



2 September 2019

Mr Nick Westerink
Individuals and Indirect Tax Division
The Treasury

Email: TPBreview@treasury.gov.au

Dear Nick,

Re: Review of Tax Practitioners Board – Discussion Paper July 2019

The National Tax and Accountants' Association ('NTAA') appreciates the opportunity to be part of the consultation process and to provide input into the review of the Tax Practitioners Board ('TPB').

The NTAA is a national member-based not-for-profit association, with over 10,000 member firms, representing a considerable proportion of the registered tax agent population.

Since 1992, the NTAA has been dedicated to helping and providing support to tax agents, primarily through the delivery of tax-based seminars and its National Hotline Service. Overall, the NTAA's aim is to educate its tax agent members in a way that enables them to provide high quality and practical tax advice to their clients, whilst complying with their obligations under the Tax Agent Services Act 2009 ('TASA'), including the Professional Code of Conduct ('the Code').

The NTAA also represents the interests of the broader tax community. In particular, the NTAA constantly participates in several ATO forums and consultative groups, makes submissions on tax policy-related issues, and works with tax agents to resolve any disputes with the ATO.

NTAA's comments on the Review of the TPB Discussion Paper July 2019

The NTAA's comments regarding the TPB Discussion Paper focus on a number of key areas addressed in the Discussion Paper. These comments are summarised below, in respect of each of these key TPB review areas.

1. Chapter 3 – TPB governance – Independence of the TPB from the ATO

Currently, the TPB's funding is a subset of the ATO's budget, and the TPB's Chair is not the accountable authority under the *Public Governance, Performance and Accountability Act 2013* ('PGPA Act'). Further, TPB staff are co-located with ATO staff within the ATO. This contributes to the perception that the TPB is not appropriately independent from the ATO, notwithstanding the TPB may operate in a completely independent manner at a practical level.

On this basis, the NTAA is supportive of any changes that further strengthen the TPB being (and being seen to be) independent from the ATO. In this regard, of the three options set out in the TPB Discussion Paper, the NTAA favours the **third option** (i.e., at paragraph 3.22.3). Under this option, the Chair of the TPB would be established as the relevant accountable authority responsible for its own budget and reporting, and the TPB would continue to be located within the ATO (as opposed to relocating to its own premises) and operate under a "shared services arrangement" with the ATO. This (third) option is preferred by the NTAA for the following reasons:

- (a) This option should still achieve the requisite level of TPB independence from the ATO (in particular, the NTAA believes that being located within the ATO should **not** actually impact on the TPB's ability to carry out its functions independently from the ATO).

- (b) Operating within the ATO and under a “shared services arrangement” achieves efficiencies. In particular, it allows both agencies to work closely and to consult effectively, and it allows the TPB to obtain staff who have the necessary tax technical skills required to undertake its regulatory function.
- (c) Having the TPB located within the ATO should also achieve significant savings in infrastructure costs. The NTAA believes that these savings would outweigh any perceived independence benefits of the TPB operating from its own premises and employing its own staff.

These cost savings are extremely important in minimising the costs associated with being a registered tax agent. In other words, any dissipation of these cost savings (by having the TPB located in its own premises, etc.) will generate pressure to have additional costs recouped from tax agents (e.g., through increased registration costs), which is an outcome the NTAA sees as both unnecessary and undesirable.

- (d) The NTAA also believes that there is no merit to the argument that the TPB should operate from its own premises and employ its own staff on the basis that this is a similar arrangement to that of the Inspector-General of Taxation and Taxation Ombudsman (‘IGTO’). This is because, comparing the functions of the TPB to those of the IGTO is not a valid comparison. In particular, the IGTO’s role inherently requires it to be completely independent from the ATO, as it is required to be critical of the ATO’s administration of the tax system from time to time.

2. Chapter 5 – Registration, education and qualifications

The TPB Discussion Paper indicates that the current registration framework works well generally. However, amendments to the framework would be appropriate (or should be considered) to reflect contemporary practices and to ensure, amongst other things, better alignment with existing government approaches to lift standards and consistency across different professions.

The Discussion Paper also questions whether the appropriateness of individuals becoming a registered tax agent through their voting membership with a TPB recognised professional association needs to be considered. This is particularly in light of the lifting of standards in the financial adviser profession (which now mandates that all financial advisers have a baseline education qualification).

In response to the above, the following comments are provided:

- (a) The NTAA acknowledges that, having appropriate education and qualification standards for becoming a registered tax agent is paramount to maintaining the integrity of the tax system. However, any changes to the existing qualification and experience requirements should **only** be considered if there is sufficient evidence to suggest that the existing standards are no longer fit for purpose.
- (b) The NTAA is of the opinion that, the suggestion that the education and qualification standards in one profession (e.g., the tax industry) should be increased due to a lifting of standards in another profession (e.g., the financial services industry) is quite arbitrary and concerning.

As to whether the education and qualification standards for a particular profession need to be lifted should only be determined based on an independent review of that profession.

- (c) Following from the above, the review into the financial advice industry should **not** be used a proxy for a review into the tax advice industry. The need for changes in the financial advice industry were driven by very specific matters that were affecting the quality of the advice being provided. For example, issues such as independence, commission-based remuneration and fee disclosure were somewhat unique to that profession.

Therefore, to impute the need for FASEA-style changes to the tax advice industry only ‘clouds’ what should otherwise be an independent review into whether the standards of individuals seeking to become registered tax agents should be lifted. In this regard, the NTAA rejects any suggestion that there is a need to have a minimum degree level qualification in the tax industry solely because this is now a standard imposed by FASEA on financial planners.

- (d) **‘Grandfathering’ any changes to the standards** – In the event that changes are made to the education and qualification standards for registered tax agents, the NTAA submits that appropriate ‘grandfathering’ rules are put into place in respect of existing registrations.

In particular, any lifting of the standard for the current entry pathway 206 should only apply to new registrations and not to renewals. The NTAA believes that many tax agents registered under this pathway are appropriately competent to provide tax agents services, and would also have at least a tertiary degree qualification in accountancy. Therefore, with a continued (and appropriate) CPD requirement (to maintain relevant skills and knowledge), it would be unreasonable to require these tax agents to undertake further TPB approved courses (which may be required under new standards) in order to continue to be registered as a tax agent.

Further, the NTAA submits that, unless the TPB has appropriate data or evidence to suggest that tax agents registered under the 206 entry pathway represent a greater proportion of the egregious tax agent population (compared to tax agents registered under another pathway), changes to this entry pathway would not be warranted.

3. Chapters 7 and 9 – Sanctions and Safe harbour penalties

The TPB Discussion Paper indicates that the TPB should be equipped with an agile sanction regime by expanding the range of sanctions to deal with egregious tax practitioners and to respond to emerging issues in the profession (e.g., by expanding the range of sanctions that can be imposed on tax agents and improving the TPB's investigative powers and processes).

The Discussion Paper also indicates that there is merit in:

- extending the existing 'safe harbour' penalty protection for a taxpayer (which currently only applies where a tax agent fails to take reasonable care) to instances of recklessness and intentional disregard of the law by a tax agent; and
- the ATO's proposal to impose an administrative penalty upon egregious tax practitioners.

In response to this, the following comments are provided:

- (a) It is a fundamental position that tax agents who engage in inappropriate (particularly egregious conduct) should be held accountable for that conduct.
- (b) The NTAA believes that, where necessary, the TPB should be able to carry out its regulatory function effectively and without unnecessary impediments.
- (c) **Extending the existing 'safe harbour'** – The NTAA acknowledges that there is uneasy tension between the fact that taxpayers are ultimately responsible for the information in their tax returns (and hence, bear the responsibility for any shortfall penalties), and the fact that they remain so responsible even where a shortfall can be attributable, wholly or partly, to the conduct of their tax agent.

The current 'safe harbour' protection for the taxpayer partly eases this tension where a tax agent's conduct amounts to a failure to take reasonable care, but not in cases of higher level culpability (e.g., recklessness or intentional disregard of the law).

An obvious approach would be, prima facie, to extend the existing 'safe harbour' to instances of recklessness or intentional disregard of the law by a tax agent (as outlined at paragraph 9.25 of the Discussion Paper). However, the NTAA believes that this should be further reviewed in the context of a broader review into how various levels of culpable conduct by both taxpayers and tax agents should be dealt with, to ensure that the right balance is achieved between consumer protection and ensuring that taxpayers do not abrogate their tax responsibilities by simply engaging a tax agent.

- (d) **Imposition of administrative penalty upon a tax agent** – The current system of shortfall penalties does not require any element of blame to be apportioned between the taxpayer and a tax agent. If the shortfall is attributable to a particular level of culpable conduct, a penalty applies (subject to the existing 'safe harbour' noted above and the ATO's discretionary remission powers).

The NTAA believes that the concept of a new administrative penalty for tax agents needs to be further explored and reviewed as part of a broader review into how various levels of culpable conduct by both taxpayers and tax agents should be dealt with, for the following reasons:

- It is one thing to have objective criteria set out in the law as to when an administrative penalty could be applied to a tax agent but, in reality, deciding who is responsible for the culpable conduct may contain subjective elements.

- Without a proper investigation of the circumstances that led to a particular shortfall, accurately determining blame will be problematic. It is quite conceivable that any explanations provided by a taxpayer and their tax agent will be at odds with each other (and the capacity for this to occur will escalate if the taxpayer is attempting to avoid their own penalty).
- Further, many situations will arise where the culpable conduct is not owned solely by the taxpayer or the tax agent. If any penalty is going to be applied to the tax agent, it is incumbent on the party responsible for applying the penalty to conduct a thorough review such that a fair and reasonable outcome is achieved.
- While the parties may be in a position to provide some documentary information, a lot of the information will be by way of verbal attestation, as in a 'he said she said' scenario.

4. Chapter 10 – Tax (Financial) Advisers

The Discussion Paper highlights the regulatory burden associated with being a tax (financial) adviser, as a result of having to be registered with both the TPB (in relation to tax advice) and with ASIC (in relation to financial advice).

The NTAA is supportive of developing an appropriate model that reduces the regulatory duplication (i.e., from both the TPB and ASIC) for tax (financial) advisers. However, the challenge in this regard will be to develop a model that strikes an appropriate balance between adequate regulation for tax and financial advice, and minimising the cost of such regulation for tax (financial) advisers.

In relation to the seven options put forward by the Discussion Paper (to reduce the regulatory burden for tax (financial) advisers, the following comments are provided:

- (a) The NTAA questions the appropriateness of any model which proposes to allow the TPB to regulate the provision of financial advice, or for ASIC to regulate the provision of tax advice, including the imposition of sanctions. This is because it would be questionable whether each agency under this type of model would have the capacity to effectively regulate an industry that it may be somewhat unfamiliar with, unless of course the relevant agency (e.g., ASIC) second staff from the other agency (e.g., the TPB) in order to carry out its regulatory functions in the other industry (e.g., the provision of incidental tax advice by a tax (financial) adviser).
- (b) Option 7 has re-ignited the discussion around the re-instatement of the former accountants' exemption, which allowed recognised accountants to provide certain limited advice to clients in relation to Self-Managed Superannuation Funds ('SMSFs').

The NTAA is supportive of an approach that considers a 'carve-out' from the AFS licencing rules for tax agents providing certain financial advice, similar to the former accountants' exemption. However, in practice, the former accountants' exemption was extremely restrictive in the advice it allowed accountants to provide without holding an AFS licence (i.e., basically, the establishment and operation of an SMSF). Further, the former exemption was only available to recognised accountants, and there was considerable confusion around the type of advice that could be provided to clients about SMSFs under the exemption.

Therefore, if the Government is to consider the re-instatement of a similar 'carve-out' (to the former accountants' exemption) for accountants providing certain financial advice:

- any new 'carve-out' should be broader than the former accountants' exemption (i.e., any new 'carve-out' should reflect the type of advice that can be provided under the current limited licencing arrangements), for it to have any practical effect; and
 - it should be available to all tax agents.
- (c) Any solution towards reducing the regulatory duplication for tax (financial) advisers would need to be further explored and workshopped, as part of a separate independent review of this area, in consultation with relevant stakeholders (including appropriate professional bodies).

Chapter 11 – Relationship between the TPB and the professional bodies

The Discussion Paper highlights that the TPB should cease to be a regulator of the professional bodies. This appears to be based on a 'push' to remove tax agent associations from the system (i.e., the removal of registration entry pathway 206, which allows a voting member of a recognised tax agent association to register as a tax agent if they have 8 out of 10 years relevant experience), and appears to be driven by the lifting of the education standards in the financial adviser profession.

According to the Discussion Paper, this would then allow the professional bodies to take on a co-regulatory function (or role) with the TPB.

In this regard, the NTAA submits the following comments:

- (a) As previously noted (in relation to Chapter 5), the NTAA believes that any changes affecting the registration entry pathway 206 should **only** be considered if there is sufficient evidence to suggest that this entry pathway is no longer fit for purpose. Further, any changes to this entry pathway should be subject to appropriate 'grandfathering arrangements' also being introduced for existing tax agent registrations.
- (b) As also previously noted, the review and developments into the financial advice industry should **not** be used as the basis for making changes to the tax agent registration entry pathways (especially entry pathway 206), as the need for changes in the financial advice industry were driven by very specific matters that were affecting the quality of advice provided in that industry.
- (c) As to the professional associations taking on a co-regulatory function with the TPB, the NTAA considers this to be highly inappropriate. Whilst there is clearly merit in establishing a greater degree of liaison and co-operation between the TPB and the professional associations, it is important that the TPB remains the 'key guardian' of the system. In particular:
 - when members interact with their professional associations they should not feel as if they are interacting with an 'outpost' of the TPB;
 - the TPB should be appropriately resourced to carry out its regulatory functions without having to delegate tasks to the professional associations; and
 - it should be possible for the TPB and the professional associations to liaise and exchange information without the professional associations being co-regulators.
- (d) In the event that the professional associations were to take on some type of co-regulatory role with the TPB, any such regulation should be limited to tax technical competencies.

If you have any questions regarding this submission, please feel free to contact Nick Connell at nick.connell@corsem.com.au, or James Deliyannis at james.deliyannis@corsem.com.au.

Yours Faithfully,



Geoff Boxer

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