's sustainability standards functions. The amendments leverage the existing bodies' experience to facilitate the development of sustainability standards while longer-term governance arrangements for sustainability-related financial reporting, including climate disclosure, are developed and implemented. This allows the AASB to establish, in the first instance, non-binding reporting requirements for sustainability that will, as far as is practicable, align with significant international developments, including the standards under development by the ISSB.

Human rights implications

6.10 This Schedule does not engage any of the applicable rights or freedoms.

Conclusion

6.11 This Schedule is compatible with human rights as it does not raise any human rights issues.

Schedule 3 – Government response to the Review of the Tax Practitioners Board

Overview

6.12 Schedule 3 to the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

6.13 Schedule 3 to the Bill amends the TAS Act to ensure that tax agent services and BAS services provided to the public are of an appropriate ethical and professional standard and to enhance the financial independence of the TPB from the ATO. To achieve this, Schedule 3 to the Bill implements the following recommendations of the TPB Review to:

- update and modernise the objects clause of the TAS Act (Recommendation 2.1);
- create financial independence for the TPB from the ATO (Recommendation 3.1);
- require tax practitioners to not employ or use a disqualified entity without the TPB's approval, or enter an arrangement with a disqualified entity (Recommendation 4.6);
- convert to an annual registration period (Recommendation 4.7); and
- enable the Minister to supplement the existing Code of Professional Conduct to ensure that emerging or existing behaviours and practices by tax practitioners are properly addressed (Recommendation 5.1).

6.14 The implementation of these recommendations is intended to improve the effectiveness and independence of the TPB, enhance community confidence, and support high standards in the tax profession whilst streamlining the regulation of tax practitioners.

Human rights implications

6.15 In addition to the other recommendations, Schedule 3 to the Bill implements Recommendation 4.6 which introduces new Code of Professional Conduct obligations on tax practitioners and civil penalties on disqualified entities who fail to disclose their status to tax practitioners they are engaged with.

6.16 Recommendation 4.6 is anchored in concerns in relation to insufficient internal governance practices leading to tax practitioners employing or using people who are unsuitable to provide tax services on their behalf. This increases the risk of sub-standard tax advice and tax fraud by or on behalf of taxpayers which diminishes the integrity of the tax system.

6.17 Recommendation 4.6 aims to close this identified gap in the regulation of tax services by introducing the following obligations:

- an entity who meets the definition of a 'disqualified entity' must disclose their disqualified status to the tax practitioner if:
  - they are being employed or used to provide tax agent services on behalf of the tax practitioner; or
  - they are entering an arrangement with a tax practitioner in connection with providing tax agent services; and
- tax practitioners have obligations under the Code of Professional Conduct to ensure that:
  - they do not employ or use individuals who meet the definition of a 'disqualified entity' to provide tax agent services on their behalf, unless approved by the TPB; and
  - they do not enter an arrangement with a disqualified entity in connection with providing tax agent services.

6.18 The amendments are intended to facilitate compliance with, and preserve the integrity of, the taxation system. They are designed to reduce the possibility of tax fraud and evasion by or on behalf of taxpayers (e.g., claiming unsubstantiated deductions) in response to the identified gap in the law, as well as protecting consumers from services being provided by entities inappropriately.

6.19 As a result of these provisions implementing Recommendation 4.6, Schedule 3 to the Bill engages with the following rights:

- the right to work under Article 6(1) of the ICESCR;
- the right to a fair trial and presumption of innocence under Articles 14 and 15 of the ICCPR; and
- the right to privacy under Article 17 of the ICCPR.

Right to work

6.20 Schedule 3 to the Bill engages the right work under Article 6(1) of the ICESCR.

6.21 The right to work provides that everyone must be able to freely accept or choose their work and includes a right not to be unfairly deprived of work.

6.22 The right to work is engaged in Schedule 3 to the Bill as it may affect the ability of individuals and entities to gain or continue employment in the provision of tax agent services. The concept of disqualified entities is introduced by Schedule 3 to the Bill in subsection 45-5(2) and includes any individuals or entities who have been convicted of serious offences, had sanctions applied to them for breach of the Code of Professional Conduct or had their application for registration or renewal rejected. Schedule 3 to the Bill may limit the potential for these disqualified entities to continue providing tax agent services on behalf of a tax practitioner or under an arrangement with a tax practitioner. In particular, the requirement for tax practitioners to seek approval from the TPB prior to employing or engaging a disqualified entity, may prevent a disqualified entity from providing tax agent services on a tax practitioner's behalf.

6.23 The objective of Recommendation 4.6 is to ensure that all individuals and entities who are responsible in the provision of tax agent services, are subject to similar ethical and professional standards applied to registered tax and BAS agents. This closes the regulatory gap currently existing within the tax industry and protects the integrity of the tax system.

6.24 Schedule 3 to the Bill is an effective way to achieve this object as it places on ongoing obligation on tax practitioners to be aware of the risks associated with the employment and engagement of disqualified entities. Additionally, the disqualified entity themselves is also required to remain transparent about their status to tax practitioners and ensure both their employer and the TPB is aware of their status.

6.25 Schedule 3 to the Bill is a proportionate response to the current regulatory gap in the tax industry as although it imposes ongoing obligations on the tax practitioner and notification requirements on the disqualified entity, the disqualified entity may still be employed or engaged to provide tax agent services on behalf of the tax practitioner if they receive approval from the TPB. Schedule 3 to the Bill imposes a barrier for disqualified entities which they can overcome if they remain transparent with the tax practitioner and in turn, the TPB.

6.26 Based on the TPB's assessment, which requires a fair consideration of the circumstances surrounding the entity's disqualification, a decision is made based on whether they are suitable to continue employment or engagement to provide tax agent services. If they are, the right to work under Article 6(1) of the ICESCR will not be infringed. Alternatively, if they are deemed a concern to the tax industry following assessment by the TPB, the disqualified entity's inability to freely work is only limited in relation to the provision of tax agent services. They are still able to be employed under a different capacity and can seek work in another role.

6.27 Any potential limitations on the right to work are reasonable and proportionate as the exclusion of these disqualified entities from the tax system is necessary to protect the public from potential dishonesty, misconduct or fraud and maintain high standards in the tax industry.

6.28 Similarly, in relation to the ongoing obligation and notification requirement preventing tax practitioners and disqualified entities from entering arrangements in which the disqualified entity is able to operate through the registered agent's credentials, the strict prohibition of these arrangements is reasonable and proportionate to any limitation on the right to work. The integrity of the tax system is severely jeopardised in these circumstances as these arrangements are purely undertaken for a disqualified entity to continue acting in a dishonest or fraudulent manner by controlling the actions of a registered tax practitioner.

6.29 To the extent that Schedule 3 to the Bill engages with the right to work, any limitations on an individual's right are necessary and proportional to maintain a high quality of tax agent services and close the regulatory gap currently existent in the tax industry.

Civil penalty

6.30 Schedule 3 to the Bill introduces new civil penalty provisions which may engage the right to a fair trial, as well as the presumption of innocence in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). Article 14(2) of the ICCPR recognises that all people have the right to be presumed innocent until proven guilty according to the law. Articles 14 and 15 apply only in relation to the rights of natural persons, not legal persons, such as companies.

6.31 Civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR. Although there is a domestic law distinction between criminal and civil penalties, 'criminal' is separately defined in international human rights law. Therefore, when a provision imposes a civil penalty, it is necessary to determine whether or not the penalty amounts to a 'criminal' penalty for the purposes of Articles 14 and 15 of the ICCPR.

6.32 Schedule 3 to the Bill introduces new civil penalty provisions which may apply if written notice of the entity's disqualified status is not provided to the tax practitioner in the following circumstances:

- disqualified entity seeking or continuing to provide tax agent services under a tax practitioner;
- entity that becomes disqualified and is providing tax agent services under a tax practitioner;
- disqualified entity seeking or continuing an arrangement with a tax practitioner in connection with the provision of tax agent services; and

- entity that becomes disqualified and is under an arrangement with a tax practitioner in connection with the provision of tax agent services.

6.33 The civil penalty provisions contained in Schedule 3 to the Bill are not 'criminal' for the purposes of human rights law. While a criminal penalty is deterrent or punitive, these provisions are regulatory and disciplinary, and they aim to encourage compliance with Schedule 3 to the Bill. The new civil penalty provisions will apply in line with the current operation of the TAS Act, which provides that if a civil penalty provision is breached, the TPB has the option to apply to the Federal Court for an order to pay a pecuniary penalty. The penalties represent a maximum potential penalty which will only be applied in the most serious cases, as determined by the court.

6.34 Further, the provisions do not apply to the general public, but to a sector or class of people, namely disqualified entities who provide tax agent services on a tax practitioner's behalf or under an arrangement with a tax practitioner, who should reasonably be aware of their obligations under the TAS Act. Therefore, imposing these civil penalties will enable an effective disciplinary response to non-compliance.

6.35 While these civil penalties are large, they are appropriate in size. A lesser penalty of 250 penalty units is applicable to individuals who breach these provisions and a higher penalty of 1,250 penalty units is applicable to body corporates. This is in line with the body corporate multiplier rule established in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.* This Guide notes that larger penalties are more appropriate for bigger companies, as they provide an adequate deterrent.

6.36 Further, the judiciary continues to have discretion to consider the seriousness of the contravention and impose a penalty that is appropriate in the circumstances. The courts are experienced in making civil penalty orders at appropriate levels having regard to the maximum penalty amount, taking into account a range of factors including the nature of the contravening conduct and the size of the organisation involved.

6.37 Therefore, a relevant consideration in setting a civil penalty amount is the maximum penalty that should apply in the most egregious instances of non-compliance with Schedule 3 to the Bill.

6.38 The maximum civil penalty amounts that can be imposed under Schedule 3 to the Bill are intentionally significant and are in line with the penalties for other provisions in the TAS Act.

6.39 Finally, there is no sanction of imprisonment for non-payment of these civil penalties.

6.40 These civil penalty provisions apply prospectively for conduct that occurs on or after commencement of the legislation and therefore upholds Article 15 of the ICCPR. Transitional rules have also been put in place for disqualified entities who are currently providing tax agent services on behalf of a tax practitioner, or under an existing arrangement with a tax practitioner in connection with providing tax agent services. These individuals have an additional 12 months and 30 days to notify the tax practitioner of their disqualified status, meaning the civil penalties will also not be applicable for one year after commencement.

Privacy

6.41 Schedule 3 to the Bill engages the right to protection from unlawful or arbitrary interference with privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR) because it involves the disclosure of personal information about disqualified entities by the tax practitioner to the TPB. Specifically. subsection 45-5(3) requires tax practitioners to submit an application and any required documents to the TPB, which may contain personal information about a disqualified entity, if they wish to seek approval to employ or use a disqualified entity to provide tax agent services on their behalf.

6.42 The right in Article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

6.43 The amendment allows the registered tax practitioner to disclose confidential information to the TPB. It will improve the TPB's ability to investigate and assess disqualified entities, and ultimately determine whether they are able to provide tax agent services on behalf of a tax practitioner. This is essential to better protect the integrity of Australia's tax system.

6.44 The amendment is a reasonable change as it is necessary for the TPB to commence an assessment of the disqualified entity and establish whether they can be employed or used to provide tax agent services. Importantly, this information would only be disclosed if the disqualified entity wanted to continue to pursue a position in the tax industry and is not required in any other circumstance. Overall, this allows the TPB and tax practitioners to work together more effectively to ensure compliance with taxation laws.

6.45 This new provision is appropriate as it will ensure that the process for sharing information is consistent with other existing provisions in the TAS Act. The current registration process for tax practitioners requires them to provide any relevant documents and complete the application form required by the TPB. The process included in this amendment operates in an identical manner.

6.46 Schedule 3 to the Bill engages the 'authorised by law' exemption in Australian Privacy Principle (APP) 6.2(b), which allows for use and disclosure of personal information where required or authorised by law. Due to the similar information sharing process existent in the TAS Act and the necessity of this information to achieve the overall objective of the amendments to protect the tax system's integrity, the amendments are reasonable, necessary, and proportionate to achieving a legitimate aim, paying due regard to the nature of the information disclosed and the particular public policy objective.

6.47 Any information that is shared between the tax practitioner and the TPB will remain subject to strict confidentiality protections. The TPB will remain subject to the requirement to take all reasonable measures to protect confidential information from any unauthorised disclosure. The Board is subject to the APPs under the *Privacy Act 1988*, which regulate how information is collected, disclosed, and stored. Personal information used only by the Board for the purpose in which it was given, or for purposes directly related to one of its functions under the Act, such as maintaining a register.

Conclusion

6.48 To the extent that Schedule 3 to the Bill engages the right to work under Article 6(1) of the ICESCR and the right to privacy, fair trial, and presumption of innocence under Articles 14, 15 and 17 of the ICCPR, it is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 as the limitations are appropriate, proportionate and achieve a legitimate objective.

Schedule 4 – Off-market share buy-backs

Overview

6.49 Schedule 4 to the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

6.50 Schedule 4 to the Bill aligns the treatment of off-market share buy-backs undertaken by listed public companies with that currently applied to on-market share buy-backs. It does this so that no part of the purchase price is taken to be a dividend in an off-market share buy-back undertaken by a listed public company.

6.51 It also treats any distribution received as part of a share capital reduction as unfrankable.

Human rights implications

6.52 Schedule 4 to the Bill does not engage any of the applicable rights or freedoms.

Conclusion

6.53 Schedule 4 to the Bill is compatible with human rights as it does not raise any human rights issues.

Schedule 5 – Franked distributions funded by capital raisings

Overview

6.54 Schedule 5 to the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

6.55 This Schedule amends the ITAA 1997 to include a new item to make certain distributions funded by capital raising unfrankable.

6.56 The purpose of the amendments is to ensure that direct or indirect recipients of affected distributions are not entitled to a tax offset and the amount of the franking credit is not included in the assessable income of the recipient. The distribution is also not exempt from withholding tax under section 128B of the ITAA 1936.

6.57 The amendments are an integrity measure. They prevent entities from manipulating the imputation system to facilitate the inappropriate release of franking credits. They are designed to specifically prevent the use of artificial arrangements under which capital is raised to fund the payment of franked distributions to shareholders and enable the distribution of franking credits.

Human rights implications

6.58 Schedule 5 to the Bill does not engage any of the applicable rights or freedoms.

Conclusion

6.59 Schedule 5 to the Bill is compatible with human rights as it does not raise any human rights issues.

Attachment 1: Independent Review of the Tax Practitioners Board – Final Report

Foreword

The Terms of Reference for this Review (Appendix A) provide that a major focus should be how the tax practitioner regulatory regime should be structured.

The tax practitioner landscape has unique features. First, tax practitioners have a responsibility to assist taxpayers to ensure that their taxation affairs comply with the law, particularly in a self-assessment environment. Secondly, they play an important role of mediating the relationship between those paying tax and those collecting tax1.

Compliance with Australian taxation law by all participants is by no means easy given the wide tax base and the ever-changing complexity of a modern economy. As a result of this complexity, taxpayers more often than not rely on appropriate professional and ethical assistance and advice for their dealings with the Australian Taxation Office (ATO).

It has long been accepted that what are appropriate professional and ethical standards for tax professionals interacting with the ATO should not be set by the ATO.

In this context, the Review focuses on three key issues:

- the setting of appropriate professional and ethical standards (see Chapter 5);
- the importance of an independent Tax Practitioners Board (TPB) (see Chapter 3); and
- whether the legislation appropriately equips the TPB to effectively perform its task, including appropriate sanctions and enhancing the ongoing registration requirements (see Chapters 4 and 6).

In the opinion of the Review, independence and the appropriate regulatory framework is not the complete answer to the question of whether we have a fit for purpose regulatory regime.

In administering the tax legislation, the ATO collects extensive data about taxpayers. This data is relevant in decisions concerning, for example, reviewing

[1] The Ethics Centre advice, see Appendix B.

tax returns and compliance more generally. The collected data also enables the ATO to analyse returns lodged by tax practitioners.

The appropriate use of this data has to acknowledge a taxpayer's expectation of access to independent, professional and ethical advice. Its use must respect the independence of the TPB and the ATO, and importantly, the ATO's responsibility to administer the tax laws.

This is a unique position, being that the same information, or source of it, has to be used by both the ATO and the TPB for them to administer their different functions.

It is our opinion that the dual use of taxpayer information by both the ATO and the TPB cannot be solved by regulation alone. Nor can participants in the Australian tax system operating in independent silos, acting on behalf of different sectors of the tax community, resolve it. It can be resolved by those participants working together with a transparent plan of who is doing what and with respective responsibility.

An outstanding feature of this Review has been that all levels of participants have approached the review with the objective of seeking a much better outcome for Australia's taxation system.

To build on this engagement, we have recommended in this Report that the TPB convene and sponsor a Tax Practitioner Governance and Standards Forum. This Forum will have the objective of providing input into a transparent set of memoranda of understandings between relevant participants and the development of a charter in concept similar to the Taxpayers' Charter. This Forum would also assist in the breaking down of silos and ensuring that key participants in the tax community work together, leading to a greater level of trust in the integrity of the tax system by the Australian community.

The underlying policy behind the *Tax Agent Services Act 2009* (TASA) was to ensure the ATO was not responsible for regulating the profession and determining the appropriate standards of professional and ethical behaviours for tax practitioners. Instead, these tasks are undertaken by an independent and effective regulator.

Our Review, coupled together with the report of the Black Economy Taskforce and the ongoing discussion about various tax gaps shows that there is room for improvements to be made.

This Review, together with the earlier 1994 *National Review of Standards of the Tax Profession* initiated by the National Tax Liaison Group, suggest that the best outcome is not just a tinkering with legislative solutions but a coming together where all stakeholders agree on a set of common objectives.

Executive Summary

The regulation of the tax profession by the Tax Practitioners Board (TPB) has continued since 2010, shortly after the *Tax Agent Services Act 2009* (TASA) was introduced.

Nine years is more than enough time to ascertain the effectiveness and efficiency of both the TPB and the TASA. While submissions and consultation have overall been positive in their assessment of the performance of the TPB, it is clear that there are some areas that need to be addressed, not just from the perspective of legislative change but also in terms of the structural framework that underpins the TPB and the culture that has developed among (a) those that regulate the tax profession and (b) some elements of the tax profession.

One of the most significant changes being proposed is a significant expansion of the sanctions available to address misconduct by tax practitioners. To give this proposal some context it is necessary to provide some background detail. The TPB's focus in its early years of formation was, generally speaking, an educative approach. When tax (financial) advisers (TFAs) were subsequently introduced into the TPB's regime this required significant resources to register a population of what was, at the time, approximately 15,000 TFAs. It is only in more recent times that the focus of the TPB has shifted, recognising that an important part of its function is to also regulate the behavioural standards of tax practitioners.

In 2018 the Commissioner of Taxation published for the first time his estimate of the tax gap for individuals, estimated at approximately $8.7 billion for 2014-15. Earlier this year the tax gap for small business for 2015-16 was estimated to be approximately $11.1 billion. The vast majority of small businesses use tax agents, and the Commissioner of Taxation has been quite outspoken that he considers there are egregious tax practitioners who are contributing to the size of the tax gaps for both individuals and small business.

Similarly the "safe harbour" that was introduced into the *Taxation Administration Act 1953* at the same time that the TASA was introduced needs revisiting. The concept of the safe harbour is straightforward, if a taxpayer provides their registered tax practitioner with all the information necessary to complete their tax return or activity statement, they should not be at risk of any penalty if errors are made by the tax practitioner. They do however remain liable to pay the primary tax and any interest that has accrued.

The safe harbour has however created an environment where agents can operate in an almost risk-free zone as long as they can establish that they have taken reasonable care. This (almost) risk-free environment has encouraged over-claiming by those agents willing to push the boundaries.

This in turn has led to large tax gaps which of course are a cost to the community. The Review has proposed solutions which, if implemented should help to reduce these tax gaps. These solutions include agents being held to account when they have not met the expected standards and, in the most egregious cases penalties being able to be imposed by the Commissioner of Taxation.

A broader range of sanctions will help facilitate this. However, in providing a broader range of powers it is important that this is balanced by providing a level of comfort to the tax profession and the community that the significant increase in sanction powers now available to the TPB will be imposed in accordance with due process. Responsibility and accountability for the exercise of these sanction powers should clearly lie with the TPB with no inferences being able to be made that the ATO has any influence. This means that it is important that the TPB is, and is clearly seen as, being independent from the ATO.

While the Board has always been independent, from an administrative perspective the TPB was originally set up as part of the ATO. That was intended to be an interim arrangement. The failure to change this over a period of nine years has not been helpful. Much clearer lines of demarcation are required. This can be achieved by ensuring the TPB receives its own appropriation from Government and becomes a Commonwealth entity (rather than be part of the ATO).

Furthermore, everyone should understand what they are meant to do and what others are meant to do. With improved clarity on roles and accountabilities it is expected that other improvements will follow.

With that in mind, the Review has proposed the establishment of a Tax Practitioner Governance and Standards Forum. Members would include not just the TPB and ATO, but also representatives of some of the major professional associations and also the Professional Standards Councils (PSC) as an ex-officio member. It is expected this Forum will foster a more collaborative culture.

The Forum is intended to become the peak consultative body for matters involving the provision of tax agent services and ensuring they are provided to the public in accordance with appropriate standards of professional and ethical conduct.

Similar in concept to the ATO’s National Tax Liaison Group (NTLG), this Forum would identify significant and strategic issues and drive improvements in relation to a number of aspects, including:

- public confidence in regulation of the tax profession
- compliance with the tax practitioner regulatory system
- tax agent services law interpretation, administration, design and policy (including technical issues)
- the memorandum of understanding between the TPB and the ATO, to the extent it impacts on the TPB and ATO’s service delivery to tax practitioners

- the legislated Code of Professional Conduct

Another significant change proposed in this Review concerns TFAs. When TFAs became required to register with the TPB their regulatory requirements with Australian Securities and Investments Commission (ASIC) were not reduced. Instead a regulatory overlap was created with additional fees and red tape. Other changes have further contributed to the regulatory burden, with the TPB, ASIC, Financial Adviser Standards and Ethics Authority (FASEA), ATO and Australian Financial Complaints Authority (AFCA) all having roles in regulating TFAs.

The regulatory burden on financial planners and accountants was commented upon in many of the submissions and was also the subject of a very recent report by the CPA titled "*CPA Australia's Regulatory Burden Report, The Impact of Complex Regulatory Frameworks".*

The Review believes this regulatory burden can and should be simplified, though it will need to be done in a manner that aligns with implementing recommendations from the Financial Services Royal Commission.

In considering options to improve the regulatory landscape for TFAs the Review's Discussion Paper raised as a possible option the re-introduction of the accountants' exemption, an exemption that previously allowed accountants to provide basic self-managed super fund advice and services without having to operate in the financial licensing regime administered by ASIC.

The Review acknowledges that what advice accountants can and cannot give in respect of superannuation is a complex issue and, in accordance with some of the submissions received, worthy of more thorough analysis than this review has capacity for, perhaps in a subsequent review.

The Review has also looked at the education and registration requirements for tax practitioners and made a range of recommendations that should improve these processes and better align them with the requirements of other Government regulators such as ASIC and the Australian Prudential Regulation Authority.

All of the recommendations made by the Review are set out on the following pages.

List of Recommendations

Recommendation 1.1

The Review recommends the Government retain the TPB as the statutory authority responsible for regulating tax practitioners, noting that the disciplinary model for tax (financial) advisers may be reviewed, with effect from 2021, as part of the process of establishing a new central disciplinary body further to Recommendation 2.10 of the Final Report of the Financial Services Royal Commission (see also Recommendation 7.1 in Chapter 7).

Recommendation 2.1

The Review recommends the object clause of the TASA (section 2-5) should be updated to:

a) Include wording to the effect that there should be community confidence in the integrity of the tax system.

b) Remove reference to tax (financial) advisers, subject to the adoption of Recommendation 7.1 in Chapter 7.

c) Include reference to unregistered agents.

d) Rephrase the wording to reflect that the TPB is a more mature organisation that is no longer in a start-up phase.

Recommendation 3.1

The Review recommends the TPB should become a separate agency and receive its own specific appropriation from the Government rather than as an allocated proportion of a broader ATO budget (which will require accompanying law changes). This will represent a TPB that is independent from the ATO.

Recommendation 3.2

The Review recommends, in addition to Recommendation 3.1, the following changes should be made to improve the level of independence the TPB has from the ATO:

a) The position of the CEO of the TPB should be accountable to the Board and become a statutory appointment rather than, as at present, an ATO employee on secondment to the TPB.

b) If the TPB seconds staff from the ATO, there should be formal secondment arrangements put in place for those ATO staff on secondment to the TPB.

Recommendation 3.3

The Review recommends:

a) The TPB and ATO should maintain and publish a plan that sets out how they will work together, encouraging early engagement, strengthening information sharing, providing clear responsibilities and accountabilities and setting agreed strategic goals.

b) The creation of a Tax Practitioner Governance and Standards Forum and corresponding Charter of Tax Practitioner Governance.

Recommendation 3.4

The Review recommends:

i) The law should be amended to oblige each of the TPB and ATO to:

a) co-operate with the other;

b) share information to the maximum extent practicable; and

c) notify the other whenever it forms the belief that a breach in respect of which the other has enforcement responsibility may have occurred.

ii) The law should be amended to oblige each of the TPB and ASIC to:

a) co-operate with the other;

b) share information to the maximum extent practicable; and

c) notify the other whenever it forms the belief that a breach in respect of which the other has enforcement responsibility may have occurred.

Recommendation 3.5

The Review recommends that the whistleblower laws be amended such that the TPB is legislatively defined as an 'eligible recipient'. This would ensure that the TPB is able to:

a) receive information from an eligible whistleblower and eligible recipient; and

b) disclose information received to other eligible recipients.

Recommendation 3.6

The Review recommends:

a) *The Tax Agent Services Act 2009* is amended to mandate that at least one member of the Board is a community member. Consideration will need to be given as to how this term is defined but it should be expected they would provide community focused input and have a high level of experience in regulating professional activities outside of the tax profession.

b) Subsection 70-30(2) of the *Tax Agent Services Act 2009* is amended so that only two members of a committee, that is making appellable decisions, have to be Board members and the third member can be a person chosen at the Board's discretion so long as that person has the appropriate skills and knowledge.

Recommendation 4.1

The Review recommends in relation to the primary qualifications (education and experience requirements), that:

a) The TPB, in collaboration and consultation with other regulators, professional associations, education providers, the tax profession and other key stakeholders, undertake a review to determine if the primary qualification level itself has been set at the right level and what grandfathering arrangements would be appropriate (if required).

b) The Treasury and the TPB, with input from key stakeholders, determine whether an amendment to the *Tax Agent Services Regulations 2009* is appropriate to give the TPB greater flexibility to accept other qualifications that may not fall within the traditional tax practitioner course of study.

Recommendation 4.2

The Review recommends that the TPB should no longer accredit professional associations as a 'recognised professional association'. The consequence of this is that the registration entry pathway based on being a voting member of a TPB recognised professional association (items 102, 206 and 304 of Schedule 2 to the *Tax Agent Services Regulations 2009*), will no longer be required. However, it is recommended that these items are removed prospectively with appropriate permanent grandfathering arrangements in place.

Recommendation 4.3

The Review recommends:

a) The *Tax Agent Services Regulations 2009* being amended to give the TPB greater flexibility to accept different types and periods of experience as being relevant. This would allow the TPB to take into account individual circumstances such as maternity leave or other absences from the profession.

b) As part of (a), The Treasury and the TPB, with input from key stakeholders, determine whether an amendment to the TASR is appropriate to amend the amount of relevant experience (and nature of experience) required to be registered as a BAS agent.

Recommendation 4.4

The Review recommends that the eligibility requirements for company and partnership tax practitioners in the *Tax Agent Services Act 2009* be amended to include a requirement that the entity has appropriate governance arrangements in place that demonstrate who is accountable for the delivery of tax agent services.

Whether arrangements are appropriate will be a matter for the TPB to determine, noting that the TPB will need to provide guidance on what appropriate arrangements are, in consultation with key stakeholders, including the professional associations.

Recommendation 4.5

The Review recommends that:

a) The Treasury, with input from key stakeholders (in particular the TPB) amend the fit and proper person test in the *Tax Agent Services Act 2009* to ensure greater consistency with the requirements of other Government regulators, such as ASIC and APRA.

b) The current 5-year period in the *Tax Agent Services Act 2009* in which the TPB must consider certain conduct that may contravene the fit and proper person test should be increased or removed entirely, with guidance from other regulators.

c) Those applying for registration with the TPB, including renewal, must disclose any spent convictions.

Recommendation 4.6

The Review recommends that the *Tax Agent Services Act 2009* be amended to include as part of a tax practitioner's eligibility for registration a requirement to declare:

i) a) any close associates relevant in the provision of tax agent services; and/or

b) employees involved in the provision of tax agent services;

who are affected by any of the fit and proper events in the *Tax Agent Services Act 2009*; and

ii) if they have engaged anyone listed in the proposed unregistered practitioners register.

Recommendation 4.7

The Review recommends that:

a) The registration period be converted to an annual period, subject to the TPB being able to make the necessary system and IT enhancements to reduce the regulatory burden on tax practitioners that are renewing their registration.

b) The annual registration fee should be pro-rated, in comparison to the current fee payable for a three year registration period.

Recommendation 4.8

The Review recommends that following completion of the trial of tax clinics and decisions of Government to either cease or extend the program, the issue of tax clinics and the TPB be reviewed to determine if any longer term amendments may be required.

Recommendation 4.9

The Review recommends that:

a) Only those tax intermediaries that are not regulated by any other Government body should require registration with the TPB, despite otherwise being required to be registered with the TPB.

b) The TPB should have the power, through the legislative instrument process, to exclude certain other services from having to register with the TPB.

Recommendation 5.1

The Review recommends that the relevant Minister be given a legislative instrument power to be able to supplement the Code of Professional Conduct to address emerging or existing behaviours and practices. The legislative instrument process would also ensure appropriate consultation with key stakeholders and parliamentary oversight.

Recommendation 5.2

The Review recommends that a provision concerning legal professional privilege (LPP) such as that in section 70 of the *Australian Securities and Investments Commission Act 2001* be enacted in the *Taxation Administration Act 1953*.

Further, a similar protocol to that being developed between the Law Council of Australia and the ATO in relation to LPP claims should be developed for tax practitioners generally. This item should be something for the proposed forum (at Recommendation 3.3) to consider.

Recommendation 6.1

The Review recommends that the Board's sanctions powers need to be increased, including introducing the following sanctions into the *Tax Agent Services Act 2009*, which could be applied to registered and unregistered practitioners:

a) infringement notices

b) enforceable undertakings

c) quality assurance audits

d) interim suspensions

e) permanent disbarment

f) external intervention.

Recommendation 6.2

The Review recommends that:

a) Investigations are able to commence and/or continue once a registered tax practitioner either has their registration terminated, chooses not to re-register, or is seeking to surrender their registration.

b) The limitation on the TPB formally gathering information prior to commencing and notifying a tax practitioner of an investigation be removed.

c) The six month timeframe to conduct an investigation be removed.

Recommendation 6.3

The Review recommends that the *Tax Agent Services Regulations 2009* be amended to enable the TPB to publish more detailed reasons for tax practitioner sanctions, including terminations, on the TPB Register (which is publicly available). See also Recommendation 8.1.

Recommendation 6.4

The Review recommends that an administrative penalty regime, administered by the ATO, be introduced to impose penalties on tax practitioners who demonstrate an intentional disregard of the taxation laws in making, or being involved in making, a statement to the Commissioner of Taxation.

Recommendation 6.5

The Review recommends the safe harbour protection as it applies both to false or misleading statement penalties and failure to lodge penalties, be extended to cover instances where the tax agent or BAS agent has demonstrated recklessness or intentional disregard with respect to a taxation law.

Recommendation 7.1

The Review recommends, in alignment with implementing Recommendation 2.10 of the Final Report of the Financial Services Royal Commission, a new model be developed for regulating tax (financial) advisers in consultation with ASIC, FASEA, the TPB and Treasury. This new model should incorporate the following features:

a) single point of registration for individuals;

b) requirement to abide by only the one code of conduct; and

c) any disciplinary action involving the provision of tax advice is decided by experts from the tax profession.

Until the new model is developed the status quo should be retained.

Recommendation 7.2

Having recommended the regulatory burden on tax (financial) advisers is to be reduced, the Review believes it is reasonable that a similar level playing field should be considered for accountants. The Review therefore recommends the Government initiate a specific review of what advice accountants can and cannot give in respect of superannuation and which accountants that might apply to. Such a review could perhaps be undertaken by the Productivity Commission.

Recommendation 8.1

The Review recommends that:

a) Details of tax practitioners that are currently included on the TPB Register should be expanded. This could include publishing a wider range of information, decisions and outcomes on the TPB Register.

b) A register of unregistered tax practitioners be made available. This register would include those entities that receive a notice by the TPB to 'cease and desist' providing tax agent services for a fee and publication of details relating to renewal application rejections (in certain circumstances, such as not being fit and proper).

c) The time limits on how long certain information appears on the Register be removed.

Recommendation 8.2

The Review recommends that details of tax practitioners that are included on the TPB Register should ultimately be included on the Modernising Business Register.

Preface

This is the final report of the review into the effectiveness of the Tax Practitioners Board (TPB)[2] and associated legislation. The report arises as a result of an announcement by the then Assistant Treasurer Stuart Robert MP on 5 March 2019. The Terms of Reference are attached as Appendix A.

Mr Keith James (former member of the Board of Taxation for 10 years and Deputy Chair for four years) was appointed as Head of the review and was assisted by Mr Neil Earle (former President of the Tax Institute of Australia). Mr James and Mr Earle were assisted by Michael Buscema from the Australian Taxation Office, Janette Luu from the Tax Practitioners Board, and Suzanne Taylor and Nick Westerink from the Department of the Treasury.

We published a Discussion Paper in July 2019 setting out our initial consultations. Further consultation occurred in August 2019 with major professional associations and stakeholders attending roundtables held in Sydney

[2] References in this paper to the TPB are to the entity. References to the Board are to the board members, headed by the Chair.

and Melbourne. In this phase of the review, we also consulted with various agencies including the TPB, Australian Taxation Office (ATO), Australian Securities and Investment Commission (ASIC), the Inspector-General of Taxation and Taxation Ombudsman (IGTO) and the Financial Adviser Standards and Ethics Authority (FASEA).

Much of this report could not have been written without the benefit of the submissions received and consultation with the various agencies, professional associations and other interested stakeholders. We would like to thank them for their time and effort.

We are also grateful for the assistance of The Ethics Centre. The Centre's advice guided much of the preliminary views in the Discussion Paper and likewise many of the recommendations in this final report are based on the concepts of 'fit for purpose' and 'independence' that form the constructs of the Centre's advice. That advice was reproduced in full in the Discussion Paper with the Centre's permission and is attached at Appendix B.

All non-confidential submissions are listed at Appendix C. A copy of those submissions can be found via the review website at Second round of consultation. Several submissions were marked as confidential and are not listed nor published on the review's website. The review considered the points made in each submission regardless of whether the submission was confidential or not.

Where individuals provided submissions in their capacity as an impacted tax agent, BAS agent or tax (financial) adviser (TFA), the Review has taken the step of deleting the submitters name and contact details (and agent number where provided).

1. INTRODUCTION

1.1 The environment that tax practitioners operate in is an integral component of Australia's economy. There are approximately 43,000 registered tax agents, 20,000 registered tax financial planners and 15,000 registered BAS[3] agents. Last financial year $426 billion was collected by the Australian Taxation Office (ATO). Much of that was reconciled via tax returns and BAS prepared by tax agents and BAS agents. With 74 per cent of individual income tax returns prepared by tax agents, and 53.7 per cent of BAS by BAS agents[4] it is clear that community confidence in the tax profession is essential for the integrity of the tax system.

[3] Business Activity Statement.
[4] Source: ATO 2018-19 Annual Report.

1.2 As was explained in our Discussion Paper[5], the *Tax Agent Services Act 2009* (TASA) has its origins in the transition in Australia to a self-assessment system that formally began in 1986 when taxpayers became responsible for assessing their own income tax returns. It is not necessary to repeat the historical background that led to the TASA that we provided in the Discussion Paper, though it is worthwhile restating the principles that underpinned the transition to a self-assessment regime.

1.3 The tax system in place prior to self-assessment required a taxpayer to provide the Commissioner of Taxation (Commissioner) with the necessary facts relevant to the income period[6] and the Commissioner then assessed the application of the income tax law to those facts and issued an assessment. If a taxpayer failed to provide all of the facts honestly and accurately then the Commissioner could impose a penalty for the making of a false and misleading statement.

1.4 With the introduction of self-assessment this changed and taxpayers became responsible not just for providing all of the relevant facts but they were now required to apply the tax law to those facts. Understandably many taxpayers do not have those skills and so they rely on the services of a tax practitioner to assist them with the preparation of their income tax return and to help them manage their tax affairs.

1.5 This increased reliance on tax agents (and subsequently BAS agents with the introduction of a *Goods and Services Tax* (GST) in 2000) made it important that appropriate standards should be put in place for tax and BAS agents to safeguard the community and provide them with the confidence to engage a tax or BAS agent should they so choose.

1.6 The legislative regime that was introduced in 2009 to address this transformational change, namely the TASA and *Tax Agent Services Regulations 2009* (TASR) was intended to ensure that tax agent and BAS services provided to the public were of an appropriate ethical and professional standard. It sought to do so by:

- 1.6.1 requiring tax and BAS agents to be registered and to comply with a nationally consistent and enforceable professional code of conduct;
- 1.6.2 creating appropriate sanctions for misconduct by tax practitioners and safe harbours for taxpayers; and

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5 Review of the Tax Practitioners Board — Discussion Paper p. 9.

6 Generally from 1 June to 30 July.

1.6.3 establishing an independent national board to register tax and BAS agents and to monitor and enforce compliance with those standards.

1.7 Now that the TASA and TASR have been in operation for just over 10 years it is overdue that this review has now been undertaken. This is supported by wording in the Explanatory Memorandum[7] to the *Tax Agent Services Bill 2008* (EM) which, paraphrased below, provided that:

1.7.1 The arrangement of the Board sitting within the ATO is intended to be the subject of a post-implementation review to be conducted three years after commencement of the Bill.

1.7.2 The key focus of the review will be to assess whether this arrangement remains appropriate and satisfactory. The review will consider whether the independence of the Board is impaired in any way because of its continued connection with the ATO, and whether an alternative arrangement should be considered.

1.7.3 The Government intends that the operation of the legislation will be reviewed within three years of implementation, with particular emphasis on (but not being limited to) the governance arrangements for the Board and the operation of the 'safe harbour' from penalties in certain circumstances for failing to lodge a return, notice, statement or other document in the approved form and on time.

1.7.4 In any case, the legislation will be reviewed under the Government's five-yearly review requirements.

1.8 It is also noted that in the Australian National Audit Office's report, '*The Regulation of Tax Practitioners by the Tax Practitioners Board*', published in May 2013, the ANAO commented that the EM notes that the Government may conduct a post-implementation review of the TASA and the TPB during 2013. For this reason, the ANAO audit excluded matters that were likely to be included in such a review, including the operation of the legislation, and consideration of the appropriateness of the ATO's administrative support.[8]

1.9 As was set out in the *Opening Comments* of our Discussion Paper[9], a post-implementation review should take into account certain fundamental principles as outlined in the Board of Taxation's foundation report in 2002 titled *Government Consultation with the*

7 See paragraphs 5.32, 5.33, 6.70 and 6.71.

8 Paragraph 15 of the ANAO report.

9 Above n 5, p. 6.

Community on the Development of Taxation Legislation. We have adopted the principles of the Board of Taxation that a post-implementation should "have regard to the extent to which the legislation:

1.9.1 gives effect to the Government's policy intent;

1.9.2 is expressed in a clear, simple, comprehensible and workable manner;

1.9.3 avoids unintended consequences of a substantive nature;

1.9.4 reflects actual taxpayer circumstances and commercial realities;

1.9.5 results in compliance and administration costs commensurate with the legislation's significance to the tax system;

1.9.6 is consistent with other tax legislation; and

1.9.7 provides certainty."[10]

1.10 In each of the subsequent chapters of this report we reflect on these principles while taking into account the submissions provided to us. We have chosen to follow a different format to the Discussion Paper with separate chapters on each of the following topics:

- Object of the TASA
- Independence and governance
- Registration and education
- The Code of Professional Conduct
- Sanctions
- Tax services and financial advice
- Other issues

1.11 Some ancillary issues that have been raised during the course of the review are discussed at the end of this report under "Other Issues" (Chapter 8). These include issues such as increasing community awareness of the TPB and issues concerning the TPB Register.

1.12 There are other Government sanctioned reports that have been written in the last few years that have relevance for this review. They are:

1.12.1 Final Report of the Financial Services Royal Commission released in February 2019.

10 Board of Taxation's report *Government Consultation with the Community on the Development of Taxation Legislation*, p. 18.

1.12.2 Black Economy Taskforce Final report released in October 2017.

1.12.3 The IGTO's report The Future of the Tax Profession released in April 2019.

1.13 The recommendations made in this report are consistent with those made in all three of these reports.

1.14 Before embarking on an analysis of the many issues raised during consultation it is appropriate that we begin with a consideration of one major, underlying fundamental question:

"Do we need the TPB?"

Do we need the TPB?

1.15 This question was raised in some submissions, though more from a theoretical perspective than from a suggestion that the TPB is not necessary. A useful commentary on the regimes currently in existence in numerous other countries[11] has been provided by the IGTO in their report *"The Future of the Tax Profession"*.

1.16 Having a separate statutory authority that regulates tax practitioners is unique to Australia[12]. In many of the countries considered by the IGTO, the revenue agency and/or the profession also regulate tax practitioners. A fact worth noting later in this report when we consider governance issues in Chapter 3.

1.17 We agree with submissions that observe that having a separate statutory authority does not automatically mean that this is the best model for governing the profession. However, as none of the submissions suggested replacing the TPB, and indeed most submissions were supportive of the role performed by the TPB to date, there seems little to no evidence that would warrant replacing the TPB with another authority or integrating it into the ATO.

1.18 This observation does need to be balanced by recognising Recommendation 2.10 of the Final Report of the Financial Services Royal Commission which recommends the establishment of a single, central disciplinary body for financial advisers. The Government has

[11] New Zealand, United Kingdom, Canada, the Netherlands, Sweden, Finland, Estonia, Singapore, Russia, USA, South Africa, (Chapter 3 The Future of the Tax Profession).

[12] An exhaustive analysis of all countries has not been undertaken but we are unaware of a similar statutory regime elsewhere in the world.

announced[13] that legislation will be introduced for this disciplinary body by the end of 2020 and the body will be set up by early 2021.

Recommendation 1.1

The Review recommends the Government retain the TPB as the statutory authority responsible for regulating tax practitioners, noting that the disciplinary model for tax (financial) advisers may be reviewed, with effect from 2021, as part of the process of establishing a new central disciplinary body further to Recommendation 2.10 of the Final Report of the Financial Services Royal Commission (see also Recommendation 7.1 in Chapter 7).

The future of the tax profession

1.19 It is appropriate that some initial thoughts on this topic are made up front as an important element of this review is setting the framework for the future.

1.20 Keeping pace with technology has become a constant challenge for not just Government but also business and individuals. The tax profession is no different. Digital service providers continue to expand the range of services available and more and more of the process of lodging tax returns is becoming automated, particularly for the more standard or routine type return lodged by many individuals.

1.21 As is recognised by the IGTO, the potential for technology to enable the provision of tax-related services in the gig economy to go undetected is another risk that must be considered.[14]

1.22 Changes in technology and changes in the tax law also mean that there has been an ongoing expansion of what we refer to as "tax intermediaries". Digital service providers are but one example. The Review refers to others in the Discussion Paper such as conveyancers, payroll service providers, quantity surveyors and research and development specialists[15]. There will be others as new tax initiatives are introduced. It is therefore important that any changes introduced as part of this review are *future proofed* such that they can be readily accommodated within the regulatory regime if need be.

1.22 Education standards are also changing. The Final Report of the Financial Services Royal Commission recognises the importance of

13 Treasurer's Press Release dated 11 October 2019.
14 The IGTO's report *The Future of the Tax Profession* at [6.66].
15 Above n 5 at p. 38.

having suitable education and training[16]. The lifting of standards in the financial adviser profession necessitates that standards in the tax profession are of a similar standard. This is examined in Chapter 4 of this report.

2. OBJECT OF THE TAX AGENT SERVICES ACT

2.1 Section 2-5 of the TASA sets out its object:

Object

The object of this Act is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct. This is to be achieved by (among other things):

a) establishing a national Board to register tax agents, BAS agents and tax (financial) advisers;

b) introducing a Code of Professional Conduct for registered tax agents, BAS agents and tax (financial) advisers; and

c) providing for sanctions to discipline registered tax agents, BAS agents and tax (financial) advisers.

2.2 The Review's Discussion Paper[17] suggested that a further component of this is that, in addition to the *TASA* providing consumer protection to clients of tax practitioners it should also be ensuring that the integrity of the tax system is upheld. Reference was made to the 1932-1934 Royal Commission on Taxation, the *National Review of Standards for the Tax Profession (Australia) 1994* and the EM to support this suggestion.

2.3 This issue has been the subject of considerable debate at the consultation roundtables and also in many of the submissions. The inference was made by some that in suggesting that tax practitioners have a role in ensuring that the integrity of the tax system is upheld that this means that they have a role in collecting the revenue.

2.4 The Review accepts that the Discussion Paper left this issue open to such inference. However, this was not the intent. Tax practitioners do not have a duty to the ATO. The core object is the appropriate

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16 Final Report of the Financial Services Royal Commission at pp. 170 — 171.
17 At paragraphs 3.51 and 3.52.

standards of professional and ethical conduct. Tax practitioners must be free to provide professional and ethical advice to their clients, so that taxpayers can fulfil their obligations to the ATO. It is this tripartite relationship that contributes to the integrity of the tax system.

2.5 The Ethics Centre has advised:

> *The system — as a whole — encompasses those who levy taxes (the Parliament), those who collect taxes (the Australian Taxation Office), those who pay taxes and those who mediate the relationship between those who pay and those who collect tax.*
>
> *The Tax Practitioners Board (TPB) is responsible for regulating the conduct of the latter group; those who mediate the relationship between those paying and those collecting taxation. As such, the TPB forms part of the taxation system as a whole — standing alongside other elements of the system, like the ATO.*
>
> *The taxation system is only efficient and effective if it is trusted by all concerned to serve the public interest through means that are lawful, fair and in accordance with the highest standards of integrity.*[18]

2.6 As previously noted, the Review agrees with this overview. Tax practitioners play an integral role in the *tax system* and it is important that the community has confidence that this role is being performed by all tax practitioners for the benefit of all taxpayers, *in accordance with appropriate standards of professional and ethical conduct* (as per section 2-5 of the TASA).

2.7 The ATO has been quite outspoken in the last couple of years that one of the contributors to the size of the tax gaps is the role of some tax agents and that this has led to growing concerns in the community about the integrity of the tax system. Clearly one means of addressing this is to have appropriate sanctions in place and this is discussed elsewhere in this report. The Review considers that this should be supplemented by also updating the objects clause in the TASA.

2.8 An objects clause is used in legislation to underlie the purpose of the legislation and to resolve any uncertainty or ambiguity that may arise.[19]

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18 See Appendix B.

19 Australian Law Reform Commission Report 108, last modified 16 August 2010, paragraph 5.90.

2.9 Further guidance is provided by the Office of Parliamentary Counsel who advise that:

> *Some objects provisions give a general understanding of the purpose of the legislation ... Other objects provisions set out general aims or principles that help the reader to interpret the detailed provisions of the legislation.*[20]

2.10 A useful summary of the policy objectives of the TASA was provided at paragraph 6.25 of the *Explanatory Memorandum* (EM) that accompanied the legislation when it was introduced in 2009. It is convenient to replicate that paragraph here:

> *For tax agents and BAS agents — to improve consistency in registration and to regulate the provision of tax agent services in an appropriate, but flexible, way;*
>
> *For taxpayers — to enhance the protection of consumers of tax agent services, thereby reducing the level of uncertainty for taxpayers and the risks associated with the self-assessment system*[21]*; and*
>
> *For the system — to strengthen the integrity of the tax system and the tax industry.*

2.11 The Review sees merit in making the objects clause of the TASA more contemporary. There is value in clearly expressing that the community should have confidence in the integrity of the tax system. This is not a controversial statement and both underlies and affirms the principle that the tax system is only effective if it is trusted by the community. This is particularly so in a self-assessment regime as is recognised in the second point in paragraph 2.10 above.

2.12 Furthermore, including a specific statement that the community should have confidence in the integrity of the tax system goes no further than what was originally envisaged as one of the policy objectives of the TASA as is recognised in the third point at paragraph 2.10 above.

2.13 As was also noted in the Review's Discussion Paper, the objects clause should also be rephrased to acknowledge that the TPB and TASA are no longer new creations and that the Government is no longer in the

20 Office of Parliamentary Counsel, *Working with the Office of Parliamentary Counsel: A Guide for Clients* (3rd ed, 2008), [125].

21 The EM dealt with the alteration of the law beyond the TASA and the TASR, in particular the "safe harbour" provisions inserted into the *taxation Administration Act 1953*. The safe harbour provisions serve a direct purpose of protecting consumers/taxpayers/clients.

process of *establishing* a national Board as this has now been in operation for over nine years.

2.14 For illustrative purposes this could be achieved by words such as the following:

Object

The object of this Act is to ensure that tax agent services are provided to the community in accordance with appropriate standards of professional and ethical conduct.

This is achieved by (among other things):

a) an independent Board which regulates tax agents and BAS agents;

b) a Code of Professional Conduct for registered tax agents and BAS agents and; and

c) sanctions to discipline registered and unregistered tax agents and BAS agents.[22]

[22] As stated, this wording is provided for illustrative purposive only. It should also be noted that references to tax (financial) advisers in the current clause have been deleted in order to align this wording with the recommendation in this report that a new model should be developed for the regulation of TFAs. Unregistered agents have also been included in accordance with Recommendation 6.1 of this report.

Recommendation 2.1

The Review recommends the object clause of the *Tax Agent Services Act 2009* (section 2-5) should be updated to:

a) Include wording to the effect that there should be community confidence in the integrity of the tax system.

b) Remove reference to tax (financial) advisers, subject to the adoption of Recommendation 7.1 in Chapter 7.

c) Include reference to unregistered agents.

d) Rephrase the wording to reflect that the TPB is a more mature organisation that is no longer in a start-up phase.

3. INDEPENDENCE AND GOVERNANCE

3.1 A key theme of this review has been the relationship between the TPB and the ATO. There are many aspects of this relationship that are covered throughout this report and one of the most significant is the extent of the independence of the TPB from the ATO.

3.2 In the early stages of this review 'The Ethics Centre' was consulted and its views sought on independence. The Centre's advice was reproduced in full in the Review's Discussion Paper and is again reproduced in this report as Appendix B. In short, the Centre advised that:

3.2.1 The taxation system is only efficient and effective if it is trusted by all.

3.2.2 The TPB must be entirely independent and be accountable and responsible for its own budget.

3.2.3 It should also have the formal power of appointment of its executive and staff who should work exclusively under the Board's direction.

3.2.4 Any staff (whether employed directly or by secondment) should not have any residual obligation to any other organisation.

3.2.5 The TPB should have an appropriate means of induction for its staff such that they understand the importance of being independent.

3.3 The Review agrees with these underlying principles. There must be a clear understanding of responsibilities and accountabilities between the TPB and the ATO.

3.4 The need for the TPB to be seen as independent from the ATO was recognised at the time the TPB was established in 2009-10, as is reflected in paragraphs 5.28 — 5.32 of the EM[23] (see also paragraph 1.7).

3.5 The intent at the time was for the Board to operate with decision-making independence from the ATO but would rely on the ATO for administrative support[24]. It was also expected that this would be an interim position subject to review[25]. It is therefore appropriate that this review examines this issue. This is done under three main headings:

3.5.1 Funding

3.5.2 Staffing

3.5.3 Working together

3.6 Submissions have not identified the TPB failing to act independently nor with the ATO directly interfering in the operation of the TPB. However, on reviewing the submissions and taking into account the matters listed in paragraph 3.2 above, the Review has formed the view that the governance arrangements and structural framework that underpin the TPB are no longer fit for purpose. The lack of independence from the ATO is considered to have impaired the TPB's functionality in some vital areas. These are discussed below.

Funding

3.7 Regulation 11 of the TASR states (as relevant):

1) For section 60-80 of the Act:

…

c) the Commissioner is to determine the number of persons having regard to:

i) the number of persons who would be required to enable the Board to perform its functions and exercise its powers under the Act; and

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[23] Extract from the EM copied at Appendix D.

[24] Paragraph 5.30 of the EM.

[25] Ibid at paragraphs 5.33 and 6.71.

ii) the funding that has been allocated, as agreed between the Commissioner and the Board, for the purpose of allowing the Board to perform its functions and exercise its powers under the Act.

3.8 It is the Review's understanding that until recently this has not worked as well as originally envisaged. While budget negotiations are often a challenge, the aim set out in the legislation of having both parties reach agreement has not always been achieved.

3.9 In part, this is because of the size of the ATO and its myriad of responsibilities. The ATO commenced 2018-19 with an operating expense budget, excluding depreciation, of $3.4 billion in 2018-19[26] compared to the TPB's 2018-19 operating budget of $19.7 million[27]. Therefore, it is clearly evident that the TPB's responsibilities are a very small part of the picture from the ATO's perspective.

3.10 It was intended that this disparity in negotiating strength was to be addressed by the creation of a Special Account with the Board's annual appropriation to be quarantined within the ATO's funding[28].

3.11 This is not however how the funding has occurred. A Special Account was never created. Monies for the TPB were never quarantined. Rather the ATO would hold discussions with the TPB and would then determine what was an appropriate allocation for the TPB taking into account its many other responsibilities.

3.12 Almost every submission that addressed the issue of independence, including those received from the TPB and the ATO, has stated that the TPB needs to be independent of the ATO. While overall, submissions were supportive of the way the TPB has been operating, it is clear that there is ongoing concern regarding independence. This can be addressed by providing for the TPB to receive its own specific appropriation from the Government rather than as an allocated proportion of a broader ATO budget.

3.13 Such changes could be achieved if the TPB were to become its own separate agency. Ultimately this would require the approval of Government as to the manner in which it is implemented.

3.14 Without going into the mechanics of how such a change would occur, it is recommended by the Review that whatever change is made it should be such that:

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26 ATO's Annual Report 2018-19, p. 34.

27 TPB's Annual Report 2018-19, p. 60.

28 At paragraph 5.30 of the EM

3.14.1 The TPB receives its own separate appropriation from the Government.

3.14.2 The TPB Chair, rather than the Commissioner of Taxation, would be responsible for signing off on key governance documents including the annual report, annual performance statement, corporate plan, regulator performance framework submission and the cost recovery implementation statement.

3.14.3 From a whole of Government perspective, it is expected that these additional responsibilities should only lead to some minor cost increases.

3.15 The benefits of a stand-alone agency would be:

3.15.1 Increased tax practitioner and community confidence in the regulation of tax practitioners.

3.15.2 Control of a budget with accountability against priorities and clear responsibility to the public and Government.

3.15.3 Clear distinction that the TPB has a role to supervise/regulate the tax profession as a stand-alone agency and to work with professional bodies (among others) in upholding the professional and ethical standards of tax practitioners.

3.15.4 It would assist with allowing the TPB to receive and disclose information under the new whistleblower laws. This is discussed below at paragraphs 3.52 — 3.55.

3.15.5 It would provide comfort to the tax profession and the community that the significant increase in sanction powers now available to the TPB are being imposed in accordance with due process. Responsibility and accountability for the exercise of these sanction powers should clearly lie with the TPB with no inferences able to be made that the ATO has any influence.

3.15.6 More timely and responsive engagement with industry on items like the dynamic Code of Professional Conduct.

3.16 This review is an ideal policy opportunity to address the tax gaps identified by the ATO and, more specifically to strengthen the standards of behaviour expected by the community of tax practitioners, especially when the current standards (and consequences of breaching them) have proven themselves inadequate.[29] Making the TPB a

[29] Similar comments received from Mr Neil Olesen, former Second Commissioner, Australian Taxation Office.

stand-alone agency is a fundamental component of improving these standards and as a consequence assisting to reduce the tax gaps.

> **Recommendation 3.1**
>
> The Review recommends the TPB should become a separate agency and receive its own specific appropriation from the Government rather than as an allocated proportion of a broader ATO budget (which will require accompanying law changes). This will represent a TPB that is independent from the ATO.

Staffing

3.17 In 2018-19 the TPB had 133 staff who were all ATO employees.[30] While technically all of the 133 are ATO employees it should be noted that a significant percentage[31] were recruited by the TPB advertising for positions and they did not work for the ATO prior to working for the TPB.

3.18 Under the terms of the *Public Governance Performance and Accountability Act 2013* (PGPA Act), in particular Schedule 1 of the PGPA Rule[32], the following persons are officials of the ATO:

3.18.1 Members of the Tax Practitioners Board (including the Chair).

3.18.2 ATO employees whose services are made available to the TPB (including the CEO of the TPB).

3.19 This needs to change. Having Board members and the CEO as paid officials of the ATO does not achieve an acceptable level of independence. The Board should be accountable directly to the Government and the CEO should be accountable to the Board.

3.20 The advertising of the role of the position of CEO, which occurred in May 2018, illustrates the difficulties of achieving an acceptable level of independence within the structural framework that was created. The advertisement was published on 28 May 2018 and begins:

> *The ATO and Tax Practitioners Board is seeking an experienced and successful professional to lead and oversee the operations and resources of the Tax Practitioners Board and provide*

30 As at 30 June 2019: TPB's Annual Report 2018-19, p. 16.
31 As advised by the TPB, who were unable to provide an exact figure.
32 Excerpt attached at Appendix E.

> *strategic leadership and guidance to Board members and the Board's workforce.*[33]

3.21 There was no avoiding language to this effect as from a legal perspective it had to be the Commissioner of Taxation (or his delegate) who was the person responsible for making the appointment, though in hindsight and from a perception viewpoint it might have been preferable to have given the ATO and the Commissioner of Taxation less prominence in the advertisement than was the case.

3.22 Adopting the suggestion in 3.13 above of making the TPB a *Commonwealth entity* and also making the position of the CEO a statutory appointment would resolve this situation and make it abundantly clear that the CEO is accountable to the Board, and only the Board.

3.23 Another change that should also occur is improving the secondment arrangements currently in operation whereby ATO employees are seconded to work for the TPB. There are clearly benefits for the TPB in obtaining well qualified staff under this arrangement and conversely, benefits for the staff in obtaining a broader range of experience from working for the TPB. There are also benefits for the ATO when the staff return to work for the ATO at the end of their secondment, now well versed in the strategies, policies and operations of the TPB.

3.24 However the current secondment arrangements are not sufficiently formal to reflect an appropriate level of independence. This could be rectified by having ATO staff who are seconded to the TPB sign a formal Secondment Agreement that clearly sets out their rights and obligations. Such an agreement should make it clear that these officers are engaged by the TPB and can be released by the TPB.

3.25 Consideration could also be given to having those staff who report directly to the CEO being employees of the TPB rather than ATO secondees. This idea was raised in the Review's Discussion Paper[34] and some submissions raised concerns as to how this would be done in an equitable manner[35]. The Review recognises the unions' submissions, which say that there are concerns for staff and that these should be properly addressed in accordance with established

[33] Public Service Gazette PS22, published 28 May 2018 by the Public Service Commission.

[34] At paragraph 3.25.

[35] For instance if a TPB employee (who was not an ATO secondee) was to go on leave and there was an opportunity for *higher duties*, could the TPB employee be replaced on a short term basis by an ATO secondee?

consultative processes before any decisions on this particular issue are made.

3.26 The suggestion by 'The Ethics Centre' of ensuring that the TPB's induction process for all new staff includes a component that explains the importance of being independent is also worthwhile.

Conclusion

3.27 The Review does not think that the current arrangements can be maintained going forward. They do not meet the standards set out by The Ethics Centre, are not supported by either the TPB, ATO and those submissions that commented on this point (apart from those referred to in paragraph 3.32).

Recommendation 3.2

The Review recommends, in addition to Recommendation 3.1, the following changes should be made to improve the level of independence the TPB has from the ATO:

a) The position of the CEO of the TPB should be accountable to the Board and become a statutory appointment rather than, as at present, an ATO employee on secondment to the TPB.

b) If the TPB seconds staff from the ATO, there should be formal secondment arrangements put in place for those ATO staff on secondment to the TPB.

Working together

3.28 Section 60-80 of the TASA states:

> *The Board is to be assisted by APS employees whose services are made available to the Board by the Commissioner.*

3.29 Currently all TPB staff are co-located with ATO staff in ATO premises. This creates significant savings in terms of infrastructure costs and also encourages and facilitates a close working relationship optimising the advantages of being able to effectively collaborate and consult.

3.30 Both the TPB and the ATO understand the importance of working together, engaging early to identify high risk tax practitioners, collaborating on strategies to address egregious conduct, sharing information and communicating in an effective and timely manner. This is well illustrated by the attached diagram at Appendix F which was recently developed jointly by the ATO and TPB.

3.31 This close working relationship is guided by a Memorandum of Understanding (MOU), to all intents and purposes a plan enabling both parties to work together with a mutual understanding, common goals and clear accountabilities. The MOU is not a legal agreement but it is a formal agreement signed by the Chair of the TPB and the Commissioner of Taxation with the expectation that the respective staff of both organisations abide by it.

3.32 The MOU was signed in 2010 and is currently in the process of being re-drafted.

3.33 The fact that the MOU has not been updated since 2010 is symptomatic of an underlying, and now deeply rooted problem; namely that the structural framework that was developed as a transitional phase with the TPB established as part of the ATO is, in the Review's opinion, no longer sustainable. The Review does not seek to attribute blame for this. Indeed, the current situation has developed not so much due to the actions of either the TPB or ATO, but more so because of the way the TPB was established in the first place and the lack of a timely review taking place.

3.34 Nonetheless, a contemporary MOU supplemented by a plan as to how the TPB and ATO would work together would have assisted in identifying areas of strategic mutual significance and how they might be best addressed. A plan should encourage early engagement, strengthen information sharing (discussed further below), provide clear responsibilities and accountabilities and set agreed strategic goals. The Review also sees merit from a transparency perspective in having this document published on the websites of both the TPB and the ATO and reviewing and updating it on a regular basis.

3.35 With one party to the relationship (the ATO) so much larger than the other (the TPB), it was almost inevitable that without a clear structural independence between the two that over time inequities would arise. These inequities are especially noticeable when it comes to staffing and funding.

Tax Practitioner Governance and Standards Forum

3.36 In order to safeguard the independent role of tax practitioners in the tax system the Review recommends the creation of a forum for tax practitioner governance. The forum, to be called something like the "Tax Practitioner Governance and Standards Forum", would meet to ensure that any significant proposals affecting tax practitioners, such as changes to the Code of Professional Conduct, are made with appropriate consultation.

3.37 The established Forum would initially create a Charter of Tax Practitioner Governance, and once created oversee its implementation and ongoing application. In addition to the Forum being comprised of senior officers from the TPB, the ATO, and a representation of professional organisations who are part of the Professional Standards Councils (PSC) framework[36], the Review considers that the PSC should be an ex-officio member.

3.38 Having the PSC as an ex-officio member will help in the development of harmonised professional standards for tax practitioners, help foster appropriate information sharing between the TPB, ATO, professional associations and PSC and provide valuable co-ordination into the regulation of the tax practitioner profession.

3.39 The Review also recommends that the Forum would be co-chaired by the TPB and a member of the Forum representing the professional associations.

3.40 The Charter, in a similar vein to the Taxpayers' Charter[37], would not be enshrined in legislation. Rather it would be a document endorsed by the TPB, the ATO, and a member of the Forum representing the professional associations, that would set out the rights and obligations of tax practitioners. The Charter would also set out the respective roles of the TPB, the ATO, and the main professional associations and how they should interact with each other.

3.41 Each participant's independent role would be acknowledged and respected. Without prescribing outcomes, the memorandum of understanding would aspire to:

3.41.1 recognise what each other's role and responsibilities are and are not;

3.41.2 enable bodies to exchange information to assist the appropriate entity to take the appropriate action;

3.41.3 advise the TPB on appropriate best practice professional and ethical standards;

3.41.4 advise on what and where appropriate resources are best allocated; and

3.41.5 conduct appraisals from time to time of wider regulatory outcomes.

36 These are the professional associations that are also members of the NTLG.

37 Taxpayers' Charter.

3.42 The role of this new Forum is discussed further in Chapter 5 which discusses having a dynamic Code of Professional Conduct (Code). The Review sees this Forum as playing an integral role in ensuring the Code becomes dynamic.

Recommendation 3.3

The Review recommends :

a) The TPB and ATO should maintain and publish a plan that sets out how they will work together, encouraging early engagement, strengthening information sharing, providing clear responsibilities and accountabilities and setting agreed strategic goals.

b) The creation of a Tax Practitioner Governance and Standards Forum and corresponding Charter of Tax Practitioner Governance.

Information sharing

With other Government bodies

3.43 The current legislative provisions require the exchange of information between the TPB and a number of other organisations including the ATO.[38] For example, if the TPB registers or terminates the registration of a tax practitioner, the TPB must notify the ATO, ASIC and/or the recognised professional association. The TASA also allows the TPB to request information from any other entity, including the ATO, as part of the process of conducting investigations and the ATO may refer matters to the TPB for investigation. Nonetheless, it was the view of the Black Economy Taskforce that the regulators could communicate better.[39] Furthermore, it appears that there is no reciprocity for the ATO, ASIC or the professional associations to share information with the TPB.

3.44 The TPB is also required to provide information to law enforcement agencies, and there are MOUs in place between both the TPB and ASIC, and the TPB and the ATO. As stated above[40], the MOU between the ATO and the TPB is now quite dated having been signed back in 2010. The creation of an updated MOU (with input from the proposed "Tax Practitioner Governance and Standards Forum") is

38 Division 355 of Schedule 1 to the *Taxation Administration Act 1953* and Sub-division 70-E of the TASA. Attached as Appendix G is a list of the TPB's specific information sharing obligations.

39 Black Economy Taskforce Final Report at p. 164.

40 At paragraph 3.32.

however well underway and that plus a strategic plan as to how the TPB and the ATO will work together should make a substantial difference.

3.45 On its own though this will not be sufficient. Both the ATO and the TPB have access to a vast range of information and documents that no doubt would be of assistance to the other. The sharing of that information *may* be made but is not *required* to be made. A similar situation occurs as between the TPB and ASIC.

3.46 The Financial Services Royal Commission examined the issue of information sharing between Government regulators (ASIC and APRA) and recommended that a model be developed that required the mandatory sharing of information rather than relying on the exercise of discretion in determining what information should be shared[41]. While recognising that the environment and issues examined by Commissioner Hayne are different to those considered by this review, nonetheless many of his findings about information sharing are quite apposite.

3.47 For instance, his comments that "*a new statutory scheme for the sharing of information … is required. The detail of the scheme will need to be carefully worked through. But it should be founded on the premise that joint responsibility and co-operation necessitates substantial commonality of information*."[42]

3.48 And later, his comments that information should be shared when it is "*information concerning entities in respect of which both regulators have regulatory responsibilities and which is relevant to the exercise, or possible exercise, of a power or function of the other regulator. I suspect the most efficient way of storing that information will be in a shared database. But consideration will need to be given to the mechanics of the system, including how each regulator can be best made aware that documents have been uploaded to the database*."[43]

3.49 Such a process has of course the clear advantages of receiving information in close to real time. It is also aligned with the Government's Digital Technology Taskforce's aims of promoting an integrated approach across Government on policies relating to digital technologies that will help drive productivity and innovation while ensuring an appropriate balance with security, safety and privacy concerns.

41 Above n 16, pp. 461 — 464.
42 Ibid at p. 462.
43 Ibid at p. 463.

Recommendation 3.4

The Review recommends:

i) The law should be amended to oblige each of the TPB and ATO to:

a) co-operate with the other;

b) share information to the maximum extent practicable; and

c) notify the other whenever it forms the belief that a breach in respect of which the other has enforcement responsibility may have occurred.

ii) The law should be amended to oblige each of the TPB and ASIC to:

a) co-operate with the other;

b) share information to the maximum extent practicable; and

c) notify the other whenever it forms the belief that a breach in respect of which the other has enforcement responsibility may have occurred.

Information sharing with professional associations

3.50 The Discussion Paper also canvassed the exchange of information with the professional associations. Improved sharing of intelligence and risk assessments, consultation on education pathways and ethical standards, earlier engagement in investigations, coordination on the imposition of sanctions and a joint approach to the conduct of practice reviews are all areas that can be improved; as long as the sharing of information is done in accordance with secrecy and privacy laws.

3.51 These issues are discussed elsewhere in this report, but it is worth noting here that the Review does see that there are many benefits in strengthening the relationships between the TPB and the various professional associations. The Tax Practitioners Governance and Standards Forum that has been proposed[44] should go a long way to achieving this.

Whistleblower laws

3.52 New whistleblower laws[45] came into effect on 1 July 2019. However the TPB is not considered to be an “eligible recipient”[46] for the purposes of these laws. This means that the TPB is unable to receive

44 See paragraphs 3.36 to 3.42.

45 *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*.

46 As defined in section 1317AAC of the *Corporations Act 2001*.

information from an eligible whistleblower and/or an eligible recipient (such as the ATO) unless consent is provided by the whistleblower.

3.53 The Review agrees with the TPB's submission that this is an anomalous outcome. As a regulator of the tax profession with a legislative role to protect consumers of tax services it is clear that the TPB should be entitled to receive such information.

3.54 There are a number of facets to this issue:

3.54.1 a whistleblower should be able to provide information to the TPB and obtain whistleblower protection;

3.54.2 the ATO, where appropriate should be able to disclose whistleblower information to the TPB; and

3.54.3 the TPB, where appropriate should be able to disclose this information to the ATO.

3.55 Providing the TPB with the legislative power to receive information about individuals who are eligible whistleblowers is also consistent with wider Government policy to combat crime and misconduct through corporate, financial and tax law enforcement.

Recommendation 3.5

The Review recommends that the whistleblower laws be amended such that the TPB is legislatively defined as an 'eligible recipient'. This would ensure that the TPB is able to:

a) receive information from an eligible whistleblower and eligible recipient; and

b) disclose information received to other eligible recipients.

Membership of the Board

3.56 Currently there are 8 part-time members, one of whom is the Chair.

3.57 Section 60-10 of the TASA requires that there must be at least 7 members of the Board, one of whom is the Chair (appointed by the relevant Minister). There are no stipulations in either the TASA or the TASR as to whether the Chair or the members are full-time or part-time, nor are there any stipulations as to the experience necessary to be a Board member. It is important to note that the Board of the TPB is not just a traditional strategic or oversight Board, instead the Board has the additional responsibility of being an operational board in that it is also required to make appellable decisions that impact on a tax practitioner, for example, a decision to terminate a tax practitioner's registration.

3.58 A board operates most effectively when its members have different skills, knowledge and experience. It is good governance for a board to regularly evaluate the mix of skills, knowledge and experience that will best complement board effectiveness with a view to ensuring it has a proper understanding of, and the competence to deal with, the current and emerging issues of the public sector body it oversees.

3.59 Clearly there is benefit in a model that has *"peers judging peers"* and the current Board, with a wealth of tax experience satisfies that, though consideration could be given to broadening the experience of the Board.

3.60 The Review's Discussion Paper suggested a number of possible changes including mandating having a Board member as:

3.60.1 A community member.

3.60.2 An IT expert with experience introducing innovation and change.

3.60.3 An ATO officer.

3.61 Submissions were generally supportive of the first option and opposed to the last option. The Review agrees in both regards.

3.62 The EM highlighted that the Minister may appoint a community representative. This is a common feature of many Government Boards[47] and provides many of the advantages outlined above about having a broad range of skills and experience on the Board.

3.63 There were a number of submissions that also suggested that mandating specific skills (eg IT skills, BAS experience, bookkeeping skills) would be of benefit to the Board. The Review can see the benefit of the Board being able to access these skills from time to time but is not of the view that it follows that it should be mandated that there should be some Board members with these attributes.

3.64 Section 60-85 of the TASA already enables the Board to establish committees that consist *"of such persons (whether Board members or not) as the Board determines."* The Board having the power to co-opt persons with a range of skills as required provides the Board with significantly more flexibility than mandating that Board membership should require certain specified skills.

[47] For instance Qld Legal Practice Committee, Dental Board of Australia, Victorian Board of the Medical Board of Australia.

3.65 The above point does need to be qualified however. At the moment the ability of the Board to co-opt persons who are not Board members is limited to decisions which are not appellable to the Administrative Appeals Tribunal (AAT).[48]

3.66 The Review is of the view that this is unnecessarily restrictive and could contribute to delays in progressing some matters. That is understandable when it is borne in mind that there are only eight Board members, so having to have three Board members (who are all part-time) available at the same time may lead to some delays.

3.67 The law should be amended so that the Board has the flexibility to be able to co-opt other persons, even if the decision is appellable to the AAT. Noting that such decisions have the potential to impact on a person's livelihood[49] the Review recommends that such decisions should still be made by a committee of at least 3 members and at least 2 of those members should be Board members. This is considered to still provide adequate protection but will also provide the Board with more flexibility in allocating and utilising its resources and should also mean such decisions are able to be made in a timelier manner.

3.68 The third member could be an experienced person from the tax profession, an academic, a person with expertise in a particular field of relevance, or a TPB executive (eg the CEO) with an appropriate delegation if that person had, in the Board's opinion, the requisite skills and knowledge.

3.69 The TASA should also empower the Board to decide who can issue sanctions, such as an infringement notice. This will allow the TPB to delegate such decision making where appropriate, which facilitates a more streamlined process.

[48] Section 70-30 of the TASA

[49] Similar concerns were noted in the EM at paragraph 5.45.

Recommendation 3.6

The Review recommends that:

a) The *Tax Agent Services Act 2009* is amended to mandate that at least one member of the Board is a community member. Consideration will need to be given as to how this term is defined but it should be expected they would provide community focused input and have a high level of experience in regulating professional activities outside of the tax profession.

b) Subsection 70-30(2) of the *Tax Agent Services Act 2009* is amended so that only two members of a committee, that is making appellable decisions, have to be Board members and the third member can be a person chosen at the Board's discretion so long as that person has the appropriate skills and knowledge.

4. REGISTRATION AND EDUCATION

Requirements for individual practitioners

Background information

4.1 For individuals seeking registration as a tax practitioner, an individual will need to satisfy one of the entry pathways relevant to registration as a tax agent, BAS agent or TFA, as contained in the TASR.

4.2 The different pathways reflect a combination of primary qualifications, Board approved courses and relevant experience and are summarised as follows:

Table 1: BAS agent entry pathways

Item 101	2. At least a Certificate IV Financial Services in bookkeeping or accounting. 3. Board approved course in GST/BAS taxation principles. 4. 1,400 hours of relevant experience in the past four years.
Item 102	5. At least a Certificate IV Financial Services in bookkeeping or accounting. 6. Board approved course in GST/BAS taxation principles. 7. Voting member of a recognised tax or BAS agent association. 8. 1,000 hours of relevant experience in the past four years.

Table 2: Tax agent entry pathways

Item 201	9. Tertiary qualifications in accountancy (degree or post-graduate award). 10. Board approved course in Australian taxation law. 11. Board approved course in commercial law. 12. 12 months of relevant experience in the past five years.
Item 202	13. Tertiary qualifications in another discipline (degree or post-graduate award). 14. Any combination of the following may be required: a. Board approved course in Australian taxation law. b. Board approved course in commercial law. c. Board approved course in basic accountancy principles. 15. 12 months of relevant experience in the past five years.
Item 203	16. Diploma or higher award in accountancy. 17. Board approved course in Australian taxation law. 18. Board approved course in commercial law. 19. Two years of relevant experience in the past five years.
Item 204	20. Tertiary qualifications in law. 21. Board approved course in Australian taxation law. 22. Board approved course in basic accountancy principles. 23. 12 months of relevant experience in the past five years.
Item 205	24. Board approved course in Australian taxation law. 25. Board approved course in commercial law. 26. Board approved course in basic accountancy principles. 27. Eight years of relevant experience in the past 10 years.
Item 206	28. Voting member of a recognised tax agent association. 29. Eight years of relevant experience in the past 10 years.

Table 3: Tax (financial) adviser entry pathways

Item 301	30. Tertiary qualifications in a relevant discipline (degree or post-graduate award). 31. Board approved course in Australian taxation law. 32. Board approved course in commercial law.

	33. 12 months of relevant experience in the past five years.
Item 302	34. Diploma or higher award in a relevant discipline. 35. Board approved course in Australian taxation law. 36. Board approved course in commercial law. 37. 18 months of relevant experience in the past five years.
Item 303	38. Board approved course in Australian taxation law. 39. Board approved course in commercial law. 40. Three years of relevant experience in the past five years.
Item 304	41. Voting member of a recognised tax agent or tax (financial) adviser association. 42. Six years of relevant experience in the past eight years.

Primary qualification

4.3 The primary qualifications for tax agents have been in place for a number of decades, well before the TPB commenced in 2010. For BAS agents, who were previously unregulated, qualification requirements were put in place for the first time in 2010. For TFAs, these requirements were set in 2014, when TFAs were first introduced into the TPB regime.

4.4 Given the period of time that has elapsed since these requirements were set and the significant changes in the financial adviser profession, it is appropriate that the tax practitioner primary qualification requirements are reviewed to ascertain whether they can better align with existing government initiatives to lifting standards and ensuring consistency across different professions. For example, new education standards apply to new and existing financial advisers requiring an approved bachelor degree qualification. Consideration ought to be undertaken in relation to whether there should be a similar lifting of educational requirements for tax and BAS agents.

4.5 The submissions provided mixed feedback on this point. There was some support, with appropriate grandfathering arrangements in place, to lift the tax agent primary qualification requirement to a degree minimum level and the BAS agent primary qualification requirement to a diploma minimum level. Minimal feedback was received in relation to TFAs — this is most likely a reflection of the other changes affecting financial advisers which essentially override the TPB's requirements. This is because those other changes are set at a higher level than what is currently required by the TASR. A number of submissions proposed that there was no need for change, while others suggested that there might be a case to lift the qualification level, after a separate review is undertaken.

4.6 On a separate but related issue, it is important to note that the primary qualifications are set out in the TASR and therefore the TPB has no flexibility to accept another primary qualification that is not prescribed, even if the qualification is otherwise relevant and appropriate. This has been an issue for some emerging tax intermediary groups, such as payroll service providers, who may have qualifications that do not necessarily fit within the structure as contained in the TASR.

Recommended solution

4.7 There are two issues that need to be considered when reviewing the primary qualification requirements, noting that the education levels were set for tax agents as far back as the 1980s and in 2010 for BAS agents, it is now timely for there to be a review. The first is whether the qualification level itself has been set at the right level and secondly, whether the TPB should have greater flexibility to accept other qualifications that may not fall within the traditional tax practitioner course of study.

4.8 Any decision to lift the primary qualification level should not be taken lightly and without careful analysis and consideration. As such, the recommended solution to this issue is to:

- 4.8.1 Confirm what learning outcomes the TPB is seeking to achieve.
- 4.8.2 Review the existing qualification requirements to determine if they are fit for purpose and consistent with the learning outcomes that the TPB is seeking.
- 4.8.3 Once complete, determine if the qualification levels for each tax practitioner category are set at the right level or whether an amendment is required, including any grandfathering arrangements that may be appropriate.
- 4.8.4 Determine if there are any gaps arising in relation to course and education providers.

4.9 Importantly, the recommended solution is not a task simply for the TPB. Rather, the task needs to be a TPB led joint exercise with other regulators, professional associations, education providers, the tax profession and other key stakeholders. This combined and consultative process will best ensure that the right outcome is achieved.

4.10 Further, the Review is of the view that if there was to be a lifting of education standards (with grandfathering arrangements in place), there needs to be an assessment to ensure that the quality of tax services provided from all tax practitioners (grandfathered or not) remains at an appropriate level. Should there be any differences in the quality of tax services being provided, the Board needs to be equipped with mechanisms to ensure that those differences can be addressed and dealt with. A number of the sanction powers proposed in Chapter 6 of this report will assist in equipping the TPB with those mechanisms, for example, the introduction of an enforceable undertakings regime.

4.11 On the issue of grandfathering and determining its appropriateness, it is important to recognise that there is no underlying evidence to suggest that the current education levels are resulting in the widespread provision of incompetent tax services.

4.12 In relation to the issue of giving the TPB greater flexibility to accept other qualifications that may not fall within the traditional tax practitioner course of study, the Review is of the view that this should be reviewed by Treasury and the TPB, with input from key stakeholders and a determination is made as to whether an amendment to the TASR would be appropriate. This will ensure that the registration framework is future proofed and is able to address and accommodate any new tax intermediary groups as they emerge.

Recommendation 4.1

The Review recommends in relation to the primary qualifications (education and experience requirements), that:

a) The TPB, in collaboration and consultation with other regulators, professional associations, education providers, the tax profession and other key stakeholders, undertake a review to determine if the primary qualification level itself has been set at the right level and what grandfathering arrangements would be appropriate (if required).

b) The Treasury and the TPB, with input from key stakeholders, determine whether an amendment to the *Tax Agent Services Regulations 2009* is appropriate to give the TPB greater flexibility to accept other qualifications that may not fall within the traditional tax practitioner course of study.

Voting member entry pathway

4.13 The Review's Discussion Paper flagged that, in light of the lifting of standards in the financial adviser profession, which now mandates that all individual financial advisers have a baseline educational qualification, the appropriateness of individuals becoming registered through their voting membership with a TPB recognised professional association needs to be considered. For the purposes of Tables 1, 2 and 3, this refers to items 102, 206 and 304.

4.14 Further, the Review's preliminary view in the Discussion Paper stated that the TPB should cease to accredit the professional bodies who are seeking recognition for TPB purposes and this would then allow the professional bodies to take on a co-regulatory function with the TPB.

4.15 A number of submissions received on this point did not support this proposal, noting that there are many individuals who operate as effective tax practitioners despite not having certain designated educational qualifications.

Recommended solution

4.16 The Review appreciates the counter argument that has been raised, however the Review maintains its earlier position and recommends that items 102, 206 and 304 be removed on a prospective basis and with appropriate permanent grandfathering arrangements in place. The key reasons for removing these items are as follows:

- 4.16.1 The TPB has limited capacity/capability to test and assess whether a professional association complies, both initially and in an ongoing sense, with the requirements to become recognised.
- 4.16.2 Where the association is subject to little oversight, the TPB could be seen as a regulator and thereby carry substantial reputational risk.
- 4.16.3 Better alignment with existing government approaches to lift education standards and ensuring consistency across different professions.

4.17 If this recommendation was to be accepted, the Review does not envisage a dilution of the relationships between the TPB and professional associations. In fact, the Review expects that the relationships would be strengthened through a shared co-regulatory focus, based on strong two-way information sharing arrangements and the development of the Tax Practitioner Governance and Standards Forum.

Recommendation 4.2

The Review recommends that the TPB should no longer accredit professional associations as a ‘recognised professional association’. The consequence of this is that the registration entry pathway based on being a voting member of a TPB recognised professional association (items 102, 206 and 304 of Schedule 2 to the *Tax Agent Services Regulations 2009*), will no longer be required. However, it is recommended that these items are removed prospectively with appropriate permanent grandfathering arrangements in place.

Relevant experience

4.18 In order to register as an individual tax practitioner, all individuals must have an appropriate amount and type of relevant experience (see Tables 1, 2 and 3 above). The amount of relevant experience varies based on the tax practitioner registration type and what primary qualification the individual is relying on. The amount, and what constitutes, relevant experience is defined in the TASR. Essentially, relevant experience can include work:

4.18.1 as a registered tax practitioner;

4.18.2 under the supervision and control of a registered tax practitioner;

4.18.3 as a legal practitioner; and

4.18.4 of another kind.

4.19 Further, for experience to count as relevant experience it must include substantial involvement in one or more types of tax agent services, or substantial involvement in an area of taxation law to which one or more of those types of tax agent services relate.

4.20 In relation to work of another kind, the TPB can accept work other than as a registered tax practitioner, under the supervision and control of a registered tax practitioner or as a legal practitioner. To be accepted, the TPB requires that the work of another kind demonstrates that experience includes substantial involvement in one or more types of tax agent service or a particular area of taxation law.

4.21 The Review in the Discussion Paper noted that there is a need for the relevant experience requirements to reflect the modern landscape, recognising that there is a growing number of specialist practitioners and a move away from traditional ‘tax return work’ towards tax advice work (which is occurring in a highly digitised environment).

4.22 The Review agrees with the TPB and many other submissions that the concept of relevant experience is a sound model and in the best interests of consumers, however, due to the prescriptive nature of the relevant experience requirements (type and period) in the TASR, the TPB currently has limited flexibility to take into account special circumstances, such as a career breaks, maternity leave or non-traditional tax intermediaries.

Recommended solution

4.23 To address these situations, the Review recommends that, similar to the issue of primary qualifications, the definition and amount of relevant experience should be reviewed by Treasury and the TPB, with input from key stakeholders and a determination is made as to whether an amendment to the TASR would be appropriate to give the TPB the flexibility to accept different types and periods of experience as being relevant. This will ensure that the registration framework is sufficiently flexible to remain current and appropriate in the future and is able to respond to situations on a case by case basis.

4.24 In addition to the above, one submission raised that the amount of relevant experience for a registration as a BAS agent was inappropriate and needed to be increased. While the Review does not express a view as to whether it agrees with this proposition, the Review is of the view that this aspect of BAS agent registration should be reviewed, noting that:

4.24.1 The relevant experience requirements were set in 2010, at a time when the focus was to transition in a new group. Now that that transition is completed, a holistic review would be appropriate.

4.24.2 The scope of the services BAS agents are now providing, compared to 2010, has increased, and therefore this needs to be considered as part of the relevant experience requirement.

4.24.3 There appears to be barriers to obtain relevant experience due to the business models in which the BAS agent profession operates, which are predominately made up of sole traders or businesses that employ very few staff. These characteristics may be an impediment for a potential BAS agent to be able to gain the relevant experience. The solution may be to develop a strong training program that is a substitute for work experience (this would be similar in concept to the College of Law programs available to students who are completing their legal qualifications).

Recommendation 4.3

The Review recommends:

a) The *Tax Agent Services Regulations 2009* being amended to give the TPB greater flexibility to accept different types and periods of experience as being relevant. This would allow the TPB to take into account individual circumstances such as maternity leave or other absences from the profession.

b) As part of (a), The Treasury and the TPB, with input from key stakeholders, determine whether an amendment to the *Tax Agent Services Regulations 2009* is appropriate to amend the amount of relevant experience (and nature of experience) required to be registered as a BAS agent.

Registration requirements for companies and partnerships

4.25 The eligibility requirements for registration as a tax practitioner or company or partnership are contained in the TASA. Generally, a company or a partnership seeking registration, including renewal of registration, as a tax practitioner, must satisfy the TPB that:

4.25.1 each director or individual partner is at least 18 years of age;

4.25.2 each director or individual partner is a fit and proper person;

4.25.3 the company or partnership maintains, or will be able to maintain once registered, professional indemnity insurance that meets the TPB's requirements;

4.25.4 the company or partnership has a sufficient number of registered individual tax agents to provide tax agent services and supervision on behalf of the entity;

4.25.5 the company is not under external administration;

4.25.6 the company has not been convicted of a serious offence involving fraud or dishonesty during the previous five years; and

4.25.7 if there is a company partner in the partnership:

4.25.7.1 each director of the company partner must be at least 18 years of age;

4.25.7.2 each director of the company partner must be a fit and proper person;

4.25.7.3 the company partner must not be under external administration; and

4.25.7.4 the company partner must not have been convicted of a serious taxation offence or an offence involving fraud or dishonesty during the previous five years.

4.26 The submissions provided minimal but mixed feedback on this issue. Some submissions indicated that the current framework is appropriate, while another submission called for reduced complexity and greater clarity in relation to the registration of Australian Financial Services (AFS) licensees and corporate authorised representatives who are registered with the TPB.

Recommended solution

4.27 In relation to the first point, the Review agrees that the current registration criteria to register as a company or partnership are appropriate. However, the Review considers that the criteria could be strengthened to also include an entity's governance arrangements as an eligibility requirement (such as having actual governance and control structures in place). Such an inclusion, in the view of the Review, would ensure that there is clear line of sight for the TPB, ATO and the public as to who is accountable for the delivery of tax agent services — all of which support the object of the TASA.

4.28 On the second issue raised, regarding complexities for AFS licensees and corporate authorised representatives, the Review appreciates that there is a disconnect between the TPB regime and the regime administered by ASIC. Under the TPB, registration is based on an individual and entity level, whereas under the ASIC regime, registration is focused on the entity level, namely the AFS licensee. Chapter 7 of this report addresses the future regulation of TFAs and this issue is more appropriately addressed as part of that section.

Recommendation 4.4

The Review recommends that the eligibility requirements for company and partnership tax practitioners in the *Tax Agent Services Act 2009* be amended to include a requirement that the entity has appropriate governance arrangements in place that demonstrate who is accountable for the delivery of tax agent services. Whether arrangements are appropriate will be a matter for the TPB to determine, noting that the TPB will need to provide guidance on what appropriate arrangements are, in consultation with key stakeholders, including the professional associations.

Fit and proper person test

4.29 For an individual to be eligible to register as a tax practitioner, the TPB must be satisfied that they are a fit and proper person. For partnerships and companies, the TPB must be satisfied that each partner or director is a fit and proper person.

4.30 In deciding whether an individual is a fit and proper person, the TPB must consider:

- 4.30.1 whether the individual is of good fame, integrity and character;
- 4.30.2 whether any of the following events have occurred during the previous five years:
  - 4.30.2.1 the individual has been convicted of a serious taxation offence;
  - 4.30.2.2 the individual has been convicted of an offence involving fraud or dishonesty;
  - 4.30.2.3 the individual has been penalised for being a promoter of a tax exploitation scheme;
  - 4.30.2.4 the individual has been penalised for implementing a scheme that has been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling;
  - 4.30.2.5 the individual has had the status of an undischarged bankrupt; and
  - 4.30.2.6 the individual has been sentenced to a term of imprisonment, or served a term of imprisonment in whole or in part.

4.31 If a registered tax practitioner ceases to meet the fit and proper person requirement, The TPB may decide to terminate their registration for not meeting an ongoing registration requirement.

4.32 The Review's preliminary view in the Discussion Paper stated that guidance could be taken from the fit and proper person requirements of other Government agencies. The fit and proper person requirement under the TASA could be expanded to require consideration of conflicts of interest, disqualification from managing corporations, or whether the individual was involved in the business of a terminated or suspended tax practitioner.

4.33 On the issue of taking guidance from the fit and proper person requirements of other Government agencies, the TPB usefully articulated in the Discussion Paper that there should be modifications made to the fit and proper test to include:

4.33.1 Incorporating the matter of conflicts of interest as part of its consideration as to whether an individual is a fit and proper person including a specific reference to ensuring all personal tax obligations are up to date (for the renewal of registration only).

4.33.2 Bolstering the management of personal income tax obligations to include a consideration of the management of the income tax obligations of an individual and the individual's associated entities.

4.33.3 Whether a company or partnership has appropriate governance arrangements in place.

4.33.4 Any other relevant matters that the Board considers appropriate.

4.34 These modifications drew upon the current fit and proper test in the TASA as well as the approach of other regulators, including ASIC and APRA, who have a statutory power to set fit and proper requirements. Appendix H provides further details of each regulator's fit and proper requirements.

4.35 Further to this, reproducing what was in the Discussion Paper, the ATO identified a number of potential reforms to the fit and proper person test:

4.35.1 The TASA does not have a mechanism to treat close associates of egregious tax practitioners as the tax practitioner. This is to be contrasted with the tax and corporations legislation, which provide for the actions of close associates. The ATO has suggested that the fit and proper person test could be amended to include consideration by the TPB of the actions undertaken by close associates of the registered tax practitioner in certain circumstances, akin to the related party provisions in the *Corporations Act 2001*.

4.35.2 The TASA allows serious previous criminal convictions and imprisonment to be withheld in an application for registration as a tax practitioner. The TASA could mandate the disclosure of spent convictions and relevant information to be considered for the fit and proper person test.

4.35.3 The TASA applies a ‘shall register’ regime, so that if a behaviour is not listed in the TASA, the TPB has limited discretion to reject an application for registration.

4.36 A number of submissions were received on this consultation question. Submissions ranged from zero to full support. Some important points made in the submissions were that if the fit and proper test was to be expanded, it is vital that the level of a tax practitioner’s involvement be scrutinised so that mere association does not give rise to a breach of the fit and proper test. Further, it is important that any expansion of the fit and proper test be limited to consideration of behaviour that is genuinely under the control of the tax practitioner. Another submission raised concerns that not all conflicts of interest that arise impair a tax practitioner’s professionalism.

Recommended solution

4.37 Having considered all the input and feedback, the Review recommends that the fit and proper test be extended as per the Review’s preliminary view in the Discussion Paper. However, it is important that there is a clear and strong nexus between a tax practitioner’s involvement and the breach in question.

4.38 The Review notes that the effect of being a registered tax practitioner is that you can practice in a limited area of law and not be in contravention of the *Legal Professional Act 2007* and hence the rules that apply to the regulation of tax practitioners should not be less than those that apply to lawyers.

4.39 On the issue of mandatory disclosure of spent convictions, the Review agrees that the TASA should mandate the disclosure of spent convictions. This approach would align with the requirements of other regulated professions, including those that apply to lawyers. By way of example:

4.39.1 Under the Legal Profession Uniform Admission Rules 2015, in determining if someone is a fit and proper person, the relevant Legal Services Board must have regard to whether the person has been found guilty of an offence including a spent offence in Australia or in a foreign country. Where this has occurred, the Board must have regard to the nature of the offence, how long ago the offence was committed, and the person's age when the offence was committed.

4.39.2 The *Superannuation Industry (Supervision) Act 1993* specifically provides that the law on spent convictions does not apply, and therefore spent convictions must be disclosed, in determining the eligibility of an entity to be a trustee, custodian or investment manager of a superannuation entity.

4.40 In addition to reviewing the fit and proper test in the Discussion Paper, the Review suggested that there may also be scope to adjust the five-year time period built into the fit and proper person requirement under the TASA. The Review recommends removal of the five-year period referred to in section 20-15 of the TASA and to either increase, or remove entirely, the timeframe within which matters can be taken into consideration

Recommendation 4.5

The Review recommends that

a) The Treasury, with input from key stakeholders (in particular the TPB) amend the fit and proper person test in the *Tax Agent Services Act 2009* to ensure greater consistency with the requirements of other Government regulators, such as ASIC and APRA.

b) The current 5-year period in the *Tax Agent Services Act 2009* in which the TPB must consider certain conduct that may contravene the fit and proper person test should be increased or removed entirely, with guidance from other regulators.

c) Those applying for registration with the TPB, including renewal, must disclose any spent convictions.

Close associates

4.41 The Review recommends changes are made to the eligibility for registration requirements contained in section 20-5 of the TASA to deal with the issue of close associates.

4.42 Some submissions highlighted the need to keep any definition of associates limited and relevant to the provision of tax agent services. It is important that any mechanism to deal with associates does not capture the whole profession and require the 'good practitioners' to get out.

4.43 The review proposes that the TASA could, as part of the eligibility for registration, require tax practitioners to declare whether they have:

4.43.1 any close associates relevant in the provision of tax agent services; and/or

4.43.2 employees involved in the provision of tax agent services;

who, for example, have had their tax practitioner registration terminated by the TPB or have committed a serious criminal offence. In this regard, the list of events affecting continued registration in section 20-15 and section 20-45 of the TASA could be used. The fit and proper requirements are contained in these two sections of the TASA.

4.44 In terms of legislative design, guidance could be taken from the Legal Profession Uniform Law in Victoria and 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.

4.45 As was stated above at paragraph 4.38, the Review considers that the same standards that apply to lawyers should also apply to tax practitioners.

4.46 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:

4.46.1 their name has been removed from the Australian Roll of Lawyers;

4.46.2 their practising certificate has been suspended or cancelled, or their renewal has been refused; or

4.46.3 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.

4.47 Additionally, the TASA should require, as part of the eligibility for registration, tax practitioners to declare if they have engaged anyone listed in the proposed unregistered practitioners register (see discussion in paragraphs 6.32.2.3 and 6.40.2 of Chapter 6 on proposed TPB sanctions). Similarly to the legal profession’s treatment of lay associates, the TPB would then be provided with the discretion to approve the engagement.

4.48 These amendments would enable the TPB to consider the misconduct of close associates and how, if it all, it impacts an applicant's eligibility for registration. Should a registered tax practitioner seek to engage such an entity post-registration, they would then be obligated to notify the TPB of a change of circumstances.[50] Failure to do so would then be a breach of the Code of Professional Conduct.

4.48.1 Guidance could be taken from ASIC's legislated breach reporting requirement, which provides that AFS licencees must notify ASIC in writing of an 'significant' breach (or likely breach) of their obligations as soon as practicable, and in any event within ten business days of becoming aware of the breach or likely breach.

4.49 Once a practitioner declares their proposed engagement, the TPB may approve of the engagement or impose certain conditions on the engagement. Should the TPB not approve the engagement, conditionally or otherwise, the practitioner would be unable to engage that person.

4.50 Engaging such an entity without approval from the TPB should then become an event affecting a practitioner's continuing registration.[51]

Recommendation 4.6

The Review recommends that the *Tax Agent Services Act 2009* be amended to include as part of a tax practitioner's eligibility for registration a requirement to declare:

i) a) any close associates relevant in the provision of tax agent services; and/or

b) employees involved in the provision of tax agent services;

who are affected by any of the fit and proper events in the *Tax Agent Services Act 2009*; and

ii) if they have engaged anyone listed in the proposed unregistered practitioners register.

Registration period

4.51 In the Discussion Paper the TPB articulated a view that, in the interests of tax practitioners, the TPB and Government, it would be beneficial if the registration period (which is currently three yearly) was converted

50 See section 30-35 of the TASA.

51 Section 20-45 of the TASA.

to an annual basis. There are a number of reasons to justify this approach including:

4.51.1 This approach would align with most other requirements affecting tax practitioners, including professional indemnity insurance and association membership.

4.51.2 This annual registration would replace the current TPB administrative 'Annual Declaration' process.

4.51.3 It would ensure that the TPB has ongoing and regular visibility as to whether it is appropriate for a tax practitioner to remain registered and therefore creating a level playing field.

4.51.4 It would increase consumer confidence that those registered meeting the ongoing registration requirements.

4.52 Mixed views in the submissions were received on this point, with a number of submissions suggesting that the status quo should remain, while some recognised that there are benefits of moving to an annual basis, so long as the application fees are appropriately pro-rated and the process itself is simplified.

4.53 This approach is in contrast to the *National Review of Standards for the Tax Profession (Australia) 1994* where a five year registration period was recommended. At that time, a longer registration period was appropriate, but given the advancements in technology and online services (and the now non-lodgement of paper applications), such an approach is arguably inappropriate.

Recommended solution

4.54 The Review recommends that the registration period be converted to an annual period, subject to the following pre-conditions:

4.54.1 An annual renewal process would remove the need for the TPB's annual declaration process; and

4.54.2 To make the annual renewal process work efficiently, the TPB would need to ensure that its forms and processes are appropriately streamlined to make it a seamless and electronic process for the renewal process to take place. The Review appreciates that funding may be required to achieve this, however such funding is justified in the interests of reducing the regulatory burden on tax practitioners when it comes time to renew their registration.

4.55 The application fee payable, if registration was an annual basis, instead of three yearly, should be pro-rated.

> **Recommendation 4.7**
>
> The Review recommends that:
>
> a) The registration period be converted to an annual period, subject to the TPB being able to make the necessary system and IT enhancements to reduce the regulatory burden on tax practitioners that are renewing their registration.
>
> b) The annual registration fee should be pro-rated, in comparison to the current fee payable for a three year registration period.

Tax clinics

4.56 The Discussion Paper discussed the role of tax clinics and that the services that they offer are intended for individuals and small businesses who do not have a tax agent. These tax clinics commenced in late 2018 when the Government announced that they would fund a pilot of 10 tax clinics for 12 months.

4.57 Under the TASA, tax clinics do not need to register with the TPB because they do not provide a tax agent service for a fee or reward. Further, through a Gazette notice, the Commissioner of Taxation has provided an exemption to allow these tax clinics to advertise or market the provision of tax agent services, despite not being registered with the TPB. For those tax clinics that choose not to register after the 12 month trial period, access to the ATO's Tax Agent portal will be unavailable which will limit the tax services these tax clinics are able to provide to their clients.

4.58 The submissions on this issue of tax clinics raised two key issues:

4.58.1 As there is not a requirement to be registered with the TPB, tax clinics are able to operate outside of the TASA, including the Code of Professional Conduct.

4.58.2 The eligibility requirements to become registered should be amended to allow universities and not-for-profit organisations to be able to register in their own right.

Recommended solution

4.59 At this time, the Review recommends that no further action is required to either require tax clinics to be registered with the TPB or to amend the eligibility requirements to allow tax clinics to be registered in their own right. However, in light of the current trial period of 12 months, the Review recommends that following completion of the trial and decisions of Government to either cease or extend the program, the issue of tax clinics and the TPB be reviewed to determine if any longer term amendments may be required.

4.60 The Discussion Paper posed a question of whether the TPB should also be given the power to approve schemes for the purpose of paragraph 50-10(1)(e) of the TASA. On reflection, this power should remain only with the ATO as the entity most affected by such schemes.

Recommendation 4.8

The Review recommends that following completion of the trial and decisions of Government to either cease or extend the program, the issue of tax clinics and the TPB be reviewed to determine if any longer term amendments may be required.

Tax intermediaries

4.61 Section 90-5 of the TASA defines what is meant by a *tax agent service.* There are similar provisions at section 90-10 and 90-15 which define a *BAS service* and a *tax (financial) advice service* respectively. Collectively these are referred to in this report as *agent services.*

4.62 All three definitions are very broad and do not draw a distinction between entities that solely provide *agent services* and entities for which *agent services* form a small portion of their offered services.

4.63 As observed in the Review's Discussion Paper, the breadth of these definitions has led to many other professions other than tax agents, BAS agents and TFAs now being treated as providers of *agent services.*

4.64 This Review does not propose to create a new registration system for intermediaries. How the Review intends to deal with particular intermediaries, however, is discussed below.

Digital service providers

4.65 Digital Service Providers (DSPs) are those entities who produce software that consume, either directly or indirectly, ATO provided Application Programming Interfaces (APIs) and web services, typically for a commercial purpose. This market may of course increase in size in an environment where change is almost a constant.

4.66 Within the tax industry, DSPs build products that enable tax professionals, businesses (sole traders and companies), superannuation funds and individuals to more easily interact with the ATO. This interaction with government services occurs through Application Programming Interfaces, commonly referred to as APIs by the industry. Within the ATO APIs allow the ATO's revenue systems to digitally interact with other DSPs including banks, accounting software providers and other government agencies. They allow connectivity between systems, people and things without providing direct access. This limits the risk of compromise to the system as opposed to if someone was allowed direct access to the system and the underpinning data stores. The ATO uses APIs to send and receive information, to validate activities, to facilitate transactions and to even impose behavioural nudges on an almost real time basis.[52]

4.67 For instance, there are software programs sold by DSPs that will enable a registered tax practitioner to lodge with the ATO income tax returns, Activity Statements and many other forms required by the ATO. These programs are compliant with the ATO's practitioner lodgement service (PLS) and are built to meet the ATO's requirements.

4.68 In this regard, the ATO has created a "DSP Operational Framework" which sets out the security requirements that DSPs must meet in order to gain access to the ATO's services. The DSP Operational Framework is designed to protect client data and in doing so maintain the integrity of the tax system. DSPs wanting access, which brings with it access to ATO systems, are required to register with the ATO's Digital Partnership Office (DPO). The DPO serves as the first point of call for DSPs wanting to interact with the ATO and partners with software providers to design digital solutions to improve the Australian tax system.[53]

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52 Commissioner of the ATO Chris Jordan at the OECD Forum on Tax Administration *Unlocking the Digital Economy — A Guide to Implementing Application Programming Interfaces in Government*, 26 — -28 March 2019.

53 Above n 14, p. 128.

4.69 In recognition of the continually changing digital environment these requirements are, by necessity, constantly being updated and renewed by the ATO. New innovations such as "Robo-advice"[54] are likely to become more prominent. Appropriate controls are however an important feature of such innovation.

4.70 It is important to note that the ATO only checks the messaging between the software and the ATO systems are correct from an IT perspective and are not performing a comprehensive review of the software to confirm its accuracy from a tax perspective.

4.71 That said, if a program does have errors in it from a tax perspective it is highly likely that this will be noticed by the ATO as part of their lodgement processing and compliance activities and the DSP notified.

4.72 Businesses do not have to use a registered tax practitioner to be able to lodge their own tax returns or activity statements. They can if they so choose lodge the return or BAS themselves through a range of secure services including the ATO's Business Portal or through software provided by a DSP.

4.73 There are different types of DSPs. Some, such as software companies produce the types of software referred to above. Typically they will also have "Customer Service Desks" that can be accessed by the client by phone, email or submitting an online request form. These Service Desks can assist with software functionality, software usage or enhancement requests. None of these services, that is either the development of the software or assisting with the software should require the software company to register with the TPB. This is discussed more fully below.

4.74 On the other hand, if the Customer Service Desk also provides assistance for tax services or tax-related advice then the software company would need to be registered with the TPB. If it is possible to segregate the Customer Service Desk then it should be possible that just that component of the software company needs to be registered with the TPB.

4.75 Another type of DSP is an entity that provides a digital service to clients and also lodges online tax returns with the ATO on behalf of their clients. This sort of DSP is an entity that has registered itself with the ATO as a DSP so as to be able to design and build their own software products either as a practice management tool and/or as a means for their clients to interact with them directly. This type of DSP is currently required to register with the TPB and that requirement should remain going forward.

[54] Above n 14, [2.37] to [2.40]

4.76 An additional aspect of software services not covered above is those software products that by virtue of a set business rules or machine learning/automation, provide advice through the software itself to users that could be considered ‘tax advice’. At present, developers of these products are not required to be registered with the TPB directly but it is noted that there are generally registered agents, engaged by the DSPs, guiding the development of these products. In addition, the users of these products are generally registered agents and are required to meet their obligations as a registered agent accordingly. The prevalence of these products at the moment is unknown although we expect to see more into the future.

Conveyancers

4.77 Conveyancers[55] and/or legal practitioners are usually engaged for transactions relating to the sale and purchases of real property.

4.78 Over recent years, amendments to taxation laws now require parties to a contract of sale for real property to ‘turn their mind’ to the tax system at the time of purchase. These changes may require conveyancers to consider tax matters such as residency or withholding obligations.

4.79 As part of the conveyancing process, conveyancers must now deal with the Foreign Resident Capital Gains Withholding (FRGCW), the annual vacancy fee for foreign owners of Australian residential property, and GST withholding on supplies of new residential premises or potential residential land, often referred to as GST at settlement.

4.79.1 FRGCW requires vendors of property[56] to consider whether they are an Australian resident for tax purposes. The annual vacancy fee also requires owners, whose residential dwellings are not occupied or rented for more than six months a year, to consider whether they are an Australian resident for tax purposes. For GST at settlement, purchasers of new residential premises or potential residential land are required to withhold GST from the contract price and remit this to the ATO.

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55 It is the Review’s understanding that Queensland, unlike other states, requires all paid conveyancing work to be undertaken by a Law Firm who must comply with the rules and regulations of the relevant legal profession. Other states allow for registered and regulated ‘stand-alone’ conveyancers to undertake conveyancing work.

56 Valued at more than $750,000. When introduced the threshold was set at $2 million or more.

4.80 Conveyancers that are not registered with the TPB cannot provide tax advice[57], and generally speaking vendors and purchasers do not require such advice in order to proceed with the purchase.

4.81 However, while dealing with taxation obligations at the time of purchase or settlement assists vendors and purchasers comply with their taxation obligations, it follows that some vendors or purchasers may seek advice from their conveyancer about how to comply with these obligations.

4.82 It is the provision of this advice during the conveyancing process, particularly for FRGCW, that constitutes a *tax agent service.* Resultantly, conveyancers have been required to register with the TPB.[58] Contrast this with lawyers, who are excluded from registration as they already had a specific exemption from needing to be a registered tax practitioner.

4.83 While it is necessary to ensure that tax agent services are provided in accordance with professional standards, it is important to consider the context in which certain services are provided. Conveyancers provide a conveyancing service, part of which includes administering paperwork and collecting money and information for the ATO. Advice provided to their clients on tax matters is, and should be, limited to this process.

4.84 It is also important in considering the future state of the profession to ensure that professionals are not subject to unnecessary or duplicative regulatory burden. Licenced conveyancers are fully regulated in most states and territories. Consumers of conveyancing services who are dissatisfied with the service they receive can have their complaint considered by the relevant State or Territory consumer body.[59]

4.85 Based on the particular role of conveyancers in the tax system, and the existing regulatory framework for consumer protections (and subject to a required law change) the TPB should exercise their discretion to exempt conveyancers from registration if they determine that they are merely inserting data into a form that is then transmitted to the ATO.

Lawyers

4.86 Legal practitioners are exempted under the TPB from registration with the TPB provided they are not prohibited from providing tax agent services under the State or Territory law that regulates their service/s

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[57] And if they are registered can only provide advice in their area of expertise (as required under the Code of Professional Conduct).

[58] Conveyancing and the TASA (from TPB's website).

[59] See paragraph 4.102.

and do not provide a service that consists of preparing, or lodging, a return or a statement in the nature of a return.

4.87 This exemption existed prior to the enactment of the TASA and recognises that legal practitioners are able to provide advice on the operation of the law, which includes tax laws.

4.88 Legal practitioners are, like conveyancers, a regulated industry with consumers able to access a review body should there be a complaint about the service the consumer has received.

4.89 The relevant review body, generally the law society in each state, is usually statutorily obligated to investigate complaints and where required pursue (enforce) disciplinary action (sanctions).

4.90 It is therefore considered appropriate, to avoid regulatory overlap that they are exempted.

Payroll service providers

4.91 Depending on the service provided by these providers there may not be a requirement to register with the TPB. Information sheet TPB(I) 31/2016 outlines the circumstances where registration is required and is not required.

4.92 Providers performing transmission of data to the ATO using approved enabled software are usually exempt from TPB registration requirements as are most 'in-house services' or data entry and processing.

4.93 However, where the provider's services are beyond incidental services it is appropriate that the payroll service provider is registered and the guidance, including examples, provided by the TPB is appropriate.

4.94 Keeping with the theme of other intermediaries in this section of the paper (and see paragraph 4.99 below), it is appropriate that the current arrangements for payroll service providers are maintained. Not all services need to be registered with the TPB and appropriate guidance has been provided by the TPB. There were no submissions suggesting any changes to the current arrangements for payroll service providers.

Quantity surveyors

4.95 The EM specifically provides an example to demonstrate that quantity surveyors are required to be registered with the TPB. Example 2.2 states that:

Jessica is a quantity surveyor who provides reports that detail depreciable items in a building to enable her clients to calculate deductions for decline in the values of depreciating assets.

Jessica is providing a tax agent service as she would need to have certain knowledge of the relevant taxation laws to determine the depreciable nature of the assets to provide the service and it is reasonable to expect her clients to rely on the service to claim an entitlement under the taxation laws.

4.96 Many quantity surveyors are members of a professional association such as the Australian Institute of Quantity Surveyors and Royal Institute of Chartered Surveyors. However, unlike other tax intermediaries that have regulation (like conveyancers), professional or industry association membership does not necessarily involve statutory requirements regarding expected behaviour with a focus on protecting consumers and the public.

4.97 In light of this it is appropriate to require quantity surveyors, to the extent that they are providing tax advice, should continue to be regulated by the TPB.

Novated lease providers and salary sacrifice providers

4.98 Unlike conveyancers whose core activity involves the sale or purchase of property and subsequent incidental taxation implications, the core advice provided by these providers is likely to revolve around the tax impact from entering into a novated lease arrangement or salary sacrifice arrangement.

4.99 For similar reasons as outlined under quantity surveyors, novated lease providers and salary sacrifice providers (to the extent that they are providing tax advice) should continue to be required to register with the TPB as there is no oversight body with statutory powers to undertake investigations and sanctions (disciplinary action) against these providers.

Research and development specialists

4.100 Research and development (R&D) tax advisory specialists or consultants provide a service to businesses regarding activities that may be eligible for tax incentives. Many R&D advisors also assist in the completion of claims. The EM specifically recognises that advising or assisting an entity on tax concessions for expenditure incurred on

R&D activities are tax agent services, where the service involves the application of the taxation laws.[60]

4.101 Similar to those intermediaries above that have a role linked to a tax outcome as a primary factor of their services, R&D specialists should be registered with the TPB.

The future

4.102 The above professions should not be considered as an exhaustive list of those occupations/professions who might, in the future, be considered as possibly falling within the TPB's regime. Indeed, there is every prospect that there will be occupations/professions in the future that currently do not exist and may not even be contemplated. 30 years ago the internet and mobile phones barely existed. Today it is difficult to imagine a world without them.

4.103 In order to future-proof this aspect of the report, the Review recommends establishing a basic principle that if a tax intermediary is regulated or monitored by a Government agency (other than the TPB) then there should be no need to also register with the TPB.

4.104 It will need to be decided what is the most effective means of doing this. While lawyers have a legislative exemption[61] the Review proposes that a more streamlined and real-time process might be more appropriate than making changes to the TASA each time a profession needs to be considered for exemption.

4.105 A possible solution might be that changes can be made by way of Legislative Instrument. This would ensure appropriate consultative processes occur before any changes occur.

4.106 For those that are exempted from registration due to regulation by another disciplinary body, these professions are under an obligation imposed by the TASR to provide a statement indicating that the provider of the advice is not a registered tax agent and that obtaining advice from a registered tax agent is suggested. This is similar to the (now redundant) Regulation 13(2) of the TASR.

[60] See paragraph 2.31 of the EM

[61] Section 50-5 of the TASA.

Recommendation 4.9

The Review recommends that:

a) Only those tax intermediaries that are not regulated by any other Government body should require registration with the TPB, despite otherwise being required to be registered with the TPB.

b) The TPB should have the power, through the legislative instrument process, to exclude certain other services from having to register with the TPB.

5. THE CODE OF PROFESSIONAL CONDUCT

Background information

5.1 Section 30-10 of the TASA establishes the legislated Code of Professional Conduct (Code) for all registered tax practitioners. The Code is legislated and sets out the professional and ethical standards that registered tax practitioners are required to comply with. It outlines the duties that registered tax practitioners owe to their clients, the TPB and other registered tax practitioners.

5.2 The term 'professional conduct' refers to the way in which registered tax practitioners act while in their professional capacity. When providing services, it is expected that registered tax practitioners will display an appropriate, professional standard of behaviour beyond that which is expected of someone who is not acting in a professional capacity.

5.3 The TPB has a range of options available to it under the TASA in making findings about the conduct of registered tax practitioners. The options open to the TPB include:

5.3.1 imposing sanctions for breach of the Code;

5.3.2 applying for a civil penalty for breach of the civil penalty provisions; and

5.3.3 terminating a registered tax practitioner's registration on the basis that the registered tax practitioner is no longer a fit and proper person to be a registered tax practitioner.

5.4 The Code consists of a list of core principles which are grouped into five categories:

5.4.1 Honesty and integrity

5.4.2 Independence

5.4.3 Confidentiality

5.4.4 Competence

5.4.5 Other responsibilities.

5.5 Section 30-10 of the TASA contains the Code consisting of the following 14 items:

Honesty and integrity

1) You must act honestly and with integrity.

2) You must comply with the taxation laws in the conduct of your personal affairs.

3) If:

a) you receive money or other property from or on behalf of a client, and

b) you hold the money or other property on trust;

you must account to your client for the money or other property.

Independence

4) You must act lawfully in the best interests of your client.

5) You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax agent or BAS agent or tax (financial) adviser.

Confidentiality

6) Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission.

Competence

7) You must ensure that a tax agent service that you provide, or that is provided on your behalf, is provided competently.

8) You must maintain knowledge and skills relevant to the tax agent services that you provide.

9) You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing you are doing on behalf of a client.

10) You must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client.

Other responsibilities

11) You must not knowingly obstruct the proper administration of the taxation laws.

12) You must advise your client of the client's rights and obligations under the taxation laws that are materially related to the tax agent services you provide.

13) You must maintain professional indemnity insurance that meets the Board's requirements.

14) You must respond to requests and directions from the Board in a timely, responsible and reasonable manner.

5.6 In the Discussion Paper, the TPB expressed a preliminary view that the Code should become more dynamic in nature by providing the Board with the power to amend and update the Code, noting that the current process would require a law change. This would allow the TPB to deal with any emerging and/or best practice behaviours, such as those in relation to operating in a digital environment or the use of engagement letters.

5.7 The ATO also supported the TPB's view and also noted that the Code should be linked to a professional association's code, such that a breach by a tax practitioner of its professional association's code could result in a breach of the TASA Code of Professional Conduct.

5.8 The consultation process led to feedback being received from the Professional Standards Councils (PSC). The PSC are independent statutory bodies established under professional standards legislation administering the national system of professional standards regulation. Councils exist in each Australian state and territory. The PSC assists professional associations in the development of self-regulation of professional standards and enable the creation of Professional Standard Schemes. Such Schemes, if approved by the PSC allow limits to be placed on the civil liability of professionals who are members of an association covered by a scheme, and ensure there will be compensation available to consumers up to that limit. The national professional standards regulatory system is funded from statutory fees paid by associations.

5.9 In addition to capping professional liability the PSC will also supervise the performance of the association in the regulation of its members. It is a form of meta-regulation in which the self-regulating association is held to account by the PSC, at the risk of its members losing the benefit of the liability cap if the association fails to properly regulate its members.

5.10 Through the submission process, many stakeholders agreed generally on the need for the Code to be more dynamic, however, the following concerns have been raised:

5.10.1 The Code as it is currently drafted is principles based and already captures a broad range of behaviour and therefore there is concern with changing the Code to be too prescriptive.

5.10.2 Any changes to the Code should be through a law or Act change rather than giving the Board the power through a legislative instrument. This is particularly important given the consequences for a breach of the Code.

Recommended solution

5.11 Acknowledging the feedback received through the submission process, the Review maintains its preliminary view that making the Code a more dynamic instrument, that can adjust to changes in a more contemporary manner than is permitted when it is enshrined in the Act, is appropriate. Currently any changes to the Code require legislative change. This can be time consuming and is not conducive to creating a proactive regime where changes to the environment can be promptly adapted to by the regulator.

5.12 To address the concerns raised about the TPB having the legislative instrument power to amend the Code, the following should occur:

5.12.1 The Code as it currently stands is considered appropriate but any legislative instrument power should be given to the Minister rather than the TPB and would not allow the Minister to amend the existing Code and its 14 items. Instead, the legislative instrument power will only allow the Minister to supplement, and not modify, the existing legislated Code.

5.12.2 It is critical that in developing any possible changes to the Code that the TPB collaborates and consults with other regulators, professional associations, tax practitioners (including those that are members of an occupational association that is regulated by the PSC) and other key stakeholders, undertake a review to determine what other Code items might be useful inclusions.

5.12.3 The legislative instrument process itself provides a number of important safeguards, which include a consultation process with the profession and appropriate controls through Parliamentary oversight. In particular, section 17 of the *Legislative Instruments Act 2003* provides that:

17. Rule-makers should consult before making legislative instruments

1) Before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation that is:

a) considered by the rule-maker to be appropriate; and

b) reasonably practicable to undertake.

2) In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to any relevant matter, including the extent to which the consultation:

a) drew on the knowledge of persons having expertise in fields relevant to the proposed instrument; and

b) ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

3) Without limiting, by implication, the form that consultation referred to in subsection (1) might take, such consultation could involve notification, either directly or by advertisement, of bodies that, or of organisations representative of persons who, are likely to be affected by the proposed instrument. Such notification could invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

Note: Under subsection 15J(2), an explanatory statement relating to a legislative instrument must include a description of consultation undertaken or, if there was no consultation, an explanation for its absence.

5.13 The Review in the Discussion Paper provided a number of examples of how the legislative instrument making power could be utilised to address emerging or existing behaviours and practices that may not have been contemplated when the Code was developed in 2009. Those examples included:

5.13.1 matters relating to those digital service providers who lodge tax returns online and have received a code from the ATO allowing them access to the ATO portal;

5.13.2 providing legal services, such as the drafting of legal documents or matters relating to the maintenance of legal professional privilege;

5.13.3 the appropriateness of using a contingency fee or guaranteed refund arrangements;

5.13.4 ensuring that companies and partnerships have appropriate corporate governance arrangements on place;

5.13.5 maintenance of trust accounts for client monies;

5.13.6 cybersecurity requirements; and

5.13.7 mandating letters of engagement.

5.14 Having reflected on those examples, the Review appreciates that some of those matters may already be addressed under the existing Code or through another mechanism. However, the Review recommends, through collaboration and consultation with the relevant stakeholders, the TPB will scope out behaviours and practices that could be considered as possible items to be addressed under a dynamic Code.

5.15 There is also scope to standardise the various codes rather than having tax practitioners having to ensure they abide by both the TPB’s Code and, if they belong to an association, the association's code as well.[62] The Review suggests that the PSC could play a role in this process.

5.16 The Board should liaise with the PSC to see if there is potential to recognise the PSC's supervision of professional bodies with an approved scheme. This could include reliance on the PSC's supervision of the professional bodies' risk management and self-regulation of their members in monitoring and enforcing insurance standards, entry standards and qualifications, continuing professional development, and occupational risk management. This would have the added benefit of freeing up resources of the TPB to then focus on compliance and disciplinary processes.

5.17 As discussed in Chapter 3, the Review has recommended the creation of a Tax Practitioner Governance and Standards Forum. This Forum would be the ideal vehicle to facilitate any changes to the Code and ensure they are only introduced after a comprehensive consultative process has occurred.

Recommendation 5.1

The Review recommends that the relevant Minister be given a legislative instrument power to be able to supplement the Code of Professional Conduct to address emerging or existing behaviours and practices. The legislative instrument process would also ensure appropriate consultation with key stakeholders and parliamentary oversight.

Legal professional privilege

5.18 Legal Professional Privilege (LPP), also referred to as client legal privilege, is a doctrine of the common law and a matter of statute.[63] It provides that, in both civil and criminal cases, confidential communications between a lawyer and her or his client, which have been made for the dominant purpose of seeking or being furnished with legal advice or for the dominant purpose of preparing for actual or contemplated litigation, need not be disclosed in evidence or otherwise revealed. The ATO's formal information gathering powers are subject to LPP. LPP applies only to some communications with lawyers acting in the capacity as a lawyer. LPP does not apply to tax advice provided

62 TFAs have the additional complexity of also abiding by FASEA's Code of Ethics.

63 In the form of the uniform Evidence Acts.

by a tax practitioner acting as such.[64] The privilege belongs to the client. In practice, the claim will often be made by someone else on behalf of the client. Unless that someone else is a tax practitioner, the regulatory environment under which such claims are made is beyond the scope of this review.

5.19 The ATO has expressed concerns that non-genuine LPP claims are being made by some tax practitioners to frustrate investigations[65] and claims not being particularised in a timely manner. The ATO has advised that it is seeing an increasing number of cases involving blanket LPP claims. In two current cases, 13,000 and 19,000 documents are being respectively withheld. 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.

5.20 The Law Council of Australia and the ATO are developing a protocol in relation to LPP claims. The protocol will provide a set of guidelines for managing claims to LPP in response to information requests from the Commissioner, including what information should be provided to the ATO concerning the claim and context in which it has been made.

5.21 The Discussion Paper discussed as examples of what a dynamic Code might contain, whether the Code might address some concerns with LPP claims — ensuring that maintaining a claim for privilege is within the professional expertise of a particular practitioner, or providing a requirement that claims should be particularised in a timely manner.

Submissions

5.22 Submissions in relation to LPP had two main themes. First, it was argued that the Code should remain principle-based rather than, for example, dealing with LPP issues at the level raised in the Discussion Paper. This was said to be prescriptive, and inconsistent with the idea of a dynamic code. Second, the submissions argued that the complex area of LPP ought not to be addressed as part of this Review, but separately. It was put that the protocol is the best way of addressing the issues raised in relation to LPP.

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64 Unless the communication is privileged as per paragraph 6.17 in the Discussion Paper. There is also an administrative concession afforded by the Commissioner of Taxation in appropriate cases to advice provided by appropriately qualified accountants. This is commonly known as the 'Accountant's Concession'.

65 The ATO has emphasised that it sees LPP as an important part of the legal system and it completely respects taxpayers making the LPP claims they are entitled to.

5.23 A further submission was that it would be valuable for the TPB to educate tax practitioners on their obligations to preserve a client's right to claim LPP.

Discussion of submissions

5.24 The suggestion that the TPB has an opportunity to educate tax practitioners of their obligations to preserve a client's right to claim LPP is well made. There is also merit in the proposition that the Code is better kept principle-based and that if it is too prescriptive, it will be less effective.

5.25 Nevertheless the Code, in requiring competence, may already address the issue of a tax agent purporting to provide legal advice where it is not qualified to do so. An example of this could be in a particular situation where continuing to maintain a claim of legal professional privilege would be the provision of legal services. A dynamic Code could deal with presenting issues which are sufficiently important to be addressed and which are found not to be already addressed.

5.26 It is also submitted that the protocol will in itself address the LPP issues raised by the ATO. The protocol is clearly an important part of dealing with these issues. However, the Review has concluded that a provision like that in section 70 of the *Australian Securities and Investments Commission Act 2001*[66] 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.

Summary

5.27 There are probably various means of addressing the issues identified. For instance, the Code could be modified or the definition of tax agent services in the TASA could be amended. However, the Review has formed the view that the enactment of new provisions in the *Taxation Administration Act 1953* is a better solution.

[66] Reproduced at Appendix I.

Recommendation 5.2

The Review recommends that a provision concerning legal professional privilege (LPP) such as that in section 70 of the *Australian Securities and Investments Commission Act 2001* be enacted in the *Taxation Administration Act 1953*.

Further, a similar protocol to that being developed between the Law Council of Australia and the ATO in relation to LPP claims should be developed for tax practitioners generally. This item should be something for the proposed forum (at Recommendation 3.3) to consider.

6. SANCTIONS AND SAFE HARBOURS

Introduction

6.1 As the regulator with responsibility for the tax profession, one of the key roles of the TPB is to focus on those registered and unregistered tax practitioners that are not meeting appropriate standards of professional and ethical conduct.

6.2 The TPB recognises that many practitioners do the right thing and provide excellent service to their clients.[67] The Black Economy Taskforce in its Final Report similarly found that most tax practitioners work hard to provide good and correct advice and adhere to the Code of Professional Conduct.[68] This Review has observed similar feedback as part of its consultation processes. However, it is vital that in protecting and supporting those practitioners who act with integrity, high-risk behaviour is addressed.

6.3 The actions of egregious tax practitioners reflect poorly on the tax profession. As was identified in the Discussion Paper, the actions of egregious practitioners can influence the behaviours within the profession. Rather than retaining clients by providing high quality tax agent services, honest practitioners must instead compete with egregious practitioners that are offering their clients inflated refunds.[69]

67 TPB Corporate Plan 2019-20, p. 4.
68 Above n 39, pp. 151, 163.
69 Ibid, see discussion at p. 163.

6.4 Egregious tax practitioners also enable, and in some instances instigate, black economy participation by their clients.[70] For instance, the Black Economy Taskforce observed that some practitioners perpetuate tax fraud and money laundering.[71] Further, the ATO's small business income tax gap analysis identified that the majority of black economy activity in that market segment is associated with deliberate under-reporting of business income and over-claiming of business deductions.[72]

6.5 These deliberate and illegal behaviours are unfair to both honest tax practitioners and honest consumers of tax practitioner services, and undermine the integrity of the broader tax and superannuation system.

6.6 Submissions and feedback received as part of this Review have identified that more needs to be done to address these behaviours and that the TPB needs to be appropriately funded and equipped to effectively monitor and discipline the profession. This reflects the findings of the Black Economy Taskforce in its Final Report, which said that there is not enough action taken to address egregious tax practitioner behaviour.[73]

6.7 As was noted in one of the submissions, "a better dynamic, and fairer outcomes, would ensue from both taxpayers and their agents being held to account against the standards expected under a self-assessment system in cases where a failure to meet the standards has been identified by the Commissioner as having led to an underpayment of tax. That is, both taxpayers and their agents should be expected to exercise reasonable care and to not behave recklessly or with intentional disregard.

Importantly, if both agent and taxpayer fail the standards in any given case, there should be consequences for both. I understand this is the principle adopted in the Canadian system. The idea that any penalty should be solely on one or the other seems flawed, given that the object is to promote behaviour consistent with the relevant standards by both parties. "[74]

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70 Ibid, p. 165.

71 Ibid.

72 https://www.ato.gov.au/General/Tax-and-small-business/In-detail/Small-business-income-tax-gap/
?page=4#Trendsandlatestfindings2 (accessed on 24 September 2019).

73 Above n 39, p. 164.

74 Comments received from Mr Neil Olesen, former Second Commissioner, Australian Taxation Office.

This concept is discussed in more detail below in the "Safe harbours" section at paragraphs 6.16 to 6.19.

The income tax gap

6.8 To appreciate the importance of a well-regulated tax profession, it is useful to appreciate the scale of tax agent services provided to Australian taxpayers. Around 17 million taxpayers (across all entity types) in the Australian tax and superannuation system use a tax agent to prepare their return.[75] Taxpayers engage tax practitioners to seek assurance that they are compliant with their tax obligations.[76]

6.9 Analysis undertaken by the ATO on the income tax gap demonstrates the significant reliance on tax practitioners; in particular, tax agents. Around 70 per cent of individuals and over 90 per cent of small businesses use a tax agent to help them prepare their return.[77] Of the approximate 44,500 registered tax agents, there are 25,000 active, registered tax agents that operate in the Australian tax system.[78]

6.10 These figures highlight the level of influence and responsibility placed on tax agents and practitioners more broadly. Professional and ethical advice on clients' tax obligations is a necessary feature of a self-assessment tax system.

6.11 However, as was detailed in the Discussion Paper, the ATO's estimate of the net income tax gap for individuals not in business in the 2014-15 financial year is $8.7 billion. Results from this analysis indicate that the error rate for agent-prepared returns is 78 per cent, which is considerably higher than self-preparer returns at 57 per cent.[79]

6.11.1 Some stakeholders in the tax profession have challenged the figures from the income tax gap analysis, on account of the small sample size. However, even if the income tax gap was halved, the amount is still significant. The Review notes that the ATO continues to monitor the income tax gap and is undertaking work to further develop its analysis and identify trends.

75 Data received from the ATO.
76 Above n 39, p. 166.
77 Above n 74.
78 Ibid; an active tax agent is one that the ATO identifies as having at least one client.
79 Individuals not in business income tax gap (ATO website) (accessed 31 October 2019).

6.11.2 This can be contrasted with the comments from Mr Neil Olesen that:

"The ATO has positioned the tax gap data and research as an opportunity for the ATO, tax practitioners and the broader community to work collaboratively to improve the performance of this vital component of Australia's revenue collection system. One important element of that opportunity is presented by this Review, which is one of the first opportunities to provide a policy response to the insights provided by the tax gap data. In this sense the Review is well timed.

The case for grasping the policy opportunity is strengthened further when the tax gap for small business taxpayers is also considered. Earlier this year the Commissioner indicated that the net tax gap for small businesses (turnover less than $10m) was in the order of $10b,[80] a net tax gap of between 10 per cent and 15 per cent of the theoretical tax payable by this market. This is a much larger net tax gap than in other markets. Rates of tax agent usage by small businesses are well over 90 per cent, much greater than for individuals-not-in-business. It would again be valuable for the Review to gain access to the ATO's insights on the behavioural drivers behind the small business tax gap, and to make these transparent."[81]

6.12 Further, the ATO now has estimated that for the 2015-16 financial year, the net income tax gap for the small business population is $11.1 billion.[82]

6.13 Considering the significant role tax practitioners and advisors play in the preparation of their clients' returns, it is necessary to understand the behaviours that are driving this gap, and to what extent these behaviours are driven by egregious tax practitioners.

6.14 With respect to small businesses, the ATO observed a range of behaviours that contributed to the income tax gap, including poor record keeping and lack of reconciliation processes, carelessness, and

80 Since the Discussion paper was published the ATO have now released details of the small business tax gap which is $11.1 billion for 2015-16.

81 Comments received from Mr Neil Olesen, former Second Commissioner, Australian Taxation Office.

82 https://www.ato.gov.au/General/Tax-and-small-business/In-detail/Small-business-income-tax-gap/
?page=4#Trendsandlatestfindings2 (accessed 24 September 2019).

business owners appearing to deliberately avoid paying the right tax (that is, exhibiting black economy behaviour). For individuals, the observed behaviours included incorrect claiming of deductions for work-related expenses and rental property expenses, and careless administration or careless preparation of the return.

6.15 Overall, the majority of behaviour was attributable to a failure to take reasonable care, while larger adjustments[83] tended to be associated with behaviour that was reckless or demonstrated an intentional disregard of the tax law.

6.15.1 It is estimated that 64 per cent of the gross income tax gap for small business is attributable to black economy activity.[84] Therefore while the incidence of adjustments is less where the behaviour is more culpable, there is a disproportionate impact on the tax gap and ultimately tax revenue.

Safe harbours

6.16 Prior to the introduction of the TASA, section 251M of the *Income Tax Assessment Act 1936* allowed clients of tax agents to recover a penalty, charge or interest they incurred because of the negligence of the tax agent. This section was repealed upon the introduction of the TASA, with clients left to sue their agent for negligence under the common law or consumer law.

6.17 To address misconduct of the tax agent, the TASA introduced a civil penalty regime. The civil penalty provision applies where a statement is made by a tax agent to the Commissioner (or the statement is prepared by a tax agent and is likely to be made to the Commissioner) and the tax agent knew the statement was false or misleading or was reckless as to whether the statement was false, incorrect or misleading (section 50-20 of the TASA). The TPB is required to apply to the Federal Court for the imposition of the civil penalty.

6.18 As part of *the Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009*, a safe harbour was introduced to protect taxpayers who use a tax or BAS agent. As identified in the Discussion Paper, the safe harbour protection sought to protect consumers of tax agent or BAS services and reduce some of the uncertainty in the self-assessment regime, while maintaining the integrity of the tax system. However, the safe harbour protection does not apply where the penalty arises from recklessness or intentional

[83] An adjustment is the difference between the tax position in the respective return and what the ATO determines to be the correct tax position.

[84] Above n 81.

disregard of the tax law by the agent. The safe harbour also does not shield the taxpayer from the tax shortfall that arises as a result of agent behaviour that has been assessed as reckless or intentional.

6.19 The current safe harbour regime is insufficient to protect innocent and vulnerable taxpayers who incur a tax shortfall as a result of the culpable conduct of these egregious intermediaries. While taxpayers must maintain a level of individual responsibility in the preparation of their returns, often they place a large degree of reliance on their agent.

Holistic approach to treating tax intermediary behaviour

6.20 The TPB and the ATO are both invested in achieving appropriate outcomes in cases of tax practitioner misconduct. The Review considers that a clear delineation of responsibilities between the TPB and ATO would assist in ensuring this misconduct is treated with the appropriate response.

6.21 The TPB and ATO must employ their best efforts to main their plan that details how each will work together in the future to address poor behaviour (see Recommendation 3.3). It is vital that as part of this plan that the TPB and ATO have an efficient and effective information sharing system that allows them to address risks to both the integrity of the tax profession and the tax system.

6.22 The TPB and ATO have demonstrated during the course of this review that they are committed to working together and with other partner agencies such as ASIC, AFP and the CDPP, to ensure the compliance of tax practitioners with relevant law and policy.

6.23 As a starting point, the TPB is adopting the ATO's Practitioner Engagement Model (the "teardrop") to understand the various behaviours, priorities and risks associated with particular advisers. This will involve data analysis and monitoring of the entire tax practitioner population. It also involves a joint compliance focus on the highest risk practitioners. This joint compliance focus incorporates:

- 6.23.1 sharing of intelligence;
- 6.23.2 understanding the risks associated with the practitioner, and their underlying causes;
- 6.23.3 designing treatment strategies to address these risks and their causes with specific goals. Sometimes the treatment strategy is from one organisation or another, but most commonly

these treatment strategies are joined up or "whole of government" approaches;

6.23.4 treatment strategy will be monitored and governed jointly by the ATO and TPB, to ensure they are on track, with appropriate capacity and capability, or to make any required adjustments; and

6.23.5 joint measurement and evaluation to identify whether goals have been attained, efficiently and effectively, to identify innovations (including law or policy reform) and improve processes into the future.

6.24 As a starting point for the Forum (recommended at Recommendation 3.3), the responsibilities for both the TPB and ATO in addressing different types of tax practitioner behaviours should be determined.

6.25 At this stage, the TPB and ATO are conducting intelligence sharing and case workshops to deliver joint treatment strategies for 2,000 high risk practitioners.

6.26 Considering their roles are distinct, misconduct may warrant action by both the TPB and ATO. This occurs in the current system: for example, the ATO may amend a taxpayer's assessment, which results in an administrative penalty for the shortfall. If the safe harbour is unavailable, the taxpayer may then sue their tax agent with respect to the penalty, while simultaneously the TPB could bring an action against the agent for a civil penalty, a breach of the Code of Professional Conduct and/or not being fit and proper.

6.27 This Review proposes to re-focus the approach currently taken to address tax practitioner behaviour, so that the TPB and ATO are treating behaviours affecting them in the most streamlined and effective manner. The first step in doing so is to consider the types of behaviours present in the profession.

6.28 As mentioned above, the majority of tax agent errors were attributable to carelessness or a lack of care in understanding the tax law. For the majority of tax agents and tax practitioners more broadly, there is no need for anything more than continuing and improved education to maintain professional standards, and where appropriate, a more nuanced and agile administrative sanctions regime that allows the TPB to appropriately manage professional standards of the tax profession.

6.29 However, tax practitioners who are clearly operating outside of the law also pose a threat to the tax and superannuation system. It is for the TPB and ATO to then work together to ensure that this behaviour is appropriately addressed.

Enhanced administrative sanctions for the TPB

6.30 Initial submissions received in response to the terms of reference for this review highlight the need for the TPB to be equipped with an agile sanctions regime to respond to emerging issues in the tax profession. The Review observed a gap, where the TPB has been left little choice between applying low-level sanctions (such as written cautions and further education), and high-level sanctions including the suspension or termination of registration and civil penalties.

6.31 The Discussion Paper identified seven possible additional sanction tools to be made available to the TPB. These sanction tools sought to promote integrity, deter egregious behaviour and to provide the TPB with greater flexibility when finding a breach.

6.32 Consultation and submissions evidenced broad support for the TPB having increased powers to address tax practitioner misconduct. The proposed sanctions, which are further detailed below, each have their role to play to cover the broad range of misconduct the TPB must address.

6.32.1 A number of the proposed sanctions sought to address tax practitioner misconduct by heading off certain behaviours before they escalate or repeat.

6.32.1.1 The proposed infringement notice for certain breaches of the Code of Professional Conduct and for unregistered practice operates both as deterrence for misconduct and to encourage future compliance. Allowing a practitioner to pay the infringement notice without the sanction being published on the register serves as an incentive for the practitioner to alter their behaviour. The TASA should empower the Board to decide who within the TPB can issue an infringement notice. This will allow the TPB to delegate such decision making where appropriate, which facilitates a more streamlined process.

6.32.1.2 Enforceable undertakings can be used either as an effective alternative to, or to supplement, civil penalties or more severe administrative sanctions as a mechanism to change future behaviour. They provide assurance to the TPB while allowing tax practitioners to continue operating their practice in accordance with professional and ethical standards.

To be effective, enforceable undertakings need to be published on the TPB register.

6.32.1.3 Quality assurance audits would allow the TPB to deal with misconduct arising from internal control weaknesses, with a view to addressing the core of a firm's compliance issues.

6.32.2 Certain sanctions operate to further protect the community. This not only includes the client or clients of a particular tax practitioner, but the broader community as well.

6.32.2.1 Interim suspensions would be a useful discretionary tool for the TPB to address the risk of immediate harm to the public. Submissions highlighted the implications an interim suspension would have on a practitioner's ability to continue their practice. Clear and transparent guidance should be published by the TPB detailing in what instances they would exercise this discretion. Further, it is intended that the broader range of sanctions will operate to address lower-risk activity earlier.

6.32.2.2 Permanent disbarment of practitioners from the tax profession would alleviate two current issues. Firstly, it would enable the TPB to prevent the most egregious tax practitioners from re-registering, as currently the TPB can only prohibit a de-registered practitioner from re-applying to become registered for up to five years. Secondly, it would prevent potential employers from employing, paid or otherwise, these most egregious practitioners. Both of these outcomes serve to protect consumers, who would not otherwise be aware of previous serious misconduct.

6.32.2.3 Providing a register of identified unregistered practitioners would provide transparency to consumers of tax agent services.

6.32.3 The external intervention sanction is aimed at not only protecting consumers of tax agent services, but also assisting practitioners and firms that are experiencing significant issues affecting their practice. As mentioned in the Discussion Paper, this option would also allow some value to be recovered for the practice in an orderly run off of clients through a managed winding up.

6.32.3.1 External interventions are currently a feature of the legal profession. For example, the Law Institute of Victoria, Law Society of New South Wales and Queensland Law Society are empowered under the relevant State legal profession legislation to appoint an external receiver to a law practice for the purpose of protecting the interests of the general public.[85]

6.32.3.2 External interveners can be appointed as supervisors of trust money received by a law practice, a manager of a law practice or a receiver of a law practice.

Recommendation 6.1

The Review recommends that the Board's sanctions powers need to be increased, including introducing the following sanctions into the *Tax Agent Services Act 2009*, which could be applied to registered and unregistered practitioners:

a) infringement notices

b) enforceable undertakings

c) quality assurance audits

d) interim suspensions

e) permanent disbarment

f) external intervention

Investigations

6.33 The Review recommends that the TPB be empowered to commence and continue an investigation once a registered tax practitioner either has their registration terminated, chooses not to re-register, or is seeking to surrender their registration. The example of Agent C in the Discussion Paper highlighted an integrity concern in the investigatory process, where the TPB was unable to finalise its investigation following Agent C's voluntary de-registration.

6.34 It follows that the TPB would then be able to make findings and impose sanctions. This has positive flow-on effects: sanctions would

[85] See Chapter 6 of the *Legal Profession Uniform Law* (VIC, NSW) and Chapter 5 of the *Legal Profession Act 2007* (QLD).

be made available to prospective employers and clients, preserving integrity in the system.

6.35 The Review further recommends that the limitations on the TPB formally gathering information prior to commencing and notifying a tax practitioner of an investigation be removed. Timely information gathering supports efficient investigations and the information obtained may also assist in reducing the number of instances where the TPB needs to formally commence an investigation. There was no opposition to these proposals.

6.36 Similarly, the six-month timeframe to conduct an investigation should also be removed. While there was some opposition to this proposal, having a one size fits all approach is inappropriate to deal with the range of matters and behaviours the TPB manage. However, there should be a clear and transparent administrative process for conducting investigations that ensures that all are dealt with expeditiously.

6.37 The Review notes that options to:

6.37.1 remove the limitation on the TPB formally gathering information prior to commencing and notifying a tax practitioner of an investigation; and

6.37.2 remove the six-month timeframe to conduct an investigation

were raised in the Discussion Paper and no negative feedback was received as regards these proposals.

Recommendation 6.2

The Review recommends that:

a) Investigations are able to commence and/or continue once a registered tax practitioner either has their registration terminated, chooses not to re-register, or is seeking to surrender their registration.

b) The limitation on the TPB formally gathering information prior to commencing and notifying a tax practitioner of an investigation be removed.

c) The six month timeframe to conduct an investigation be removed.

Controlling minds — shadow and supervisory agents

6.38 The cases provided by the ATO and detailed in the Discussion Paper[86] highlight real instances of shadow or supervisory agents obfuscating the compliance efforts of the TPB and ATO by operating outside of the system as either an unregistered or de-registered practitioner. The challenge faced by the TPB in addressing misconduct by such entities is that the higher end sanctions available to them were limited to civil penalties.

6.39 The current state provides a space for persons who are not registered with the TPB to control the operations of a tax practice in a near risk free environment. These 'controlling minds' are not visible to the TPB (and therefore the ATO) through the registration process. Even if they are identified by the TPB, there are relatively few instances where civil penalties have been imposed on these operators.

6.40 The enhanced administrative sanctions regime partly addresses this issue:

6.40.1 Permanent disbarment from the tax profession and the resulting visibility to employers will remove a small number of the most egregious, de-registered practitioners from the profession. Currently a terminated practitioner's sanction is only visible on the TPB's Public Register for up to 12 months and they can only be prohibited from applying for registration for up to five years. This provides them with an opportunity to re-enter the profession in another capacity without a registered tax practitioner knowing, or even as a registered tax practitioner again. Permanent disbarment would preclude a practitioner from working in the profession entirely — this would include performing a specific function in a tax services business, including being a senior manager or controller of a tax services business; and/or performing any function in a tax services business. Details of permanent disbarments would remain visible on the TPB Register.

6.40.2 A register of identified unregistered practitioners would provide further transparency to both prospective employers and clients. Currently there is no way for the public to know if someone has engaged in unregistered practice. Publishing known unregistered practitioners provides transparency to other practitioners, firms and the community, with a view to

86 At Appendix C to the Discussion paper

limiting their prevalence. Further, as part of a practitioner's eligibility for registration, engaging someone from this register would require approval from the TPB. This would allow the TPB to consider, among other things, whether the person on this register is knowingly non-compliant with the TASA.

6.40.3 Enforceable undertakings and even infringement notices would then be available to the TPB to utilise in instances where registered practitioners engage the services of these practitioners.[87] This is in addition to the TPB's current ability to terminate registration or apply to the Federal Court for the imposition of civil penalties.

6.41 The Review considers that the enhanced administrative sanction regime would be more effective if the TPB were empowered to impose certain sanctions directly on de-registered or unregistered practitioners (see Recommendation 6.1). For instance, where the TPB has identified that an unregistered or de-registered practitioner is inappropriately providing tax agent services, the TPB should be empowered to issue an infringement notice directly to that person. Alternatively, the TPB could require an enforceable undertaking from that practitioner to cease further practice.

6.42 The enhanced administrative sanctions seeks to mitigate the influence of controlling minds by dissuading registered practitioners from engaging the services of de-registered and certain unregistered practitioners, and allowing the TPB to impose sanctions either on non-compliant practitioners or directly on the controlling mind. However, sanctions alone are insufficient in addressing the issue; the TPB requires information to identify these controlling minds.

Firm governance

6.43 In order to assist the TPB in identifying unregistered and de-registered practitioners, the Review considers that registered tax practitioners should be required to provide details of certain engagements.

6.44 The Discussion Paper canvassed the idea of requiring firms, as part of their registration process, to provide details of their actual governance and control structures. Submissions received in response to the Discussion Paper highlighted both the burden this would place on practitioners and the limited utility of such information. Some submissions also highlighted that the TPB could then be collecting

87 Without TPB approval in instances of unregistered practitioners.

information they never use, and this information could be commercially sensitive.

6.45 As discussed in Chapter 4 and Recommendation 4.6, the Review recommends that as part of the registration process, the TPB will be provided with the discretion to consider certain associates as part of expanded eligibility requirements for registration.

6.46 The Review here recommends a more streamlined process where as part of a practitioner's obligation to notify the TPB of a change in circumstances,[88] a practitioner must notify the TPB when they engage an associate that meets the proposed definition discussed at paragraphs 4.41 to 4.50 or a person on the unregistered practitioner register.

6.47 Further, requiring applicants to meet TPB-endorsed governance standards as part of registration (see discussion at Chapter 4) would appear to remove the need for each firm to provide such control details.

6.48 Should the TPB discover that a registered practitioner has engaged such an associate and not notified the TPB of a change of circumstances, this would then be a breach of the TASA and expose the practitioner to disciplinary action.

Public visibility of sanctions

6.49 The Review recommends that the TASA be amended to enable the TPB to publish more detailed reasons for practitioner terminations on the TPB Register.

6.50 It is important to ensure that the details provided on any public register of identified unregistered practitioners clearly differentiate unregistered practitioners from registered and de-registered practitioners, and include a warning to consumers to avoid engaging the services of unregistered practitioners.

6.51 Submissions highlighted the importance of ensuring that it is clear from the Register whether a practitioner has had lower or more serious level sanctions imposed. The seriousness of the sanction should also inform the length of time the sanction remains published. The TPB should be provided with the discretion to determine this, subject to clear guidelines being created and published.

6.52 Administrative sanctions imposed with a view to encouraging a tax practitioner to re-engage should not appear on the public TPB Register. For instance, it may run counter to the intent of an infringement notice

88 Section 30-35 of the TASA.

system to publish the issuance of certain notices on the Register. However, repeated sanctions, sanctions for unregistered practice and more serious sanctions should be made publicly available. The TPB should be provided with the discretion as to what sanctions should be published on the Register.

Recommendation 6.3

The Review recommends that the *Tax Agent Services Regulations 2009* be amended to enable the TPB to publish more detailed reasons for tax practitioner sanctions, including terminations, on the TPB Register (which is publicly available). See also Recommendation 8.1.

Administrative penalties for advisers

6.53 A number of submissions received in response to the Discussion Paper, while supportive of addressing the conduct of egregious intermediaries, questioned the suitability of the administrative penalty regime as proposed. Primary concerns raised included the potential overlap in disciplinary responsibility between the TPB and ATO, having ATO regulate tax practitioners, the type of conduct or behaviour the penalty would apply to, the divergence from the existing Canadian “preparer penalty” and the existence of other powers to address the misconduct.

6.54 The Review considers that the current system is largely ineffective in addressing the behaviour of intermediaries, such as registered tax agents, unregistered preparers or advisors, who knowingly made false or misleading statements in the preparation of tax returns for taxpayers.

6.55 Further, the current tax system already empowers the Commissioner of Taxation to decide whether a tax practitioner, as an agent of the taxpayer, has demonstrated intentional disregard with respect to a tax law. The tax law, however, imposes any resulting penalty only on the taxpayer. The Review considers that there are often instances where it is more appropriate for the penalty to be imposed on the tax practitioner.

6.56 A number of the enhanced administrative sanctions detailed above target a middle-range of tax practitioner misconduct; conduct warranting more than a caution or further education, but falling short of suspension or termination of registration, or civil penalties. Ultimately these sanctions are recommended with a view of providing the TPB with tools to re-engage tax practitioners and encourage behavioural change.

6.57 However, unlike tax practitioners who exhibit carelessness or recklessness, there are high risk tax intermediaries who clearly operate outside the system, and their deliberate actions pose a real and current threat to the tax and superannuation system. These practitioners are breaking the tax law, for which the Commissioner of Taxation has the responsibility to administer.

6.58 The Review considers that it is the responsibility of the ATO to therefore address the actions of tax practitioners when they knowingly make false or misleading statements, in addition to the TPB taking appropriate action in addressing the risk to the profession.

6.58.1 As part of an improved relationship between the TPB and ATO, each case should be subject to joint analysis and a specific compliance plan. The plan should detail when the TPB and ATO will address misconduct independently and when they will collaborate. Often cases may involve collaboration: for instance, following the imposition of an administrative penalty the TPB may take action to terminate the practitioner’s registration.

6.59 The ATO has developed a new engagement and assurance model that categorises intermediaries and describes the type of experience they will receive based on the behaviours and choices they make. At the time of writing this report the ATO had identified around 200 highest risk agents representing around 500,000 taxpayers.[89]

6.60 Considering the above, the Review recommends the Government introduce an administrative penalty regime that targets particular intermediaries that demonstrate *intentional disregard* of the tax laws.

6.60.1 *Intentional disregard* would be where a person intentionally does something more than recklessly disregard or be indifferent to tax law. Actual knowledge of making a false statement would be required. An intermediary must understand the effect of relevant legislation and make a deliberate choice to ignore it. This would often involve dishonesty to separate this sort of behaviour from lack of reasonable care and recklessness.

6.60.2 Whether an intermediary’s disregard of a relevant law is intentional may be determined on the basis of direct evidence of the intermediary’s intention, but would more likely need to be inferred from the surrounding circumstances and conduct of the practitioner and the taxpayer. An intermediary would

89 According to ATO data.

not intentionally disregard a law unless it knows its obligations under the law and chooses to disregard them.

6.61 The recommended administrative penalty regime is intended to result in behavioural change by deterring those tax intermediaries who currently engage in risk taking, fraudulent and criminal behaviour. Further, it should contribute to improving the integrity of the self-assessment tax system that relies on intermediaries providing advice and preparing returns for taxpayers.

6.62 The regime would be aimed at protecting the large majority of honest agents as well as taxpayers who are trying to do the right thing. It would hold the small percentage of intermediaries that intentionally disregard the tax law accountable for their actions.

How the administrative penalty would work

6.63 The ATO already has the ability to determine that a person has demonstrated intentional disregard of the tax law in making a false or misleading statement to the Commissioner of Taxation.[90] Currently, however, the law imposes a penalty for that statement solely on the taxpayer, regardless of the involvement of the tax intermediary. Under the proposed administrative penalty regime, the ATO is still forming the same view. However, the law will allow for the penalty to be imposed on the party at fault.

6.64 For this reason, the Review considers that the ATO should administer the regime. Further, the relevant conduct demonstrates the tax practitioner is operating outside of the law and poses a threat to the integrity of the tax system.

6.65 The proposed penalty would only apply in instances of intentional disregard and would not apply to recklessness. Responsibility for tax practitioner conduct determined to be reckless or a lower standard would remain with the TPB.

6.66 For the purpose of this administrative penalty, 'tax practitioners' should be defined broadly to encompass a person who makes, or participates in in the making of a statement to the Commissioner of Taxation, on behalf of another person. This definition is based on the definition in the Canadian preparer penalty regime and seeks to ensure that the penalty cannot be avoided by failing to register, or not needing to register, with the TPB.

6.67 The administrative penalty would complement the expanded safe harbour regime discussed below, where taxpayers who do the right

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90 Division 284 of Schedule 1 to the TAA 1953.

thing and provide all necessary information to their agent can be shielded from liability to penalty. However, the Review considers these powers should operate independently as there is scope for the penalty to apply in circumstances where the taxpayer is not faultless. For example, even if the taxpayer did not provide all the necessary information, the actions of the tax practitioner could also be of a nature that still warrants a penalty. Any law design would need to ensure the penalty is appropriately apportioned between the practitioner and the taxpayer based on the behaviours exhibited by the two parties. This alleviates the prospect of a double penalty arising from this situation.

6.68 The Review is conscious that cases involving the potential intentional disregard by a tax practitioner will often involve complex facts. As such, it is important that the practitioner be afforded the opportunity to present these facts in disputing the penalty. The Review proposes that the administrative penalty framework would mandatorily involve an independent body or panel to review cases before an administrative penalty becomes due and payable. This may be an Independent Penalty Advisory Panel consisting of external industry members and ATO officers.

6.68.1 External members may include ex-federal court judges or key industry representatives that are in a position to provide impartial advice to case officers on whether a tax intermediary's behaviour ought to warrant an administration penalty under the new law. This will ensure that the ATO administration is considerate of the commercial realities of the professions and the challenges faced by practitioners in running a competitive business.

Onus and standard of proof

6.69 The Review envisages that the ATO would have the onus of proving the administrative penalty on review to a civil standard of proof.

Recommendation 6.4

The Review recommends that an administrative penalty regime, administered by the ATO, be introduced to impose penalties on tax practitioners who demonstrate an intentional disregard of the taxation laws in making, or being involved in making, a statement to the Commissioner of Taxation.

Interaction with safe harbour

6.70 The Review recommends expanding the safe harbour protection to instances of recklessness and intentional disregard to further protect taxpayers, with the trade-off of allowing it to collect penalties against those high risk tax intermediaries that break the tax law.

6.71 An expanded safe harbour protection better complements the broader sanctions and penalty regime proposed. It protects consumers of tax agent services regardless of the standard of behaviour of their agents on the basis that penalty should shift to the person who was at fault.

6.72 The Review considers that the expanded safe harbour protection should operate in parallel to the proposed sanctions and penalty regime. Extending safe harbour such that a penalty could only be imposed on a tax agent would create a situation where taxpayers were incentivised not to engage in, or take any responsibility for, the preparation of their returns. This runs counter to the objects of the self-assessment regime.

6.73 This approach accounts for situations where a taxpayer may not have provided all necessary information to their agent, but the agent's conduct remained so egregious as to still warrant a penalty.

6.74 Submissions highlighted the lack of awareness of the safe harbour protection, and the inherent reluctance of some practitioners in advising their clients of the protection. For this reason, the ATO should increase its efforts in publicising the protection. Further transparency on the safe harbour process and how the ATO makes referrals to the TPB in instances of safe harbour would also assist in clarifying the protection for taxpayers.

Safe harbour from failure to lodge penalties

6.75 The Review has not received substantive submissions regarding the safe harbour protection as it applies to failure to lodge penalties. However, the EM specifically referenced that the intended post-implementation review place emphasis on the operation of the 'safe harbour' from penalties in certain circumstances for *failing to lodge a return, notice, statement or other document in the approved form and on time*.[91]

6.76 As with the safe harbour from false and misleading statements, the safe harbour from failure to lodge penalties also does not apply where the tax agent demonstrated recklessness or intentional disregard with

[91] Paragraph 6.71 of the EM.

respect to the taxation laws. Similarly to the safe harbour protection for false or misleading statement penalties, one can envisage circumstances where a tax agent's conduct in failing to lodge a document on time would amount to recklessness or intentional disregard. For example, the tax agent could intentionally not lodge returns, even when they were asked to and were provided with all relevant information from the taxpayer.

6.77 The Review considers that the same rationale for extending the safe harbour for false or misleading statement penalties applies in considering whether to extend the safe harbour from failure to lodge penalties.

6.78 Where the ATO determines that a taxpayer is entitled to safe harbour from failure to lodge penalties, the ATO should refer the tax agent's conduct to the TPB for investigation.

Recommendation 6.5

The Review recommends the safe harbour protection as it applies both to false or misleading statement penalties and failure to lodge penalties, be extended to cover instances where the tax agent has demonstrated recklessness or intentional disregard with respect to a taxation law.

Interaction with the TPB — civil penalties and proposed administrative sanctions

6.79 This proposal provides a more efficient and potentially more effective means for the ATO to impose sanctions with a view to changing behaviour of a small group of high risk tax intermediaries. An administrative penalty allows the ATO to address misconduct in a timely manner that aligns with the extended safe harbour relief provided to taxpayers (discussed below). This avoids the current, convoluted and duplicative process where a taxpayer could sue their intermediary for negligence, and the intermediary could also face a civil penalty action brought by the TPB.

6.80 The proposal also provides low-cost, administrative pathways to deal with any subsequent dispute. The civil penalty regime requires an application to the Federal Court, which places an enormous cost and time burden on tax intermediaries as well as the TPB to dispute the claim. Interposing an independent review of the administrative penalty removes the court burden and avoids the situation of the intermediary simultaneously owing a debt that accumulates interest.

6.81 Where an administrative penalty is imposed, the legislation would 'turn off' the TPB's ability to make an application for a civil penalty for that same conduct. This is to avoid duplication of pecuniary penalties. However, the power would be retained to enable the TPB to take action against tax practitioner misconduct. For example, administrative penalties applied to a tax agent will need to be disclosed by the ATO to the TPB. The underlying conduct, leading to this administrative penalty, may raise a question about a practitioner's ongoing fitness and propriety to be registered. Further, the power would be available for the TPB to address reckless behaviour.

6.81.1 This mechanism is proposed on the basis that it is for the ATO to address this level of misconduct. However, there may be instances where, due to resourcing or the particular circumstances of a case (such as timing), it may be more appropriate for the TPB to undertake action to address the misconduct. The TPB and ATO should have a clear plan in place that sets out how this will be practically administered.

6.81.2 The recommended administrative penalty would be distinct from the current promotor penalty laws,[92] which are limited to the promotion of tax exploitation schemes.[93]

6.82 Many of the proposed administrative sanctions to be made available to the TPB, including infringement notices, QA audits and enforceable undertakings, operate both separately and in conjunction with the proposed administrative penalty. Primarily, these administrative sanctions provide a more nuanced and agile toolkit to the TPB to address conduct ranging from low to medium risk, with a view to encouraging the practitioner to provide their services in accordance with professional and ethical standards. However, the administrative sanctions such as termination of registration or the proposed permanent disbarment could be utilised by the TPB in conjunction with the administrative penalty where required.

6.83 The Review acknowledges that the detailed design of such an administrative penalty framework may pose constitutional law issues. Should these issues impede the ability to implement the proposed regime, consideration should be given to providing the ATO, rather than the TPB, with the responsibility under section 50-20 of the TASA to apply to the Federal Court for the imposition of a civil penalty for make a false or misleading statement for the reasons described above.

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92 Division 290 of Schedule 1 to the TAA.

93 The key elements of the promotor penalty laws are that an entity must not engage in prohibited conduct, and that the entity is not a promoter of a tax exploitation scheme.

7. TAX SERVICES AND FINANCIAL ADVICE

7.1 From 1 January 2016, following an 18 month transition, the TPB required entities that gave tax advice while giving financial product advice (as that term is defined in section 766B of the *Corporations Act 2001*) for a fee or reward to be registered as tax (financial) advisers (TFAs). Since March 2015 ASIC requires all natural persons who provide personal advice on investment products and life insurance to retail clients (financial advisers) to be registered on the Financial Advisers Register (FAR). Financial advisers, who are also TFAs have to register with both ASIC and the TPB, incurring registration[94] fees payable to two different government regulators.

7.2 TFAs are not permitted to make representations on behalf of their clients to the Commissioner of Taxation, including preparing or lodging tax returns or a statement in the nature of a return or represent their clients with the ATO. They also do not have access to the ATO's portal/online services unless they hold a registered tax or BAS agent number. While the provision of financial advice often also encapsulates providing tax advice, the level of tax advice provided by a TFA will inevitably differ from simple in some cases to significant or substantial in other cases.

7.3 While all financial advisers must be listed on the FAR, the legal obligation to register the financial adviser falls on the AFSL (Australian Financial Services Licensee) who authorises the financial adviser. The AFSL is also responsible for ensuring the financial adviser is adequately trained and competent. In addition, most of the conduct obligations in the *Corporations Act* fall on the AFSL, rather than the individual financial adviser. In effect the AFSL is responsible for those financial advisers it appoints to act under the AFSL. (However, some specific conduct obligations in Part 7.7A of the *Corporations Act 2001* fall on the individual adviser.)

7.4 The system used by the TPB is not quite the same because registration is an individual's responsibility which, in the case of a representative financial adviser, does not fall to their AFSL but rather to themselves. A tax practitioner must pay an application fee and the individual must go through an assessment process by the TPB. The eligibility assessment is performed by the regulator for tax practitioners whereas the AFSL undertakes their own assessment of the financial adviser.

94 The term used by ASIC for the payment of a fee for a financial adviser to be on the FAR is a fee for appointing.

7.5 Another regulatory layer was added when FASEA was established in April 2017. FASEA is responsible for setting education, training and ethical standards for financial advisers in Australia. The TPB performs a similar function for all tax agent services, BAS services and tax (financial) advice services. This creates a further regulatory overlap for TFAs, having to ensure they meet standards set by both the TPB and FASEA. However, it is important to note that where there is overlap, for example, in the education space, it will count towards both FASEA's requirements and TPB's requirements.

7.6 The Australian Financial Complaints Authority (AFCA), replacing the Financial Ombudsman Service, the Credits and Investments Ombudsman and the Superannuation Complaints Tribunal was created on 1 November 2018 and quickly become the main dispute resolution scheme for financial services in Australia. It not only provides a free complaint service, but the decisions of AFCA are binding on the AFSL and AFCA has the power to provide a wide range of remedies including monetary compensation where appropriate. In addition, AFCA can also, if it wishes name banks and insurers that are the subject of complaints.

7.7 In light of the above, while possible it is unlikely that financial advice clients would make a complaint with the TPB instead of AFCA. As such, is there a need to maintain this dual choice for financial advice clients? This is further examined below.

7.8 From 1 January 2020 all financial advisers (including TFAs) are required to comply with FASEA's Code of Ethics. The Code of Ethics outlines the ethical obligations financial advisers have to their clients. This Code is similar to the Code of Professional Conduct in the TASA — another duplication.

7.9 In the Final Report of the Financial Services Royal Commission, Commissioner Hayne considered the key features necessary in a *"new approach to discipline"*[95] as being:

> *First, each financial adviser should be individually registered.*
>
> *Second, only those who are registered should be permitted to give financial advice.*
>
> *Third, there should be a single, central disciplinary body with the power to impose disciplinary sanctions on financial advisers — the most serious sanction being cancellation of registration.*

[95] Above n 16https://financialservices.royalcommission.gov.au/Pages/default.aspx, p. 212.

> *Fourth, there should be a system of mandatory notifications, requiring AFSL holders to report particular information about the conduct of financial advisers to the disciplinary body.*
>
> *Fifth, there should be a system of voluntary notifications, enabling AFSL holders, industry associations and clients to report information about the conduct of financial advisers to the disciplinary body.*[96]

7.10 As Commissioner Hayne points out, there is currently no requirement for individual financial advisers to be registered with ASIC.[97] Recommendation 2.10 of the Financial Services Royal Commission Report addresses the points in [7.9] above including recommending individual registration with ASIC and a single, central disciplinary body.[98]

7.11 On 19 August 2019 the Government announced an "Implementation Roadmap"[99] setting out when the Commission's recommendations would be recommended. The intention for Recommendation 2.10 is that legislation creating the new disciplinary body will be introduced by the end of 2020.

7.12 Subsequently, on 11 October 2019 a further announcement was made by the Government that they would be accelerating the establishment of the new disciplinary body, looking to having it established by early 2021.

7.13 The Review's Discussion Paper set out six different options that could be adopted to help reduce the regulatory burden on TFAs, noting that this was not an exhaustive list. What is important is that whatever model is adopted, that it strikes an appropriate balance between regulation for tax and financial advice and reducing the regulatory duplication for TFAs.

7.14 The best model in the Review's opinion is one that is aligned with the recommendations made by Commissioner Hayne and also recognises that ASIC has the capability, expertise and capacity to effectively regulate financial advice and the TPB has the capability, expertise and capacity to effectively regulate the provision of tax advice.

7.15 That said, distinguishing between what is financial advice and what is tax advice can, at times be a difficult line to draw. Inherently most

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96 Ibid, p. 199 and repeated at p. 212.

97 Ibid p. 208.

98 Ibid p. 217.

99 "Restoring Trust in Australia's Financial System, Financial Services Royal Commission Implementation Roadmap, August 2019.

financial advice contains an element of tax advice; depending on the nature of the advice, it can be difficult to do one without the other.

7.16 With the implementation of the Hayne recommendations already underway it is the Review's opinion that any outcome should align not only with the intent of the Final Report of the Financial Services Royal Commission Recommendations but also with the timing of implementation of these Recommendations.

Recommended solution

7.17 The Review's Discussion Paper proposed (as Option 4) the following:

> *ASIC and the TPB operate as co-regulators of financial advisers and the TPB is responsible for the imposition of sanctions for tax related matter.*
>
> *TPB registration as a TFA automatically attaches to all financial advisers, who can then 'opt out' of the TPB regime if they do not provide tax advice.*

7.18 While many of the submissions did not nominate a preferred option (out of the six options outlined in the Discussion Paper), of those that did Option 4 was the most popular. This is also the Review's preferred model, subject to some modification. The Review's Discussion Paper was released prior to the Government's announcement of an "Implementation Roadmap". Some modification is now required to ensure that implementation of the review's recommendations can occur as seamlessly as possible in alignment with the "Implementation Roadmap".

7.19 With legislation for implementation of a new, central disciplinary body to be introduced by December 2020[100], and the new body expected to be established by early 2021, the review suggests that the status quo remain until then but that the following changes occur at the same time as the disciplinary body is created.

7.20 The TPB and ASIC, in consultation with Treasury need to develop a registration system that allows a financial adviser to only have to register once. Such a system will need to be implemented in accordance with Recommendation 2.10 of the Financial Services Royal Commission Report so that it is individuals who are registering, not just AFSLs. It is noted that this new body is also expected to be responsible for registration[101].

[100] Ibid p. 9.
[101] Ibid p. 6.

7.21 Consultation should also occur with ASIC, TPB, FASEA and Treasury so that a process is developed that continues to ensure that only appropriately qualified financial advisers can give tax advice and that AFS licensees have the option of not authorising a financial adviser to give tax (financial) advice on their behalf even though the adviser has completed the FASEA education requirements.[102] This would be consistent with the approach for product authorisations that currently exists in the financial services licensing regime.

7.22 An important feature that will need to be incorporated into the new disciplinary body is how it considers sanctions for misconduct of financial advisers[103] when the misconduct is attributable to poor tax advice. The Review recommends that the new disciplinary body when it sits to hear matters involving the provision of tax advice is comprised of a majority of panel members who have taxation expertise. Ideally those members could be TPB Board members, otherwise leading tax practitioners or other well respected members of the tax profession.

7.23 This model will:

7.23.1 Remove the need to register twice. A commensurate drop in fees should follow.

7.23.2 Ensure disciplinary action involving the provision of tax advice is decided by appropriately qualified experts from the tax profession.

7.23.3 Require TFAs to have to abide by only one code, namely the Code of Ethics set by FASEA, instead of having to also comply with the Code of Professional Conduct in the TASA.

7.24 A final point, which flows from implementation of such a model, is that in addition to reducing the regulatory overlap that currently exists it will also have the indirect benefit of freeing up resources within the TPB that are currently being used for the administration of a TFAs. The TPB could devote such resources to other activities such as focusing on the compliance of tax agents and BAS agents with their obligations under the TASA.

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102 This assumes the current processes for registering financial advisers with ASIC remains the same. These processes may change as the Financial Services Royal Commission Recommendations are implemented.

103 The term tax (financial) advisers should no longer be necessary once this new regime is implemented. All advisers providing financial advice will simply be financial advisers.

Recommendation 7.1

The Review recommends, in alignment with implementing Recommendation 2.10 of the Final Report of the Financial Services Royal Commission, a new model be developed for regulating tax (financial) advisers in consultation with ASIC, FASEA, the TPB and Treasury. This new model should incorporate the following features:

a) single point of registration for individuals;

b) requirement to abide by only the one code of conduct; and

c) any disciplinary action involving the provision of tax advice is decided by experts from the tax profession.

Until the new model is developed the status quo should be retained.

Former accountants' exemption

7.25 The Review's Discussion paper also raised the suggestion at Option 7 of restoring the accountants' exemption that previously existed and allowed accountants to provide basic self-managed super fund (SMSF) advice and services without having to operate in the AFSL environment.

7.26 Up until 30 June 2016, accountants were able to provide a range of services to SMSFs under the accountants' exemption in *Regulation 7.1.29A of the Corporations Regulations 2001.* The exemption allowed accountants to provide advice on the establishment and winding up of SMSFs without needing to hold an AFSL. As part of the Future of Financial Advice (FOFA) reforms the Government removed the accountants' exemption and since 1 July 2016 accountants have been subject to much stricter rules relating to the provision of financial advice, including in particular not being able to recommend the establishment of an SMSF unless they held an AFSL.

7.27 Accountants are also unable to advise what contribution limits apply to their clients — with respect to both concessional and non-concessional contributions. Importantly, both prior to the removal of the accountants' exemption and after, accountants have not been able to provide investment advice. This is solely within the province of the financial planner/adviser.

7.28 The policy objectives of FOFA were to improve the trust and confidence of Australian retail investors in the financial services sector and ensure the availability, accessibility and affordability of high quality financial advice[104]. Many of the submissions were of the view

[104] Treasury website Future of Financial Advice.

that these objectives had not been met, stating that it placed accountants in an impractical situation where, as trusted advisers, they were expected by their clients to be able to provide advice relating to SMSFs but could not unless they held an AFSL.

7.29 Further to this point, comments have recently been made by tax practitioners at a Tax Forum that advice on establishing an SMSF is advice concerning a structure in the same vein as advice on establishing a company or trust. At this point no financial product advice is being provided. Clients may be confused as to why their accountant can give advice on all business and investment structures but not an SMSF.

7.30 It should be noted though that it is possible for an accountant to hold a limited AFSL that will allow the provision of some advice relating to superannuation[105]. Many would agree though that this is difficult to understand[106] and remains impractical. Some submissions have advised it is not easy to obtain a limited licence.

7.31 The point should be made though that whether an accountant wishes to obtain an AFSL that will allow the provision of some advice relating to superannuation, or wants to be able to provide broader financial services by being covered by a full AFSL; either way the accountant will have to incur additional fees in addition to the fees incurred by registering with the TPB as a registered tax agent.

7.32 If, as the Review recommends, the regulatory burden on TFAs is reduced, it is reasonable that the corresponding regulatory burden on accountants is also reduced.

7.33 Some submissions have suggested that what is required is a thorough review of the accountants' exemption before considering whether it should be re-introduced. There is some substance in this when it is borne in mind what factors need to be taken into account:

7.33.1 FOFA reforms in 2016 removing the exemption;

7.33.2 the complexity of the limited licensing regime since established by ASIC that authorises the provision of some financial services;

7.33.3 how the exemption impacts upon professional indemnity insurance;

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105 ASIC Information Notes 227, 228 and 229 explain how limited AFS licences work.

106 ASIC Information Note 216 provides detailed guidance as to what information accountants can and cannot provide as regards SMSFs.

7.33.4 implementation of the recommendations arising from the Financial Services Royal Commission;

7.33.5 the education and qualification requirements for providing advice in relation to SMSFs; and

7.33.6 ensuring there is an appropriate level of consumer protection without the current high regulatory costs and burden.

7.34 In addition to the above it is important to note the observations by Commissioner Hayne in his Final Report that:

> *" … the financial services industry is itself complicated … much of the complication comes from piling exception upon exception, from carving out special rules for special interests. And, in almost every case, these special rules qualify the application of a more general principle to entities or transactions that are not different in any material way from those to which the general rule is applied.*
>
> *… it is time to start reducing the number and the area of operation of special rules, exceptions and carve outs. Reducing their number and their area of operation is itself a large step towards simplification. Not only that, it leaves less room for 'gaming' the system by forcing events or transactions into exceptional boxes not intended to contain them."*[107]

7.35 The Review held targeted consultations to understand these (and other) issues further. The Review understands the complexity and thanks stakeholders for their engagement and considers it best to move to a further review on this particular issue, subject to Government's agreement.

Recommendation 7.2

Having recommended the regulatory burden on tax (financial) advisers is to be reduced, the Review believes it is reasonable that a similar level playing field should be considered for accountants. The Review therefore recommends the Government initiate a specific review of what advice accountants can and cannot give in respect of superannuation and which accountants that might apply to. Such a review could perhaps be undertaken by the Productivity Commission.

107 Above n 16, pp. 16 — 17.

8. OTHER ISSUES

Community awareness

8.1 The Review's Discussion Paper raised as an issue whether there was sufficient public visibility of the TPB. Submissions were generally of the view that this could be improved.

8.2 As was stated in the Discussion Paper (and above at paragraph 6.9), the community relies heavily on the services of tax professionals, with approximately 70 per cent of individuals and over 90 per cent of small businesses choosing to use a tax agent to help them perform some or all their tax functions. This reflects a high degree of trust within the community of the tax profession. However, while reliant and trusting of the tax profession, consumers of tax services are largely unaware of their rights when using a registered tax professional or the risks associated with using an unregistered tax professional.

8.3 Given that the TPB is a small organisation with only 133 staff it is not surprising that there is a lack of awareness of its existence. Clearly having greater visibility would assist consumers when they are dissatisfied with the service received from their tax practitioner.

Public register

8.4 The TPB Register is a public register containing the details of registered and deregistered tax practitioners. One of the TPB's primary tools in protecting consumers of tax agent services is by publishing information on the TPB's Register.

8.5 Currently, the TPB Register includes details on the tax practitioner's registration status, including periods of effect and reasons for sanctions, disqualification and termination. The reasons currently included on the Register are however fairly general in nature. For example:

Reason: Individual no longer meets registration requirements.

No explanation is provided as to why the individual does not meet the registration requirements.

8.6 It would be beneficial for consumers of tax agent services if the TPB Register provided additional information on registered and unregistered tax practitioners. This could include publishing a wider range of decisions and outcomes on the TPB Register, including more details of reasons for sanctions and termination, publication of cease and desist notices to unregistered tax practitioners, and publication of details relating to rejections of renewal applications. Additionally, the Review suggests removing the time limits on how long certain information appears on the Register.

8.7 Submissions were generally supportive of the concept of including details of tax practitioners on the Modernising Business register (MBR), though the Law Council of Australia's submission did express concern that the MBR was being administered by the ATO which is, in the view of the submission, "inconsistent with maintaining the independence of the ATO from the TPB".

Recommendation 8.1

The Review recommends that:

a) Details of tax practitioners that are currently included on the TPB Register should be expanded. This could include publishing a wider range of information, decisions and outcomes on the TPB Register.

b) A register of unregistered tax practitioners be made available. This register would include those entities that receive a notice by the TPB to 'cease and desist' providing tax agent services for a fee and publication of details relating to renewal application rejections (in certain circumstances, such as not being fit and proper).

c) The time limits on how long certain information appears on the Register be removed.

Recommendation 8.2

The Review recommends that details of tax practitioners that are included on the TPB Register should ultimately be included on the Modernising Business Register.

APPENDIX A: Terms of Reference

This review is into the effectiveness of the Tax Practitioners Board and the operation of the *Tax Agent Services Act 2009* (the Act) and the *Tax Agent Services Regulations 2009*, which establish the regulatory regime for tax practitioners in Australia.

The review will consider whether the legislative framework for the Tax Practitioners Board delivers on its policy objectives to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct. Further, that this framework does not impair the operation of the Tax Practitioners Board to deliver against their objectives, being:

a) to maintain, protect and enhance the integrity of the registered tax practitioner profession;
b) to promote the Tax Practitioners Board as an independent, efficient and effective regulator; and
c) to protect all consumers of tax practitioner services.

The review will consider the current and future suitability and effectiveness of the legislative and governance framework.

The review will be informed by consultation on substantive issues identified before recommendations are made to Government by 31 October 2019. Submissions to the review will be made public unless otherwise requested.

In particular, the review should:

1. Examine if the legislative framework is operating as intended and continues to be fit for purpose and meet the objectives of the Act.
2. Examine if the governance framework is operating as intended and continues to be fit for purpose.
3. Consider the appropriateness of the Tax Practitioners Board's governance arrangements.
4. Consider whether the tax agent services legislation supports the Tax Practitioners Board in responding to known and emerging issues.
5. Examine whether the powers and the functions of the Tax Practitioners Board are sufficient to enable the objects of the legislative framework to be met.

6. Consider any other matters that may enhance the regulatory environment that tax practitioners operate under, including the interaction with the regulation of relevant related professional activities.

Some issues may be identified that fall outside the scope of the review of the legislative framework. The government should be advised of these matters and recommend whether further examination should be undertaken.

APPENDIX B: Advice provided by 'The Ethics Centre'

In a democratic polity, like Australia, the taxation system is the practical means by which citizens fund the provision of public goods by their agent, the elected government of the day.

The system — as a whole — encompasses those who levy taxes (the Parliament), those who collect taxes (the Australian Taxation Office), those who pay taxes and those who mediate the relationship between those who pay and those who collect tax.

The Tax Practitioners Board (TPB) is responsible for regulating the conduct of the latter group; those who mediate the relationship between those paying and those collecting taxation. As such, the TPB forms part of the taxation system as a whole — standing alongside other elements of the system, like the ATO.

The taxation system is only efficient and effective if it is trusted by all concerned to serve the public interest through means that are lawful, fair and in accordance with the highest standards of integrity.

Tax practitioners play a vital role in ensuring that the system as a whole is efficient and effective. Thus the overarching purpose of the TPB is to ensure that tax practitioners operate with integrity. However, it is equally important that tax practitioners have confidence in the integrity of the system as it applies to them — especially as it has a bearing upon their conduct.

The TPB is charged with providing *independent* oversight of tax practitioners. When understood in the larger context outlined above, it is in the public interest that the TPB be (and be seen to be) independent as this is one of the preconditions for tax practitioners voluntarily submitting to its authority — rather than merely complying as a matter of necessity. Voluntary commitment rather than mere compliance is preferable because it enhances both efficiency and effectiveness by reducing the 'deadweight' costs of formal regulation and compliance. That is, it is better for all if people choose to do what is right rather than being forced to do so.

So, if independence is key to the TPB fulfilling its purpose, how might that be assured to a degree sufficient to enjoy the confidence of tax practitioners and the wider community? In particular, to what extent can this outcome be achieved even the connection between the TPB and ATO within the design of the taxation system as a whole?

First, the Board must itself be entirely independent. It must have authority to decide all matters and do all things that fall within the scope of the TPB's remit. Ideally, it should control its own budget — once allocated. It should have the formal power of appointment of its executive and staff who should work exclusively under its direction.

Second, any staff employed by the TPB (whether directly or by secondment) must be relieved formally of any residual obligation to any other organisation. That is, the executive and staff of the TPB should formally be accountable to the Board and no other party. This accountability should be acknowledged and approved by any source of secondees, such as the Commissioner of Taxation. While the Commissioner might select and recommend a secondee, the ultimate right of acceptance must lie with the TPB.

Third, those working at the TPB must be inducted into its work by means that reinforce their *professional* obligation to serve the public interest by acting in a manner that expresses, in practical form, the independent character of the TPB's operations — including its exercise of judgement.

These are the minimum requirements that need to be met in order to merit the confidence of those subject to the TPB's authority. Equally, if met, these conditions set a foundation that a reasonable person should accept as evidence of independence of a kind and quality that should be relied on.

29 June 2019

APPENDIX C: List of submissions

Association of Accounting Technicians

Association of Financial Advisers

Australian Bookkeepers Association

Australian Business Software Industry Association

Australian Institute of Conveyancers (NSW Division)

Australian Institute of Conveyancers (VIC Div)

Australian Securities and Investments Commission

Australian Services Union

Australian Small Business and Family Enterprise Ombudsman

Australian Taxation Office

BDO

Chartered Accountants Australia and New Zealand and CPA Australia — Joint Submission (2)

Community and Public Sector Union

Curtin University

Financial Planning Association of Australia

Financial Services Council

Inspector-General and Taxation Ombudsman

Institute of Public Accountants

IPA Eastern Discussion Group

KDA Group Pty Ltd

KPMG

Law Council of Australia (2)

Law Society of New South Wales

Morgan, Mr John

National Tax & Accountants Association

Nexia Canberra

Olesen, Mr Neil

Professional Standards Councils

Queensland Law Society

SMSF Association

South African Institute of Chartered Accountants

Tax & Super Australia

Tax Practitioners Board

The Institute of Certified Bookkeepers

The Institute of Chartered Accountants in England and Wales

The Tax Institute

University of Melbourne

UNSW Tax Clinic

APPENDIX D: Explanatory Memorandum extract

Extract from Explanatory Memorandum circulated with *Tax Agent Services Bill 2008*, paragraphs 5.28 to 5.32, pages 96-97.

> 5.28 The Board has responsibility for regulating the provision of tax agent services in all Australian states and territories by reference to the Code and the system for the registration of tax agents and BAS agents and conduct of investigations set out in the Bill.
>
> 5.29 The Board is a statutory authority that falls within the portfolio responsibilities of the Treasurer. It is not itself a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA Act) and is not a body regulated by the *Commonwealth Authorities and Companies Act 1997* (ie, the Board is neither a prescribed FMA Act agency nor a Commonwealth Authorities and Companies Act body) but is formally part of the ATO, a prescribed FMA Act agency.
>
> 5.30 To ensure that the Board has the requisite degree of independence from the ATO, it will be funded via a Special Account (under section 20 of the FMA Act) through the annual appropriation to the ATO. As such, the Board's annual appropriation will be quarantined within the ATO's funding. The Commissioner of Taxation (Commissioner) will provide resources to the Board within the limits of the Special Account.
>
> 5.31 In this way the Board will operate with decision-making independence from the ATO, but will rely on the ATO for administrative support. The Board will have available to it the resources necessary to perform its functions up to the amount of its Budget as determined by the Finance Minister. The exact nature of the service relationship and arrangements between the Board and the ATO will be determined through agreements between the two parties. Such agreements are likely to cover a number of issues including resourcing, technical support and legal support.
>
> 5.32 In the establishment phase, it is efficient for the Board to sit within the ATO, due to the administrative obligations that would otherwise apply to it as a separate agency and because the ATO provides the most appropriate functional fit for the Board from among existing prescribed FMA Act agencies.

APPENDIX E: PGPA RULE EXCERPTS

Excerpt from PGPA Rule Schedule 1 — Listed Entities

Guide to this schedule

The purpose of this Schedule is to prescribe certain bodies, persons, groups of persons or organisations to be listed entities. It is also to give each of those entities a name, to specify who the accountable authority and officials of the entity are, and to set out what the purposes of the entity include.

Other bodies, persons, groups of persons or organisations that are not prescribed by this Schedule may be a listed entity because they are prescribed by an Act to be a listed entity.

This Schedule is made for the definition of *listed entity* in section 8 of the Act, for item 3 of the table in subsection 12(2) of the Act and for paragraph 103(e) of the Act.

7 AUSTRALIAN TAXATION OFFICE

For the purposes of the finance law:

a) the following combination of bodies and persons is a listed entity:

i) the Commissioner of Taxation;

ii) the Tax Practitioners Board;

iii) the Australian Charities and Not-for-profits Commission (the ***ACNC***);

iv) the Australian Charities and Not-for-profits Commission Advisory Board (the ***ACNC Advisory Board***); and

b) the listed entity is to be known as the Australian Taxation Office; and

c) the Commissioner of Taxation is the accountable authority of the listed entity; and

d) the following persons are officials of the listed entity:

i) the Commissioner of Taxation;

ii) the Second Commissioners of Taxation;

iii) the staff assisting the Commissioner of Taxation referred to in section 4A of the *Taxation Administration Act 1953*;

iv) the members of the Tax Practitioners Board;

v) APS employees whose services are made available to the Tax Practitioners Board under section 60-80 of the *Tax Agent Services Act 2009*; vi) the Commissioner of the ACNC; vii) the staff assisting the Commissioner of the ACNC referred to in section 120-5 of the *Australian Charities and Not-for-profits*

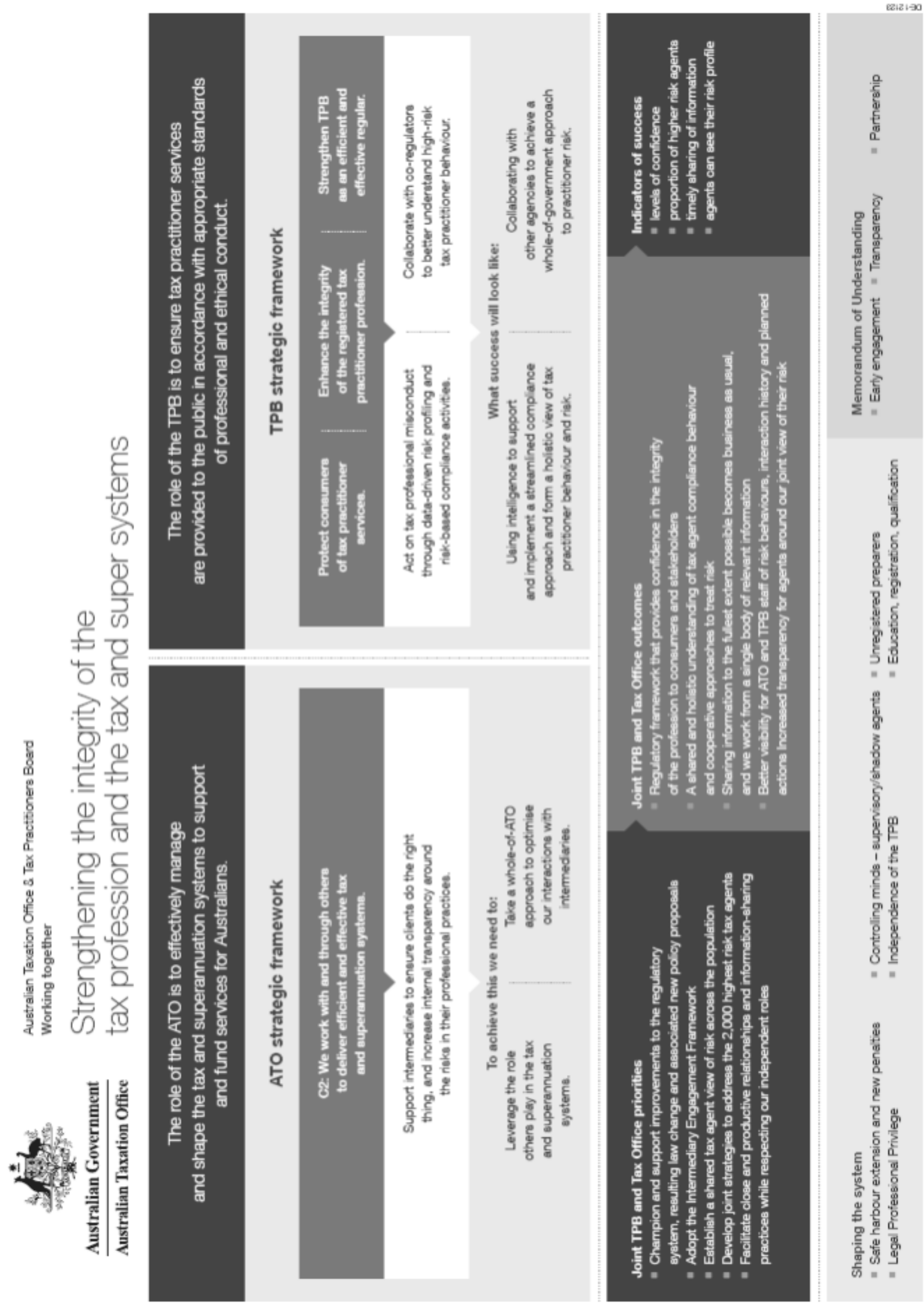
ATO	The TPB can disclose official information to the Commissioner of Taxation if it is for the purpose of administering a taxation law[108]. When the TPB makes a decision about an application for registration or renewal as a tax agent, BAS agent or tax (financial) adviser, the TPB must notify the ATO of its decision.[109] If the TPB conducts a formal investigation, against any tax practitioner, and makes a decision that there has or has not been a breach, the TPB must notify the ATO of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding. [110]
ASIC	The TPB can disclose official information to ASIC if it is for the purpose of ASIC performing any of its functions or exercising any of its powers.[111] When the TPB makes a decision about an application for registration or renewal as a tax (financial) adviser, the TPB must notify ASIC of its decision.[112] If the TPB conducts a formal investigation, against a tax (financial) adviser or a tax agent in relation to providing a tax (financial) advice service, and makes a decision that there has or has not been a breach, the TPB must notify the ASIC of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding. [113]
Code Monitoring Bodies	The TPB can disclose official information to a monitoring body for a compliance scheme if it is for the purpose of the

108 See subsection 70-40(3) of the TASA.
109 See paragraph 20-30(2)(a) of the TASA.
110 See paragraphs 60-125(8)(c) and (d) of the TASA.
111 See subsection 70-40(3A) of the TASA.
112 See paragraph 20-30(2)(b) of the TASA.
113 See paragraphs 60-125(8)(c) and (d) of the TASA.

	monitoring body monitoring or enforcing compliance with the Code of Ethics under the scheme.[114] If the TPB conducts a formal investigation, against any tax practitioner that is a person covered by a compliance scheme who provides a tax (financial) advice service, and makes a decision that there has or has not been a breach, the TPB must notify the relevant code monitoring body of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding. [115]
Inspector-General of Taxation and Taxation Ombudsman	The TPB can disclose official information to the Inspector-General of Taxation and if it is for the purpose of investigating or reporting under, or otherwise administering: (a) the *Inspector-General of Taxation Act 2003*; or (b) provisions of the *Ombudsman Act 1976*, to the extent that they are applied by the *Inspector-General of Taxation Act 2003*.[116]
Authorised law enforcement agencies	The TPB can disclose official information to an authorised law enforcement agency if: a) the record is made for, or the disclosure is to, an authorised law enforcement agency officer; a b) the record or disclosure is for the purpose of: i) investigating a *serious offence; or ii) enforcing a law, the contravention of which is a serious offence; or iii) the making, or proposed or possible making, of a *proceeds of crime order.[117]
Recognised professional associations	If the TPB conducts a formal investigation, against a member of a recognised professional association, and makes a decision that there has or has not been a breach, the TPB must notify the relevant recognised professional association of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding. [118]

114 See subsection 70-40(3AA) of the TASA.
115 See paragraphs 60-125(8)(c) and (d) of the TASA.
116 See subsection 70-40(3B) of the TASA.
117 See subsection 70-40(4) of the TASA.
118 See paragraphs 60-125(8)(c) and (d) of the TASA.

APPENDIX F: INTEGRATED PLAN



APPENDIX G: Information sharing

Table 4: sharing of information and information requests under the *TASA*

Organisation	Role
ATO	The TPB can disclose official information to the Commissioner of Taxation if it is for the purpose of administering a taxation law.[119] When the TPB makes a decision about an application for registration or renewal as a tax agent, BAS agent or tax (financial) adviser, the TPB must notify the ATO of its decision.[120] If the TPB conducts a formal investigation, against any tax practitioner, and makes a decision that there has or has not been a breach, the TPB must notify the ATO of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding. [121]
ASIC	The TPB can disclose official information to ASIC if it is for the purpose of ASIC performing any of its functions or exercising any of its powers.[122] When the TPB makes a decision about an application for registration or renewal as a tax (financial) adviser, the TPB must notify ASIC of its decision.[123] If the TPB conducts a formal investigation, against a tax (financial) adviser or a tax agent in relation to providing a tax (financial) advice service, and makes a decision that there has or has not been a breach, the TPB must notify the ASIC of the TPB's decision or finding, including

119 See subsection 70-40(3) of the *TASA*
120 See paragraph 20-30(2)(a) of the *TASA*
121 See paragraphs 60-125(8)(c) and (d) of the *TASA*
122 See subsection 70-40(3A) of the *TASA*
123 See paragraph 20-30(2)(b) of the *TASA*

Organisation	Role
	reasons, within 30 days of making the decision or funding.[124]
Code Monitoring Bodies	The TPB can disclose official information to a monitoring body for a compliance scheme if it is for the purpose of the monitoring body monitoring or enforcing compliance with the Code of Ethics under the scheme.[125] If the TPB conducts a formal investigation, against any tax practitioner that is a person covered by a compliance scheme who provides a tax (financial) advice service, and makes a decision that there has or has not been a breach, the TPB must notify the relevant code monitoring body of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding.[126]
Inspector-General of Taxation and Taxation Ombudsman	The TPB can disclose official information to the Inspector-General of Taxation and if it is for the purpose of investigating or reporting under, or otherwise administering: a) the *Inspector-General of Taxation Act 2003*; or b) provisions of the *Ombudsman Act 1976*, to the extent that they are applied by the Inspector-*General of Taxation Act 2003*.[127]
Authorised law enforcement agencies	The TPB can disclose official information to an authorised law enforcement agency if: a) the record is made for, or the disclosure is to, an authorised law enforcement agency officer; a b) the record or disclosure is for the purpose of: i) investigating a *serious offence; or ii) enforcing a law, the contravention of which is a serious offence; or

124 See paragraphs 60-125(8)(c) and (d) of the *TASA*
125 See subsection 70-40(3AA) of the *TASA*
126 See paragraphs 60-125(8)(c) and (d) of the *TASA*
127 See subsection 70-40(3B) of the *TASA*

Organisation	**Role**
	iii) the making, or proposed or possible making, of a *proceeds of crime order.[128]
Recognised professional associations	If the TPB conducts a formal investigation, against a member of a recognised professional association, and makes a decision that there has or has not been a breach, the TPB must notify the relevant recognised professional association of the TPB's decision or finding, including reasons, within 30 days of making the decision or funding.[129]

128 See subsection 70-40(4) of the *TASA*.

129 See paragraphs 60-125(8)(c) and (d) of the *TASA*

APPENDIX H: Fit and proper person comparisons

Table 5: The fit and proper person criteria for APRA and ASIC

	Industry body	Criteria
1.	Australian Prudential Regulation Authority	Prudential Standard CPS 520 is made under the following provisions: 43. section 11AF of the *Banking Act 1959*; 44. section 32 of the *Insurance Act 1973*; 45. section 230A of the *Life Insurance Act 1995*; and 46. section 92 of the *Private Health Insurance (Prudential Supervision Act) 2015*. The above provisions provide the authority for APRA to determine prudential standards. None of the Acts define the phrase "fit and proper" but rather refer to it in the context of the criteria set out in the prudential standards set by APRA. In particular, **Prudential Standard CPS 520 *Fit and proper*** provides at **paragraph 30** that for the purposes of the Prudential Acts and for the purposes of determining whether a person is fit and proper to hold a responsible person position, the criteria are whether: 47. it would be prudent for an APRA-regulated institution to conclude that **the person possesses the competence, character, diligence, honesty, integrity and judgement to perform properly the duties of the responsible person position**; 48. the person is not disqualified under an applicable Prudential Act from holding the position; 49. the person either: a. **has no conflict of interest in performing the duties** of the responsible person position; or b. **if the person has a conflict of interest**, it would be prudent for an APRA-regulated institution to conclude that the **conflict will not create a material risk that the person will fail to perform properly the duties of the position**; and

		50. for a senior manager of a corporate agent of a general insurer, the person is ordinarily resident in Australia.
2.	Australian Securities and Investments Commission	ASIC grants licenses to engage in credit activities in accordance with the *National Consumer Credit Protection Act 2009*. In particular, section 37 states that ASIC must grant a person (other than an ADI) a license if (and must not grant a person a license unless), among other things, ASIC has no reason to believe that the person is not a **fit and proper person** to engage in credit activities (see paragraph 37(1)(c)). The phrase "fit and proper" is not defined in the *National Consumer Credit Protection Act 2009*. ASIC's fit and proper requirements are set out in **Regulatory Guide 204 "Applying for and varying a credit licence"**. Chapter B1 of Regulatory Guide 204 is of relevance. It states that to engage in credit activities, you must be a fit and proper person. In particular, **RG 204.177** defines a fit and proper person to engage in credit activities to mean that the person: 51. is **competent to operate a credit business** (as demonstrated by the **person's knowledge, skills and experience**); 52. has the attributes of **good character, diligence, honesty, integrity and judgement**; 53. it not disqualified by law from performing their role in the credit business; and 54. either has **no conflict of interest** in performing their role in the credit business, or **any conflict that exists will not create a material risk that the person will fail to properly perform their role** in the credit business. ASIC notes at RG 204.177 that the criteria for determining whether a person is fit and proper are consistent with the criteria set out for responsible persons of ADI's in Prudential Standard CPS 520 *Fit and Proper*. This is also noted in the *National Consumer Credit Protection Regulations 2010* (see in particular Regulation 14).

APPENDIX I: ASIC Act provision on LPP

Section 70 Powers of Court where non-compliance with Part

1) This section applies where ASIC is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under this Part (other than Division 8).

2) ASIC may by writing certify the failure to the Court.

3) If ASIC does so, the Court may inquire into the case and may order the person to comply with the requirement as specified in the order.

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