

Independent Review of the Tax Practitioners Board

Final Report

31 October 2019

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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 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

1 The Ethics Centre advice, see Appendix B.

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 second 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 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).

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.

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 BAS³ 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 agents⁴ it is clear that community confidence in the tax profession is essential for the integrity of the tax system.
- 1.2 As was explained in our Discussion Paper⁵, 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 period⁶ 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
 - 1.6.3 establishing an independent national board to register tax and BAS agents and to monitor and enforce compliance with those standards.

3 Business Activity Statement.

4 Source: ATO 2018-19 Annual Report.

5 [Review of the Tax Practitioners Board — Discussion Paper](#) p. 9.

6 Generally from 1 June to 30 July.

- 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 Memorandum⁷ 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 Paper⁹, 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 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

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.

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

- 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.
- 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 countries¹¹ 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 Australia¹². 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

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.

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 announced¹³ 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 specialists¹⁵. 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 having suitable education and training¹⁶. 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.

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.

16 [Final Report of the Financial Services Royal Commission](#) at pp. 170 — 171.

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 Paper¹⁷ 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 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

17 At paragraphs 3.51 and 3.52.

18 See Appendix B.

- 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
- 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 system²¹; 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

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

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.

Government is no longer in the 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*

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.

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.

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 EM²³ (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 support²⁴. It was also expected that this would be an interim position subject to review²⁵. 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:*

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.

...

- 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*
 - 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 2018-19²⁶ compared to the TPB's 2018-19 operating budget of \$19.7 million²⁷. 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 funding²⁸.
- 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:
- 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.

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

- 3.14.3 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 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 percentage³¹ were recruited by the TPB advertising for positions and they did not work for the ATO prior to working for the TPB.

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

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.

- 3.18 Under the terms of the *Public Governance Performance and Accountability Act 2013* (PGPA Act), in particular Schedule 1 of the PGPA Rule³², 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 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 Paper³⁴ and some submissions raised concerns as to how this would be done in an equitable manner³⁵. The Review recognises the unions' submissions, which say that there are concerns for staff and that these should be properly addressed in accordance

32 Excerpt attached at Appendix E.

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?

with established 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 second 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) framework³⁶, 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’ Charter³⁷, 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;

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

37 [Taxpayers’ Charter](#).

- 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.
- 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 above⁴⁰, 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 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.

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.

- 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 shared⁴¹. 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.

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,

41 Above n 16, pp. 461 — 464.

42 Ibid at p. 462.

43 Ibid at p. 463.

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 proposed⁴⁴ should go a long way to achieving this.

Whistleblower laws

- 3.52 New whistleblower laws⁴⁵ 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 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

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*.

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 Boards⁴⁷ 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.
- 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.

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

48 Section 70-30 of the TASA

- 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 livelihood⁴⁹ 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.

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.

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

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

Table 2: Tax agent entry pathways

Item 201	• Tertiary qualifications in accountancy (degree or post-graduate award). • Board approved course in Australian taxation law. • Board approved course in commercial law. • 12 months of relevant experience in the past five years.
Item 202	• Tertiary qualifications in another discipline (degree or post-graduate award). • Any combination of the following may be required: – Board approved course in Australian taxation law. – Board approved course in commercial law. – Board approved course in basic accountancy principles. • 12 months of relevant experience in the past five years.
Item 203	• Diploma or higher award in accountancy. • Board approved course in Australian taxation law. • Board approved course in commercial law. • Two years of relevant experience in the past five years.
Item 204	• Tertiary qualifications in law. • Board approved course in Australian taxation law. • Board approved course in basic accountancy principles.

	• 12 months of relevant experience in the past five years.
Item 205	• Board approved course in Australian taxation law. • Board approved course in commercial law. • Board approved course in basic accountancy principles. • Eight years of relevant experience in the past 10 years.
Item 206	• Voting member of a recognised tax agent association. • Eight years of relevant experience in the past 10 years.

Table 3: Tax (financial) adviser entry pathways

Item 301	• Tertiary qualifications in a relevant discipline (degree or post-graduate award). • Board approved course in Australian taxation law. • Board approved course in commercial law. • 12 months of relevant experience in the past five years.
Item 302	• Diploma or higher award in a relevant discipline. • Board approved course in Australian taxation law. • Board approved course in commercial law. • 18 months of relevant experience in the past five years.
Item 303	• Board approved course in Australian taxation law. • Board approved course in commercial law. • Three years of relevant experience in the past five years.
Item 304	• Voting member of a recognised tax agent or tax (financial) adviser association. • 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 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.

⁵⁰ See section 30-35 of the TASA.

⁵¹ Section 20-45 of the TASA.

- 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
- 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

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.

54 Above n 14, [2.37] to [2.40]

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.
- 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 Conveyancers⁵⁵ 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 property⁵⁶ 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.

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 advice⁵⁷, 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 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.

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.

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 exemption⁶¹ 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.

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.

⁶⁰ See paragraph 2.31 of the EM

⁶¹ Section 50-5 of the TASA.

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.

62 TFAs have the additional complexity of also abiding by FASEA's Code of Ethics.

- 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 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 investigations⁶⁵ 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.

63 In the form of the uniform Evidence Acts.

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.

- 5.20 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.
- 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
- 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.

67 TPB Corporate Plan 2019-20, p. 4.

68 Above n 39, pp. 151, 163.

69 Ibid, see discussion at p. 163.

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.

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

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.
- 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*

74 Comments received from Mr Neil Olesen, former Second Commissioner, Australian Taxation Office.

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).

*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 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 adjustments⁸³ 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.

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).

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.

- 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 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 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

85 See Chapter 6 of the *Legal Profession Uniform Law* (VIC, NSW) and Chapter 5 of the *Legal Profession Act 2007* (QLD).

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 Paper⁸⁶ 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 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

86 At Appendix C to the Discussion paper

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 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.

87 Without TPB approval in instances of unregistered practitioners.

88 Section 30-35 of the TASA.

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 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 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.

89 According to ATO data.

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 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 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.

90 Division 284 of Schedule 1 to the TAA 1953.

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 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.

91 Paragraph 6.71 of the EM.

- 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

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.

- 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.

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 registration⁹⁴ 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.
- 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.

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.

- 7.7 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.*
- 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

95 Above n 16, p. 212.

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.

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 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 2020¹⁰⁰, 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 AFSs. It is noted that this new body is also expected to be responsible for registration¹⁰¹.
- 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 advisers¹⁰³ when the misconduct is

100 Ibid p. 9.

101 Ibid p. 6.

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.

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.

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 advice¹⁰⁴. Many of the submissions were of the view 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 superannuation¹⁰⁵. Many would agree though that this is difficult to understand¹⁰⁶ 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;
 - 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:

104 Treasury website [Future of Financial Advice](#).

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.

“... 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 law¹⁰⁸. 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 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) (a) the <i>Inspector-General of Taxation Act 2003</i>; or b) (b) provisions of the <i>Ombudsman Act 1976</i>, to the extent that they are applied by the <i>Inspector-General of Taxation Act 2003</i>.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:

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.

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.

	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

117 See subsection 70-40(4) of the TASA.

118 See paragraphs 60-125(8)(c) and (d) of the TASA.



Australian Government
Australian Taxation Office

Australian Taxation Office & Tax Practitioners Board
Working together

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

The role of the ATO is to effectively manage and shape the tax and superannuation systems to support and fund services for Australians.

ATO strategic framework

C2: We work with and through others to deliver efficient and effective tax and superannuation systems.

Support intermediaries to ensure clients do the right thing, and increase internal transparency around the risks in their professional practices.

To achieve this we need to:

- Leverage the role others play in the tax and superannuation systems.
- Take a whole-of-ATO approach to optimise our interactions with intermediaries.

The role of the TPB is to ensure tax practitioner services are provided to the public in accordance with appropriate standards of professional and ethical conduct.

TPB strategic framework

Protect consumers of tax practitioner services.

Act on tax professional misconduct through data-driven risk profiling and risk-based compliance activities.

What success will look like:

- Using intelligence to support and implement a streamlined compliance approach and form a holistic view of tax practitioner behaviour and risk.
- Enhance the integrity of the registered tax practitioner profession.
- Strengthen TPB as an efficient and effective regulator.
- Collaborate with co-regulators to better understand high-risk tax practitioner behaviour.
- Collaborating with other agencies to achieve a whole-of-government approach to practitioner risk.

Joint TPB and Tax Office priorities

- Champion and support improvements to the regulatory system, resulting law change and associated new policy proposals
- Adopt the Intermediary Engagement Framework
- Establish a shared tax agent view of risk across the population
- Develop joint strategies to address the 2,000 highest risk tax agents
- Facilitate close and productive relationships and information-sharing practices while respecting our independent roles

Joint TPB and Tax Office outcomes

- Regulatory framework that provides confidence in the integrity of the profession to consumers and stakeholders
- A shared and holistic understanding of tax agent compliance behaviour and cooperative approaches to treat risk
- Sharing information to the fullest extent possible becomes business as usual, and we work from a single body of relevant information
- Better visibility for ATO and TPB staff of risk behaviours, interaction history and planned actions
- Increased transparency for agents around our joint view of their risk
- Indicators of success
 - Levels of confidence
 - Proportion of higher risk agents
 - Timely sharing of information
 - Agents can see their risk profile

Shaping the system

- Safe harbour extension and new penalties
- Legal Professional Privilege

- Controlling minds – supervisory/shadow agents
- Independence of the TPB

- Unregistered preparers
- Education, registration, qualification

Memorandum of Understanding

- Early engagement
- Transparency
- Partnership

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 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:

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

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

Organisation	Role
	a) the <i>Inspector-General of Taxation Act 2003</i>; or b) provisions of the <i>Ombudsman Act 1976</i>, to the extent that they are applied by the <i>Inspector-General of Taxation Act 2003</i>.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 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

127 See subsection 70-40(3B) of the *TASA*

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: • section 11AF of the <i>Banking Act 1959</i>; • section 32 of the <i>Insurance Act 1973</i>; • section 230A of the <i>Life Insurance Act 1995</i>; and • section 92 of the <i>Private Health Insurance (Prudential Supervision Act) 2015</i>. 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: • 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; • the person is not disqualified under an applicable Prudential Act from holding the position; • the person either: – has no conflict of interest in performing the duties of the responsible person position; or – 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 • 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 <i>National Consumer Credit Protection Act 2009</i>. 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:

- is **competent to operate a credit business** (as demonstrated by the **person’s knowledge, skills and experience**);
- has the attributes of **good character, diligence, honesty, integrity and judgement**;
- it not disqualified by law from performing their role in the credit business; and
- 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.