8 May 2019

Mr Nick Westerink
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Attention: Mr Keith James, Head of the Review

By email: TPBreview@treasury.gov.au

Dear Nick

Submission on the Review of the Tax Practitioners Board

Chartered Accountants Australia and New Zealand (CA ANZ) appreciates the opportunity to provide our submission on the Review of the Tax Practitioners Board (the Review).

We welcome this long-overdue independent review of the effectiveness of the Tax Practitioners Board (TPB), including the *Tax Agent Services Act 2009* (TASA) and the *Tax Agent Services Regulations 2009* (TASR), led by Mr Keith James and conducted by Treasury (the Review Panel). The object of the Review is to ensure that tax agent services are provided to the public in accordance with appropriate professional and ethical standards. We strongly support the pursuit of that outcome.

We would like to thank Treasury for the extension granted to CA ANZ to lodge our submission, acknowledging circumstances that impacted our Tax Team's resourcing during March and April 2019.

Background

In CA ANZ's pre-Budget submissions for many years now, we have consistently called for the outstanding post-implementation review of the Tax Agent Services (TAS) regime to be conducted, with the review being pushed out each year, well beyond its intended timing of three years after the implementation date of 1 March 2010.

Despite the delay, we believe that the Government's announcement of this comprehensive review of the effectiveness of the TPB, including the legislative framework of the TASA and the TASR, is a good opportunity to consider the rationale for regulation of tax practitioners, what is working, what is not working, the impact of technology, and any international comparisons that provide a useful perspective that Australia could learn from.

The report of the Inspector-General of Taxation (IGoT) on The Future of the Tax Profession (FTP report) released in November 2018, contained many observations and recommendations on the regulation of the tax profession and identified impending changes on the tax profession, the TPB and the Australian Taxation Office (ATO) that should be considered as part of this Review.

As the IGoT's FTP report stated: "The regulation of a future tax profession is complex. It requires rigorous discussion and testing with input from all sections of the tax profession, the ATO and the TPB."[1]

This review is also well-timed to consider the broader, equally defining issues around how the regulation of tax agent services integrates with what has proven to be the critical twin pillar of regulating the provision of financial advice services to the public. Specifically, the Royal Commission (RC) into Misconduct in the Banking, Superannuation and Financial Services Industry is highly relevant to this Review. The Final Report of the Royal Commissioner, the Hon. Kenneth Hayne AC QC, is instructive as it provides important findings and related contextual information that complements and overlaps with the scope and objects of this Review. CA ANZ thinks the FSRC Report should be reconciled with and strategically incorporated into this Review's considerations and ultimate recommendations so that the two regulatory fields dove-tail seamlessly with each other.

CA ANZ is grateful for the invitation to attend and participate in the initial Roundtable consultation meeting held in Sydney by Keith James, Treasury and other members of the Review Panel, on Monday 7 April 2019. We found this forum to be a useful early opportunity to share views with other stakeholders and better understand the Review's objectives, work program and timeline. We look forward to fully participating in this important process over the course of this year and beyond.

This submission on the Review of the TPB is CA ANZ's preliminary submission in response to the Terms of Reference. We will provide our further, more developed and detailed comments in response to the Discussion Paper expected to be released around June/July 2019.

Executive Summary

In this Review, the Review Panel should consider:

How do we design a regulatory framework that is fit for a future tax profession, tax system and economy that are each very different to the ones we have now?

Future systems and service providers will be increasingly digitalised, autonomous, intelligent, ubiquitous, remote, intangible, and global in their reach.

Once a vision for the future state of the relevant systems is developed, the next questions are:

- What are the potential future regulatory models?
- What changes to the existing model are required to recalibrate the regulatory model to the new framework?

Overall, at present, we believe that the TPB's regulation of tax practitioners is working effectively in that there is little evidence of regulatory failure in terms of the legislative objective of consumer protection. The TPB has been active and performing its enforcement function effectively and successfully, although we feel more strategic interactions with the tax profession and relevant professional associations could improve its efficiencies.

[1] Future of the Tax Profession report, at 6.81.

We consider that academic pre-requisites are an area where there is significant room for improvement in both achieving more appropriate and equitable outcomes, whilst also making efficiency gains to free up TPB resources for its compliance programs. This is particularly important at a time when professional associations and employers are seeking to attract individuals from non-traditional educational pathways.

We believe that the TPB's compliance and investigation powers and functions are appropriate, but could be strengthened and clarified.

There are several measures that could likely improve consumer protection, such as ensuring that *emerging* tax services are covered by the regime and regulated in a timely manner, ensuring all academic standards are fit for purpose, and exploring whether statutory rights to claim damages could provide a fairer outcome for consumers and a better deterrent.

We would need to see more evidence of the actual application of the safe harbour. We recommend that the Review Panel gather examples of the circumstances in which it has been applied to remit penalties. We agree with the concerns that the drafting could be improved to clarify its intended operation and remove unintended consequences.

One of the most critical tasks for the Review Panel will be the need to co-design the future tax regulatory framework to dove-tail with the regulation of financial advisers in Australia to ensure that the respective regulatory regimes are fit for purpose and therefore effective.

Structure of our submission

Our submission is divided into two parts:

- Firstly, our high-level, overarching comments, which outline the 'strategic vision' that we believe should be developed before any future regulatory model can be formulated. While the TPB is operating relatively effectively at present, we identify several design flaws, unintended outcomes, and inefficiencies that have emerged in the ongoing regulation of taxation services. Our general comments also outline our framework for the seven (7) guiding principles that we consider should govern the design of the future regulation of taxation services in Australia (and also financial advice services). The design principles include discussion of an emerging imperative to streamline the regulatory model across tax and tax (financial) advice sectors, given the vast number of regulators and the degree of overlaps. In light of the recommendations in the Hayne Royal Commission report, there is an obvious need for the Review Panel to engage with the Financial Adviser Standards & Ethics Authority (FASEA) as it works to implement an improved regulatory model in the broader financial advice sector.
- Secondly, we provide more detailed comments by way of a log of specific issues that we have collated from CA ANZ's experience with the TASA over the past decade, both as an association and from the perspective of our members, professional Chartered Accountants (CAs), which we wish to highlight for the Review Panel's attention (see the Table in **Appendix 1**). The log provides the topic, a summary of our specific issue or sub-issues, and their impacts. We are continuing to consider and work through possible solutions to these issues, and we would welcome the Review Panel's examination of these matters so that we can collectively determine how they could best be addressed.

General comments

The need for a regulatory framework

We believe that an important starting point for this Review of the TPB and the TAS regime is to examine the rationale for regulation to determine firstly whether there is a need for a regulatory framework.

Relevant questions include:

- What do we want the regulation to do?
- What role do we need the TPB to perform?

As Australia's tax profession is somewhat unique in the way it is regulated, why is this the case? Does the Australian approach represent *unnecessary* regulation compared with the risks being regulated? Does the evidence support the need for this regulation, or is Australia unique or perhaps ahead of the curve in this regulatory domain? The IGoT report discusses the fact that Australia's approach is not aligned with the international approaches and raises these issues for further consideration. For example, could Australia adopt a model that is closer to that of South Africa or the United Kingdom, which rely more heavily on referrals to and collaboration with the professional bodies?

Regulation per se does not necessarily equate to good governance for the regulated population. The findings coming out of the Hayne Royal Commission make this fact abundantly clear. Regulation must be well-designed and fit for purpose, amongst other things, to be effective.

As we have seen from the Financial Services Royal Commission, poor regulatory frameworks can be almost completely ineffective, and can certainly be less effective than alternate potential means of achieving the same objectives. For example, an alternate model is the taking of disciplinary action by professional bodies which can result in different but serious, public and highly effective professional consequences for the service provider. In this respect, the difference in ethical behaviours between the accounting and legal professions, compared with the banking and financial services industry is a case in point.

In terms of what role we need the TPB to perform, the IGoT's FTP report also sets out the changing nature of the tax profession, as one that is going through generational change and rapidly moving away from its traditional professional foundations, towards one that is likely to be characterised by digitalised services, automation, autonomy or artificial intelligence (AI), and 'gig' economy service providers who are likely to be many, varied, and increasingly disparate, remote, intangible and difficult for a regulator to regulate.

Equally, at least for a transitional period for an uncertain duration, we have a tax profession and tax system characterised by the fact that:

(i) Registered tax practitioners lodge 72.4% of all income tax returns, including 96.7% of business returns.[2] This reflects the complexity of Australia's tax system, and being one of self-assessment with heavy penalties for tax shortfalls. For example, complex areas include capital gains tax liabilities and concessions, trusts, partnerships and joint venture structures, cross-border issues such as residency, and allowable deductions available to reduce assessable income. This 'tax complexity' reality will remain until significant tax simplification reforms occur, e.g. through a standard deduction being applied, or lower tax rates with no deduction, so that the tax system becomes simplified sufficiently that most Australians no longer need to lodge a tax return as in New Zealand.

[2] Australian Taxation Office, 2016, *Taxation Statistics 2015–16*, www.data.gov.au

(ii) The technological trend towards digitalisation and automation of the tax compliance and reporting function is resulting in a growing number of non-traditional tax service providers entering the market (non-professional) who are not subject to any existing professional standards and ethical duties, compared with the traditional tax service providers who have primarily been professionals (accountants and lawyers).

These existing, emerging and future dynamics of the tax profession and tax system create the conditions for a highly challenging environment to design for, and regulate effectively, now and into the future.

CA ANZ believes that the Review Panel should apply a 'strategic vision' lens to develop an 'image' or 'snapshot' of the future tax *profession* from the outset to be able to create a vision for the appropriate future model for regulating the tax profession. This is a necessary pre-requisite before moving to the next phase of considering what changes should be made to the existing regulatory framework for tax services.

Review the regulatory framework

After developing a strategic vision, the next step for the Review Panel to consider is the possible regulatory framework, if any, that would be suitable for that future tax profession – a profession which is already rapidly changing and emerging in many ways that are going to be unforeseen in their form and speed compared with anything governments, policy-makers and regulators have been familiar with in the past.

Such is the nature of digitalisation and the transformational effect of technology. It is an enabler that has the capacity to completely change the way in which things are done. Things that were done within the traditional economy in a physical, proximate and tangible way can be changed to the exact opposite – a ubiquitous, remote and intangible way that is difficult to touch, feel, and physically seize upon, and may also be cross-border. These are also challenges that the tax revenue imposition and collection system is facing now and in the future.

Once a vision for the future state of the tax system and tax profession is developed, the next questions are:

- What are the potential future models?
- What changes to the existing model are required to recalibrate the regulatory model to that framework?

Potential future models

If a regulatory framework is needed for the future state of the tax profession, what would it look like?

(a) Oversight with delegation to professional bodies for disciplinary action on conduct issues?
(b) Is it a regulator, with a focus on consumer protection?
(c) Is it more akin to the international models as a support network for the profession?

Then:

(d) What confidence is there that the model proposed will be reasonably future proof?
(e) How is policing of the future tax profession to be executed given the impending changes?
(f) If the *status quo* model of the TPB is maintained, what changes are required to the regulator, its policy objectives, powers and functions, extraterritorial jurisdiction, resourcing, budget, governance structure, reporting and accountability?

The existing TPB regulatory regime

What is working?

Overall, we believe that the evidence indicates the TPB's regulatory regime is working quite well and achieving its objectives of consumer protection.

The TPB's Annual Report for 2017/18 shows that as at 30 June 2018:

- The TPB regulated 77,749 tax practitioners, comprising 42,561 tax agents, 15,638 BAS agents, and 19,550 tax (financial) advisers.
- There were over 1.7 million searches of the TPB Register to confirm registration details.
- 1,528 complaints were received, including 1,023 from the public, 125 from other registered agents and 120 from the ATO.
- The TPB ordered 287 sanctions, including 182 written cautions, 81 orders and 25 terminations.
- More than 3,000 compliance actions were taken in total, including education interventions for 1,183 tax practitioners, 798 surrendered registrations, 83 change in behaviour orders, and 425 no breach found or proven outcomes.
- All seven published appeals affirmed the TPB's decision, five by the Administrative Appeals Tribunal (AAT) and two by the Federal Court.

The TPB should also be commended for its ease of doing business with stakeholders. CA ANZ has received positive feedback from our CA member firms about the relative ease of doing business with the TPB. As an organisation, CA ANZ finds the TPB to be very professional to deal with on day to day matters, and always available to meet about matters that we wish to discuss with them. For example, the TPB worked constructively and helpfully with us on transitioning our accreditations - Recognised Tax Agent Association (RTAA) and Recognised BAS Agent Association (RBAA) - to CA ANZ following the merger between the former ICAA and NZICA.

Under the leadership of Mr Ian Taylor, and formerly Mr Dale Boucher, the TPB has also been very committed, possibly more than most other regulators in Australia, about engaging with its stakeholders on a regular basis, and in making itself available for presentations at public events hosted by others around Australia. Senior TPB members, including the Chair, have frequently presented at open forums, webinars, and other events held by professional association to educate tax practitioners (over 80 in 2018) reaching more than 20,000 participants.

We sense however a recent change occurring under the new TPB Chair, Mr Ian Klug in that it seems he will devote less time than his predecessors in interacting with tax practitioners in face to face forums and focus more on executive risk management aspects. The TPB has also recently appointed a very pro-active CEO / Board Secretary in Mr Michael O'Neill, who formerly held senior roles in the ATO. The Review Panel may wish to consider whether there has indeed been a change in the TPB's modus operandi under Messrs. Klug and O'Neill and if so, whether the new way of doing things is a change for the better.

The Review panel should also address current consultation arrangements. At the moment, three types of Consultative Forums are held with stakeholders every four months (3 per year) – the TPB Consultative Forum, the BAS Agents Working Group, and the Financial Advisers Forum. The TPB provides comprehensive updates and relevant statistics to stakeholders at the consultative forums and provides communiques and key messages to professional associations for distribution to our members.

What is not working?

Essentially, our Log of Issues at **Appendix 1** provides a catalogue of the main aspects of the TPB regulatory regime that are not currently working as intended or as required for an effective and efficient model.

Please refer to 'Specific Comments' below and **Appendix 1** for our list of 14 separate topics, a summary of the issues and sub-issues, and a discussion of the impacts or significance.

CA ANZ's major ongoing concern with the TPB's administration of the TASA framework has been in relation to the academic requirements, and the misalignment with CA ANZ's current and emerging academic requirements for the education and admission of CA's to practice as professional accountants. At a time when many CA firm employers are 'opening the funnel' and hiring talent from non-traditional (i.e. other than commerce, law) backgrounds, some of the TPB's pre-requisites and pathways appear outdated and unsuited to the needs of the profession.

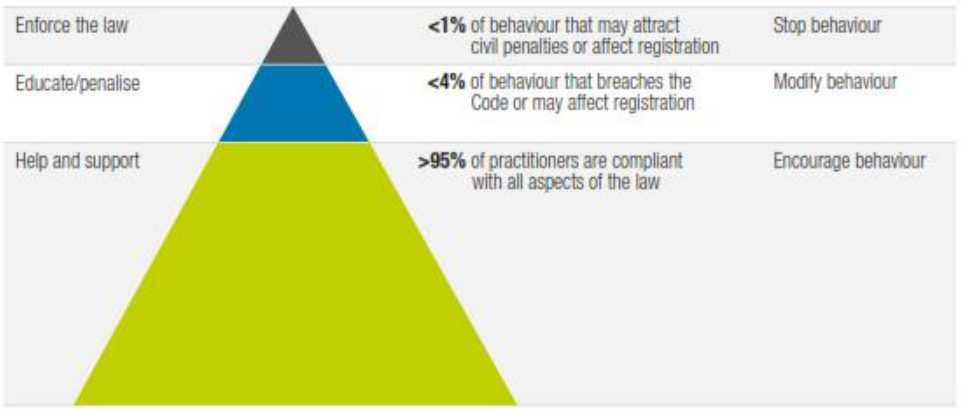
Some of the other bigger picture shortcomings in the existing model for the Review Panel's attention and refinement include:

- There is a lack of structural independence and separation from the Australian Taxation Office (ATO). TPB staff are largely seconded from the ATO, and the TPB's funding comes from or via the ATO.
- The ATO should establish (or fully implement) a formal process for timely referral of conduct-related issues to the TPB, across all tax types, where systemic or egregious tax practitioner behaviour is identified so that action can be taken in a timely manner.[3]
- The ATO's powers to refer conduct-related matters to professional bodies could also be enhanced to enable disciplinary action to be taken earlier.
- A larger budget is required for the TPB to enhance education, tax agent support and compliance action.
- The TPB's somewhat wordy, legalistic guidance material which many tax practitioners find difficult to fathom.
- The suitability of the TPB's Compliance Model (see extract from TPB Annual Report 2017/18 below), particularly in view of the ATO's so-called 'tear-drop model' for categorising tax agent behaviours[4] and ATO risk-rating of tax agents.

[3] It seems this process was not well implemented for many years, however it has been significantly improved in the last year and must continue to improve. There was a 48% increase in ATO referrals in 2018. The increase in ATO referrals was a result of the ATO's increased focus on targeting work-related expense claims, see TPB Annual Report 2017/18, at 40.

[4] This model came to light during the CA ANZ's recent work with the ATO on tax agent involvement in the over-claiming of work-related expenses.

Figure 5: Compliance model



Strategy

The TPB compliance process responds to:

- complaints from the public about the conduct of registered tax practitioners and unregistered entities
- concerns raised by tax practitioners and their professional associations
- ATO referrals
- intelligence from a range of other sources, including the media.

(Source: TPB Annual Report 2017/18, at 39)

Interaction of tax regulatory model with financial advice regulatory model

The interaction between the regulation of the tax profession and the financial advice sector is a significant issue that will also affect the design of the TPB's future regulatory model. This is because tax (financial) advisers are currently regulated by the TPB in respect of the tax component of financial advice.

As the IGoT observed: "Regulation of a future tax profession is complex." That truism is made even truer, and the objective made exponentially more complex, when we consider the important interaction of the tax profession with the financial advice sector. While the twin pillars of tax services and financial advice overlap to some extent, they are also primarily distinct and separate services in the market place and the Australian economy. A relatively small number of tax service providers operate in the financial advice space, yet many financial advice providers offer incidental tax advice, and herein lies a big issue that requires careful consideration. For tax service providers, tax services are a core activity. For financial advisers, tax is an incidental aspect of their work and cannot be charged for separately. Both camps complain bitterly about what they see as artificial, impractical boundaries which hamper their ability to have broad ranging discussions with their clients.

Financial advice industry

In terms of the financial advice industry, the case for implementing a more effective regulatory regime for financial advisers practically speaks for itself in light of Commissioner Hayne's findings and recommendations.

Hayne concluded that for the financial services sector:

> "...too little attention has been given in Australia to regulatory, compliance and conduct risks. Too

little attention has been given to the evident connections between compensation, incentive and remuneration practices and regulatory, compliance and conduct risks."[5]

These risks have manifested as the "very large reputational consequences now seen in the Australian financial services industry, especially in the banking industry", according to Hayne, and they "stand as the clearest demonstration of the pressing urgency for dealing with these issues."[6]

The FSRC Report revealed that the root cause of the issues for financial advice is the 'industry' of the service provider, namely it is "their culture, their governance and their remuneration practices"[7] that is at the heart of the concerns.

The newly created FASEA is designed to reform the standards and ethics that apply to the financial advice sector. FASEA's primary purpose is to raise the education, training and ethical standards of financial advisers to improve trust and confidence. In the majority of CA ANZ's 13 recent submissions to FASEA, we have re-iterated that there is, and will continue to be, a need for trusted advisers to look after the financial advice needs of everyday Australians. We argue that this will be best served by retaining Chartered Accountants in the financial advice industry. Any exodus of CAs from the sector is likely to significantly reduce the overall level of training and expertise in the industry and be contrary to the overall objectives of the new legislation.

CA ANZ has repeatedly advocated that:

- FASEA recognise that all CAs who have been through the CA program since 1972 have only been able to enter the program if they have been assessed, at a subject level, to have:
    1. an Australian or New Zealand qualification at least at Bachelor's degree (or overseas equivalent); and
    2. passed CA ANZ's approved subjects in the required competency areas which will also satisfy those requested by FASEA.
- FASEA notes in its published guidance that it recognises the stringent process CA ANZ undertakes to ensure minimum entrance requirements to the CA program are met and that anyone not meeting these minimum standards needs to complete bridging courses to satisfy them prior to being able to commence the CA program.
- In combination with the separate mapping CA ANZ is completing to satisfy FASEA's documentation process, FASEA recognises that all CAs who have successfully completed the CA program since 1972 have satisfied the requirements of a FASEA Graduate Diploma program at AQF8.
- Any member of CA ANZ who has satisfied the following:
    1. FASEA 'relevant' degree
    2. FASEA 'approved' Graduate Diploma
    3. Financial planning studies to qualify for registration on ASIC's FAR
    4. Ongoing CPD (which is a compulsory component of CA ANZ membership, and
    5. Have not had a banning order or any disciplinary action taken against them

  should only be required to complete one Bridging Course, being FASEA's Code of Ethics.

[5] Final FSRC Report, Vol 1, at 15.
[6] Op. cit. at 15-16.
[7] Op. cit. at 4.

CA ANZ is still awaiting FASEA's determination of our further education requirements.

Another contributing factor as to whether CAs stay in advice relates to the very complex burden of regulation under which they operate. It is therefore an ideal time to try to simplify and streamline regulatory interaction to ensure good operators remain in the industry and poorer, and less ethical advisers conflicted by compensation, incentive and remuneration practices are brought to account.

The FSRC Report also identified a set of principles that reflect the six norms of conduct that should underpin professional and ethical standards and these are also relevant to the Review Panel's work:

- obey the law;
- do not mislead or deceive;
- act fairly;
- provide services that are fit for purpose;
- deliver services with reasonable care and skill; and
- when acting for another, act in the best interests of that other.

Hayne noted that these norms of conduct are "fundamental precepts", each being well-established, widely accepted, and easily understood. However, the Commissioner recognised a problem in that, while all of these norms are currently recognised in the law, they are "piecemeal", only enforceable indirectly or tend to carry no penalty.[8]

New disciplinary system for financial advisers

A key recommendation of the Hayne Royal Commission's final report was the creation of a new disciplinary system for financial advisers. Specifically, Recommendation 2.10 states:

> "***Recommendation 2.10 – A new disciplinary system***
>
> The law should be amended to establish a new disciplinary system for financial advisers that:
>
> - requires all financial advisers who provide personal financial advice to retail clients to be registered [individually];
> - provides for a single, central, disciplinary body;
> - requires AFSL holders to report 'serious compliance concerns' to the disciplinary body; and
> - allows clients and other stakeholders to report information about the conduct of financial advisers to the disciplinary body."[9]

While FASEA has been responsible to date for establishing the new educational and ethical standards for financial advisers (via Legislative Instruments), it is not yet known whether FASEA or some other body will take on the financial advice industry's disciplinary body role. We understand there have been some applicants to ASIC to be Code Monitoring Bodies. It is imperative that whilst we are going through reforms, the new disciplinary body mentioned above, together with FASEA's Code Monitoring Bodies, ASIC, the ATO and the TPB all have clearly defined roles and take firm action against those who do not comply.

[8] Op. cit. at 8-9.
[9] Op. cit. at 28.

Both major political parties have indicated they will adopt this recommendation, so it is likely it will go ahead. If this is the case, we would like to see a full review of the licensing of accountants for what should be seen as 'merely incidental financial advice' and in that way members who do not specialise in this area should not have to be licensed.

CA ANZ is about to embark on some member feedback on possible models for this, and for thoughts around basic Self-Managed Super Fund strategies being removed from the licensing regime and brought back under services offered by qualified accountants.

We strongly recommend that now is the time for change in this space and we would be happy to provide further suggestions as to how a more simplified model might work, taking FASEA's new Code Monitoring Bodies as well as Hayne's single, central, disciplinary body into consideration.

Stripping out the complexity

For the financial services sector, it seems that ironically the burden of over-regulation and complexity may have resulted in a complete lack or failure of regulation in parts of that sector. The financial services sector has arguably had the most regulatory burden of any industry and yet some parts of it have displayed some of the worst behaviours of any industry. The Hayne FSRC Report concluded that "close attention must be given to their culture, their governance and their remuneration practices."[10]

Questions therefore include whether simple, clear and potent lines of accountability should now be instituted in order to achieve regulation of the broader financial services industry (banking, superannuation and financial advice) that is effective and fit for purpose. Perhaps this should be driven through tougher controls over member organisations, rather than via further regulation.

Specifically, for the financial advice industry, does the existing regulatory complexity need to be stripped out and removed in favour of unambiguous oversight, authority, minimum standards, and consequences for failure to meet the minimum standards?

Has the complex regulatory approach created unnecessary, unworkable, and undesirable complexity, that has contributed to unintended outcomes that are operating to the detriment of quality, accessibility, accountability and consumer protection? Indeed, some of our members already practice under four existing Codes of Ethics and there is a new FASEA one that is now a Legislative Instrument to be implemented in January 2020. So that will make five.

The Review Panel, and the government more generally post-Hayne RC, should also consider whether the existing approach – which involves the inter-mingling and overlapping of multiple regulatory regimes with attendant costs for government in terms of board membership fees, support staff etc – should instead focus on the specialist fields of practice that need regulating.

Rather than focusing on whether a provider is supplying a particular type of service that is caught by a number of different regimes, the strategic design of the regulatory regimes could focus on regulating as a composite bundle the core services provided by the specialist industry or profession in the ordinary course, including permitting and providing oversight for the provision of incidental services.

Removing financial advisers from the tax services regulatory framework

In light of this regulatory re-structure in the broader financial services sector, and the need to establish a new disciplinary system for financial advisers, the Review Panel will need to take broader 'systems issues' into account.

The Review Panel should consider whether financial advisers should now be carved out of the regulation of the tax profession.

[10] Op. cit. at 15.

And vice versa, consider whether tax professionals, including all forms of professional tax and accounting advisers, should be carved out of the regulatory regime for financial advisers and be dealt with under a tax profession/industry regulatory regime.

Specifically, should the tax advice incidental to financial advice now be regulated by the financial advice regulator?

And should financial advice incidental to taxation advice, such as some SMSF / superannuation strategic advice now be regulated by the TPB under the tax services regulatory regime rather than by ASIC under the limited licensing regime? We are not seeking a return of the accountants' exemption, rather, a new way to allow accountants who maintain their CPD and practice under a strict Code of Ethics to provide additional areas of strategic advice to their clients. The outcome of a new way to provide strategic advice in superannuation may well further enhance the basic value propositions of FASEA as well as that of Commissioner Hayne.

As mentioned above, CA ANZ is soon to embark on some member feedback in this area which will provide us with valuable insights which we would be happy to share with The Review Panel.

Design of the regulatory framework

CA ANZ has identified seven (7) broad propositions or guiding principles that we believe are important in designing an appropriate and effective future regulatory framework for the tax profession (and the financial advice sector).

Guiding Principles

1. The regulatory framework must be well-designed and fit for purpose to be effective

A future regulatory model for the tax profession must be effective now and into the future, and to achieve that it must be well-designed and fit for purpose. As discussed in some detail above, key to this will be applying strategic vision, and considering broader interconnecting system issues.

The IGoT's FTP report, particularly in Chapter 2, provides an excellent outline of the anticipated technological developments that are driving digital transformation of the tax system and its future administration. Chapter 6 is also particularly relevant as it examines the future challenges impacting the role of the TPB in regulating the tax profession, as many non-traditional tax service providers enter the field of taxation services, such as digital service providers (DSPs). We recommend that the Review Panel consider these parts of the IGoT's FTP report closely.

As discussed above, the Review Panel will also need to co-design the future tax regulatory framework to dove-tail with the critical twin pillar of effective regulation of financial advisers in Australia. Specifically, it will need to consider whether the optimum approach going forward is to focus on the particular industry sectors as service providers to ensure that the respective regulatory regimes are fit for purpose and efficacious.

2. The regulatory framework must be aptly targeted to address the risks to the systems and consumers

The key risks to the systems and consumers under each regulatory regime must be strategically targeted.

For the tax system regulator, key risks include opportunities that would for example, allow new, unknown entrants to the tax system, such as the emerging flood of DSPs and payroll service providers, to have access to the tax system or refunds that could result in large, undetected refunds to be improperly received by them. In addition, future enforcement challenges associated with dealing with systems rather than people, and remote or overseas geographies rather than domestic individuals and entities, present new risks that need to be addressed.

Other inherent risks that should be designed for include conflicts of interest, remuneration, and incentives that could cause tax service providers to take positions that are a risk to revenue integrity, such as drivers to overstate allowable deductions or refund claims. One emerging area of concern involves undisclosed incentives for tax practitioners to spruik a particular brand of software to their client base.

The broad range of risks relating to the conduct of tax practitioners suggests that all tax practitioner conduct-related powers should sit with the TPB. The Review Panel should therefore consider whether powers such as the promoter penalty provisions should be transferred to the TPB.

On the financial advice side, as the FSRC Report confirms, the major risks to the financial system and consumers are the industry "culture", "governance" and "remuneration practices", led predominantly by those who operate in vertically integrated models whereby compensation, incentive and remuneration practices have trumped regulatory, compliance and conduct risks.

3. The regulatory regime must be streamlined and efficient

If it is determined that the TPB is the appropriate regulatory model for the future tax profession, its *modus operandi* should be closely examined in terms of the way in which the TPB interacts with existing regulators in the tax services space. We agree with the IGoT that there are significant opportunities to integrate with, rather than to seek to overlap and create inconsistencies with, existing authorised regulators (including professional associations such as CA ANZ), to address shortcomings identified under the current TAS regime.

The Review Panel should consider whether the TPB has a 'reinvent the wheel' approach, i.e. is failing to take account of existing systems which in turn has created inefficiencies or dysfunctionality (for example, stretched resource capacity, diversion of work efforts away from important education, support and compliance programs, and/or a failure to achieve the TAS regime's policy objectives). It seems there is room for improvement, and this could deliver both efficiencies, and fairer and better outcomes for the system and consumers. Please refer to **Appendix 1**, where we discuss these issues in greater detail (see Issues 1.1, 1.2 and 1.3, in particular).

In particular, CA ANZ refers the Review Panel to the IGoT's recommendation that there are "opportunities for [the TPB] to consider devolving certain aspects of their functions to the profession or professional associations, where that work could be undertaken more efficiently or cost-effectively."[11]

As discussed above, can it be said that one of the greatest contributors to the failure of the financial services regulatory regime is the number of regulators involved regulating the industry, including ASIC, APRA, TPB, AFCA and now FASEA, yet none doing the job effectively or efficiently?

Similarly, is one of the biggest structural inefficiencies of the TAS regime the degree of overlaps for financial advisers who have to be licensed with ASIC, registered with the TPB and now have to meet FASEA requirements?

And conversely, is it an unnecessary inefficiency that professional accountants who are registered tax agents, also now have to have separate licensing with ASIC and meet FASEA standards?

The Review Panel should consider whether there is evidence that these respective industries and professions are now so burdened by red tape that, particularly for professional practices that are themselves "small businesses", there is a real risk that some will prematurely exit the industry and few will be motivated to take their place.

[11] IGoT's Future of the Tax Profession report, at vii.

4. The regulatory regime should dove-tail with and leverage, not duplicate or undermine, existing effective regulatory systems

This principle involves looking at how the TPB could appropriately leverage the existing effective regulatory systems that are in place for any professions within the scope of its regulatory ambit. An example of where this has been done well and successfully under the TAS regime is in the context of the legal profession, which is largely carved out of the TAS regime under the statute, and in effect, the TPB relies upon the legal profession to regulate tax advisory services provided by legal practitioners, to the extent that those services do not involve the preparation and lodgment of tax return and statements with the Commissioner.

CA ANZ suggests to the Review Panel that there is a lot more that could be done under the TAS law to appropriately rely on, and/or leverage the existing frameworks and systems in place for the accounting profession as a trusted and credentialed profession operating under the authority of Australian statutory law (*Corporations Act 2001*).

Other questions arising here include whether traditional professional fields, such as accounting, are being inadvertently treated inequitably compared with the emerging tax industry service providers, whose standards and ethics are actually what the TAS legislation was seeking to professionalise.

Should the TPB co-design and then devolve the regulatory and compliance element of the tax component of financial advice to the regulator of the financial advice sector?

Should these subject matters respectively be dealt with by the regulator for the industry/profession, in the same way as the consumer protection conduct elements have been carved out of the ACCC's jurisdiction and conferred on ASIC so that it is dealt with by the regulator of the financial services industry?

Is the best design solution that the specialist subject matter must give way, and transfer over to the industry regulators, not the myriad of industry members who should cross over to the multiple regulators?

Should industry lines of authority and accountability be made clear, unambiguous, potent and comprehensive so they can focus on their regulated population of service providers?

5. The regulatory regime must ensure that individual tax practitioners and financial advisers are subject to ethical and professional standards

If a customised Code of Conduct for the financial advice sector is being implemented, and enforced by a new single, central financial advice regulator, then questions include:

- How would this co-exist with the proposed FASEA Code Monitoring Bodies?
- Should financial advisers who provide incidental tax advice only be required to individually register with the financial advice regulator (not with the TPB), and to comply with that regulator's Code of Conduct and educational requirements?
- Should tax agents who provide incidental financial advice only be required to individually register with the TPB (not with the financial advice regulator), and to comply with the TPB's Code of Conduct and educational requirements?

If 'Yes' to any of the above, then the Review Panel's work would also need to examine how the TPB's Code of Conduct should be modified to incorporate appropriate duties and minimum standards necessary to ensure that financial advice that is a component of a tax service, is provided in accordance with professional and ethical standards.

The respective regulators would need to collaborate and co-design these ethical and professional standards.

6. The regulators must be able to impose meaningful sanctions for breach of the Code of Conduct and other egregious conduct, and must be able to enforce the law

Sanctions for breach of the Codes of Conduct must be tough on both individual tax agents and financial advisers. Furthermore, the sanctions must involve sufficiently high consequences such as heavy civil penalties and other meaningful professional sanctions.

The TPB's current powers to impose sanctions should be retained and consideration given to whether they should be strengthened. Currently, the TPB can issue a written caution (s30-15(2)(a) TASA), an order to complete further education or training (s30-20(1)(a)), an order to be supervised (s30-20(1)(b)) or provide only a limited range of services (s30-20(1)(c)), or suspend (s30-15(2)(c)) or terminate (s30-15(2)(d)) a practitioner's registration.

As noted earlier, disciplinary action by a professional body can result in very public, serious professional consequences for the service provider, which can also be a highly effective punishment, and usually also results in reputational consequences for the firm in the market place. The Review Panel may wish to consider whether secrecy and other rules unduly hamper collaboration between the TPB and those professional associations which undertake disciplinary processes.[12]

The Codes of Conduct must be able to be enforced directly by the regulator, and enforcement must be facilitated and supported by adequate investigatory powers. For example, the TPB's powers to enforce the Code of Conduct and civil penalty provisions should be bolstered by enhancing its investigatory powers. This is discussed further in **Appendix 1** - Issues 10.1 and 10.2.

The FSRC Report also recommended that Industry Codes should be put in place that entail promises between the service provider and acquirer, enforceable by those to whom the promises are made. CA ANZ believes that this idea of broader enforceability should be considered by the Review Panel to determine whether consumers of tax services should also be granted statutory rights to enforce the Code of Conduct as 'promises' implied into their contractual terms, which could give rise to direct compensation/damages being payable to those harmed by the breach.

7. The effectiveness of the key regulators must be assessed by an independent oversight authority

The key regulators should be assessed on the discharge of their functions and the meeting of their statutory objects, as recommended in the FSRC Report. (Recommendation 6.14). The oversight authority should be required to report to the Minister in respect of each regulator at least biennially, and it should be independent of Government and established by legislation.

The key regulators of the tax system are the ATO and the TPB. As both are subject to review by the Inspector-General of Taxation, who reports to the relevant Minister and Parliament, this principle is satisfied for the tax regulatory regime although the Review Panel should consider the effectiveness of current oversight.

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The above seven guiding principles, and our associated comments, represent CA ANZ's preliminary thinking on how the Review Panel should approach the conceptual design of the future regulatory regime for the tax profession in Australia, and how it should be co-designed to dove-tail with the twin pillar of regulating the provision of financial advice to the public Australia.

[12] We leave it to the Review Panel to address why the TAS regime and the TPB continue to recognise professional associations which make little or no attempt to discipline members for misconduct, let alone invest in an effective disciplinary process.

Summary of Options for TPB regulatory framework

The Review Panel should take the opportunity to consider the following options for the TPB regulatory framework as part of this Review:

- Option 1 – Leave as is, as it is working relatively well, but with refinements. Important considerations here include:
  - Create a clearer separation from the ATO – Secretariat and staff independent, not seconded from the ATO
  - TPB and the Treasury - maintain independence of this relationship
  - TPB's budget – increase to enhance education, tax agent support, and compliance action.

  The TPB should continue to report directly to the Minister, in accordance with Subdivision 60-F.
- Option 2 – Remove in line with other countries
- Option 3 – Reimagine and design a new regulatory model

Key recommendations

CA ANZ's broad recommendations to the Review Panel, in terms of the focus questions are:

1. The TPB and tax regulatory framework is mostly working well with some exceptions, and the Review Panel should therefore consider fixing flaws and designing to future-proof it.

2. The TPB's policies and the TAS Act and Regulations concerning academic requirements, scope of services covered, and professional associations need re-design and amendment.

3. All conduct-related powers and functions should sit with the TPB, e.g. including the promoter penalty provisions. ATO powers to refer conduct-related matters to the TPB and relevant professional bodies should be enhanced to support the taking of regulatory and disciplinary action.

4. Enhanced sanctions should be considered, including giving the TPB greater discretion on the best sanction or form of regulatory or disciplinary enforcement.

5. Safe harbour – gather some more evidence of its use and review its drafting.

6. Other suggestions - the critical need to reconsider the interaction between the tax regulatory regime and the financial adviser regulatory model. Importantly, consider red tape reduction vis-à-vis the FASEA regulatory model and whether financial advice incidental to taxation advice, such as some SMSF / superannuation strategic advice, should now be regulated by the TPB under the tax services regulatory regime rather than by ASIC under the limited licensing regime.

Detailed comments

Our submission also includes a series of more detailed comments, by way of a log of specific issues that we have collated from CA ANZ's experience with the TASA over the past decade, both as a professional association and from the perspective of our members.

Please refer to the Table in **Appendix 1**, which provides 14 separate topics and the associated issues and sub-issues, including a summary of the specific issue, and the impact or problem arising. We are working on developing our suggested solutions to the issues identified.

We trust that these comments are of assistance to you at this early stage of the Review of the TPB and look forward to participating further when the Discussion Paper is released around mid-year. In the meantime, CA ANZ would be pleased to engage in further discussions to assist the work of the Review Panel.

If you have any questions or would like to discuss any aspect of our submission further, please contact Ms Donna Bagnall in the first instance by email at donna.bagnall@charteredaccountantsanz.com, or by phone on (02) 9290 5761. Ms Bronny Speed is your contact for financial advice matters at bronny.speed@charteredaccountantsanz.com, or by phone on 0417 062 616.

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Yours sincerely

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Topic	Issue	Problem / Impact
1. Registration criteria - **Academic requirements**	1.1 **The academic requirements to register as a Tax agent -** "a course in commercial law approved by the Board" The academic requirements of concern to CA ANZ have been specified by the TPB as a result of the TPB's own interpretation of the clauses and words of the *Tax Agent Services Regulations 2009* (the TAS Regulations), Schedule 2. The clause in question gave the TPB very broad and generally drafted provisions to enable the Board to take a flexible administrative approach to what may meet the following requirements, namely: • Part 2 - Items 201-205 (b) - "a course in commercial law approved by the Board" However, the modern commercial law component in University accounting degrees now and at the time of introduction of the TASA was two subjects, not three subjects, and as such the Board's view is an uplift in the commercial law requirements, as the bar has been lifted above even the CA program requirement. Professional accounting bodies are specifically authorised by the Corporations Law to perform this role of educating the accounting profession to provide professional accounting services, which includes taxation services, to the public. CA ANZ is also a Registered Training Organisation (RTO) for our tertiary level Graduate Diploma of Chartered Accounting. In essence, we now have two forms of delegated regulatory authority by the Federal Parliament - one specific to the education requirements and services that can be provided to the public by this particular group of individuals, namely professional accountants (i.e. CA ANZ), and one to regulate the conduct and quality of tax-related	1.1 The TPB's views mean that CAs, who have met the educational requirements to have a Certificate of Public Practice (CPP) issued to them by our professional accounting body to provide tax services to the public, are not treated as eligible to register. Chartered Accountants (CAs) were most certainly contemplated as being able to register within the TASA regime, and CA's being registered advances the consumer protection objective. Whilst we have maintained our serious concerns about and objections to the TPB's interpretation of these Regulatory provisions since the time of implementation of the TASA in 2010, our concerns and objections are heightened at present due to the observed TPB's approach whereby it is progressively widening the scope of new kinds of poorly tax-educated, non-traditional advisers and service providers whom it is bringing within the TAS regime, which were not contemplated in the regime, and in doing so the TPB is going out of its way to interpret the scope of academic requirements to enable such parties to become a registered agent. Importantly, we note that extra caution by the TPB is required here for consumer protection purposes - by not dropping the bar - as it is in this area of Payroll Service Providers that the grandest and most elaborate fraud to be perpetrated on the Australian tax system in its history has recently been carried out in the Plutus Payroll scandal. At the same time, the TPB has maintained its overly narrow interpretation of these same provisions in determining whether fully qualified Chartered Accountants can become registered agents.

	services generally provided by a wide range of practitioners (TPB), with a specific consumer protection objective - which are at odds with each other. This is an anomaly which was unintended and needs to be resolved. The IGoT report urges the TPB to consider devolving certain aspects of their functions to the profession or professional associations, where that work could be undertaken more efficiently or cost-effectively.	This outcome is unacceptable CA ANZ and our members. In our view it arguably amounts to *Wednesbury* unreasonableness in administrative law terms, i.e. no reasonable decision-maker could determine that a qualified Chartered Accountant who has completed the Australian CA Program is not qualified from *an academic perspective* to provide tax agent services to the public in Australia. CA ANZ has assessed the key 'learning outcomes' for commercial law (specified by the International Federation of Accounting education standards) as being met in the undergraduate law subjects that are currently contained in all of the "Accredited Tertiary Courses" for entry into the CA program. The TPB has to date been unwilling or unable to change its own administrative view to resolve this issue, despite an internal review of the matter in 2013. Another impact of the TPB's approach is that for a significant period of time post-implementation, there has been a large backlog in the processing of registration applications as the Board considers each individual application and approve it, having regard to the course outline and content. This approach has also created general uncertainty for applicants as they need to apply and see if what they have studied will be approved by the Board when the Board meets and considers each individual application. This is neither an efficient or sustainable use of the Board's resources into the future, nor productive or user-friendly for tax practitioners who should have greater certainty upfront based on existing accreditation schemes.

		Two of the IGoT's Recommendations are relevant here - Recommendation 6.1: *"..that the TPB, in consultation with recognised professional associations, undertake research to determine if its policies and procedures appropriately cater for all tax professionals within its jurisdiction, including tax (financial) advisers";* and Recommendation 6.2(a): a. *periodically review the suitability of the educational requirements of the Tax Agent Services Regulations 2009 and its own related guidance with input from practitioners, professional associations, tertiary institutions and the ATO and act upon any findings including requesting the Government to consider legislative change where necessary.*
	1.2 **The academic requirements to register as a BAS agent -** "a course in basic GST/BAS taxation principles". The academic requirements of concern have been specified by the TPB as a result of the TPB's own interpretation of the clauses and words of the *Tax Agent Services Regulations 2009* (the TAS Regulations), Schedule 2. The clause in question gave the TPB very broad and generally drafted provisions to enable the Board to take a flexible administrative approach to what may meet the following requirements, namely:	1.2 CA ANZ adopts the top-down approach, which equips students with a fundamental knowledge of the subject matter together with a broader set of skills including research, critical analysis, deductive reasoning, risk assessment, and risk management to reach competent conclusions across a subject matter, such as GST/BAS. Therefore a TPB view that is singularly focused and insistent upon the bottom-up technique is necessarily discriminatory against those whose educational philosophy and approach involves the top-down deductive technique. The outcome that CAs do not meet the course in basic GST/BAS taxation principles requirement is insulting to our members, the CA

	• Part 1 - Items 101 and 102 (b) - "a course in basic GST/BAS taxation principles". However, the TPB has adopted a very narrow, inflexible, and prescriptive view particularly in relation the 'basic GST/BAS taxation principles' course. For the basic GST/BAS course, arguably, the TPB's interpretation completely ignores the word "basic" and requires a very specific, granular, detailed course on GST and BAS completion and form-filling. The TPB's approach however takes no account of different teaching techniques that are adopted by different educational service providers. Some are top-down approaches, and some are bottom-up approaches. Top-down knowledge is that which goes from the general explicit concept to specific implicit application through deductive reasoning. Bottom-up knowledge is that which goes from observed implicit specifics to general explicit conclusions through inductive reasoning. The aim of each approach is to arrive at both explicit knowledge and implicit knowledge but by going from two different directions, although studies show this aim is not fully realised especially for the bottom-up approach.	designation, and our organisation, and an unacceptable proposition. Chartered Accountants (CAs) were most certainly contemplated as being able to register within the TASA regime, and CA's being registered advances the consumer protection objective. The TPB's views mean that CAs, who have met the educational requirements to have a Certificate of Public Practice (CPP) issued to them by our professional accounting body to provide tax services to the public, are not treated as eligible to register as a BAS agent. Meanwhile, practitioners can typically register as a BAS agent with 'bookkeeping' level academic qualifications. This outcome is unacceptable to CA ANZ and our members. In our view, it arguably amounts to *Wednesbury* unreasonableness in administrative law terms, i.e. no reasonable decision-maker could determine that a qualified Chartered Accountant who has completed the Australian CA Program is not qualified from *an academic perspective* to provide BAS services to the public in Australia. The TPB has to date been unwilling or unable to change its own administrative view to resolve this issue, despite an internal review of the matter in 2013. Two of the IGoT's Recommendations are again relevant here - Recommendation 6.1 and Recommendation 6.2(a), as discussed above.
	1.3 Global talent – inability of the TAS regime and the Board's approach to accommodate for international talent. It does not	1.3 Highly skilled tax practitioners with years of experience cannot currently meet the registration rules

	reflect the transferability of taxation skills in practice, and is likely to contribute to problems of skills shortages in the important field of taxation compliance and advice.	under Items 203 - 206, as the prescribed criteria are not adequately flexible in this respect, e.g. the practitioner may not be a 'voting' member of an RTAA or may not have 8 years' experience in Australia. This detracts from Australia's ability to attract and take full advantage of the knowledge and skills of international talent. We are aware of certain tax practitioners who are at the most senior levels of Tax in the Big 4 Chartered accounting firms who cannot meet any of the current eligibility requirements for registration as a tax agent.
2. Registration criteria - **'Relevant experience'**	2.1 The impact of parental leave on whether a Tax agent can meet the 'relevant experience' requirement in item 206 – Professional membership, which is 8 years out of the past 10 years. This issue was addressed for BAS agents during 2014 by increasing the total number of years in which the relevant experience must be gained from 3 years to 4 years.	2.1 This issue has a disproportionately discriminatory impact on women who are the main group of agents who take leave (often 6 – 12 months per child) to raise their families. A period of 8 out of 10 years is a very high threshold to meet for those practitioners who can only register via the item 206 'Professional membership' pathway. This is currently a double whammy, for female CAs in particular, because they are forced into the 'Professional membership' pathway because of the TPB's views on "a course in commercial law", and "a course in basic GST/BAS taxation principles", as outlined in 1.1 and 1.2 respectively, which prevents them from qualifying to apply under items 201-205, or items 101-102. If the practitioner qualified to apply under those other pathways, then the "relevant experience" requirement would have only been 1 year in the past 5 years, which would have been far easier to satisfy despite the parental leave taken. FASEA is taking account of parental leave in its 'experience' requirements to deal with this issue.

3. Scope of services	3.1 Scope of a "BAS service" The TPB has registered a Legislative Instrument (LI) which expanded the scope of a "BAS service". Apart from the LI, the statutory definition of a "BAS service" includes some very complex, technically difficult taxes within its scope, such as Goods and Services tax (GST) and Superannuation Guarantee Contribution (SGC).	3.1 Some of the tax services included in the scope of a "BAS service", e.g. GST and Superannuation Guarantee Contribution (SGC), are extremely complex and require a high level of technical skill, knowledge and experience, compared with the much lesser academic requirements expected of a BAS agent to be dealing with this subject matter. Therefore, the internal inconsistency between the Act and the Regulations in their design and perspective on BAS agents creates anomalies. Another consequence of the disconnect in design is that indirect tax agents are liable or entitled to register as a BAS agent under the legislation, but then are not practically able to register because of the approach of the Regulations which are designed to fit 'bookkeepers' (or such is the Board's interpretation of the drafting of the Regulations). To the contrary, however, CA ANZ notes that BAS agents come in all shapes and sizes – they may be a bookkeeper or they may be an indirect tax specialist such as a GST adviser, or a BAS preparer/ reviewer, or a customs and WET adviser.
	3.2 Legislative Instrument – "Tax (financial) advice service" The TPB has issued a draft Legislative Instrument (LI) to expand the scope of a "tax (financial) advice service" so that it includes: (a) a service relating to applying for a tax file number (TFN) on behalf of a client; (b) a service relating to applying for an Australian Business Number (ABN) on behalf of a client;	3.2 We believe these proposed additional tax (financial) adviser services are inappropriate because they are beyond the scope of the Board's powers as: 1. They are beyond the scope of one of the two core elements of the legislative definition of a "tax (financial) advice service" as defined in section 90.5 of the *Tax Agent Services Act 2009* (TASA), particularly to the extent they involve

	(c) a service relating to interacting with the Australian Tax Office (ATO) regarding the tax treatment of a client's excess concessional and non-concessional contributions and liability to pay a charge on income tax paid for excess contributions tax; (d) a service relating to representing a client in their dealings with the ATO in relation to determining dependency for Superannuation Industry (Supervision) Act 1993 purposes; and (e) a service relating to representing a client in their dealings with the ATO in relation to a Division 293 of the ITAA 1997 tax that is imposed on concessional contributions of high income earners whose income and relevant concessional tax contributions exceed the legislated threshold. At the TPB's Financial Adviser Forum on 14 March 2018, it was also suggested to add the following to the proposed expanded definition of a tax (financial) advice service: (f) transfer balance cap; and (g) dealing/ assisting with hardship and compassionate claims.	representing a taxpayer in their dealings with the ATO; 2. Require higher educational standards than those currently required of tax (financial) advisers (which the TPB has set as significantly less than that required by Tax agents); and 3. Require expertise and experience in managing the complexity of clients' overall tax affairs. In regard to point 1 above (particularly paragraphs 3(c), (d) and (e) of the draft instrument), we do not believe that section 90.15(3) of the TASA and accompanying Explanatory Memorandum (EM) to Tax Laws Amendment (2013 Measures No 3) Bill 2013 permits the making of an instrument which is inconsistent with the fundamental structure of the legislation, i.e. the foundational scope of a "tax (financial) advice service", as a type of a tax agent service which excludes (iii) representing a taxpayer in their dealings with the ATO Commissioner, provided in the course of giving advice of a kind usually given by a tax (financial) adviser. We believe that the extracts from the EM below support this view: "3.52 However, a tax (financial) advice service does not incorporate all three elements of a tax agent service. The key tax-related differences between a tax agent service and a tax (financial) advice service is that the latter service only relates to:

		• ascertaining an entity's actual, or potential, tax liabilities, obligations or entitlements under a taxation law; or • advising an entity about their actual, or potential, tax liabilities, obligations or entitlements under a taxation law. 3.53 Therefore an entity that represents a taxpayer in their dealings with the Commissioner, such as by lodging a tax return or a statement in the nature of a return, provides a tax agent service that is not a tax (financial) advice service. 3.55 Accordingly, entities that wish to provide such services — even if they are provided in the course of giving advice that is usually provided by a financial services licensee or a representative — may need to register with the TPB as a registered tax agent or, if applicable, a registered BAS agent." The Board cannot in our view simply ignore or write the words in parenthesise back into the definition themselves. Parliament saw fit to expressly exclude para (iii) activities in creating the legislative structure for the new category of tax (financial) adviser. In regard to points 2 and 3 above, we believe that any proposal to expand the scope of tax (financial) advice services to include services that require a higher level of education than what is currently required of tax (financial) advisers should be made only following finalisation of FASEA's education pathways and other standards for financial advisers.

		At this stage, FASEA's education pathways do not contemplate qualifications, training or experience of a nature that would equip financial advisers to provide the additional tax-related services proposed in the TPB's draft legislative instrument, particularly any services relating to interactions or dealings with the ATO.
	3.3 Interaction between tax agent services and legal services	3.3. A long-standing issue for tax agents is the line at which tax practitioners risk straying into the domain of providing a legal service, rather than a tax agent service, in an Australian State or Territory. We understand based on media reports that there are three jurisdictions in Australia where the Acts regulating legal practice have unqualified practice prohibitions which expressly prohibit specific conduct, such as supplying documents that create or regulate legal rights. These are the Australian Capital Territory, South Australia and Western Australia. One example cited is an SMSF practitioner who provides or helps someone provide documents to the client. The argument is that the way in which the SMSF practitioner does this, i.e., if they use a non-lawyer this could impact on whether it was a breach of the unqualified practice prohibitions.
4. Nature of services – return preparation versus advisory services **and**	4.1 The definition of a "tax agent service" is (1) …"any service: (a) that relates to: (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a *taxation law; or	4.1 The definition of a "tax agent service" has an implicit contemplation or focus on tax agent services as being in the nature of tax return preparation (compliance) services, rather than tax advisory services, particularly because of the para (b) element to the definition which revolves around relying on the service to satisfy liabilities or obligations or to claim entitlements.

- scope to include emerging digitalised tax services	(ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or (iii) representing an entity in their dealings with the Commissioner; and (b) that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes: (i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law; (ii) to claim entitlements that arise, or could arise, under a taxation law."	The TPB's focus when administering registration requirements is also heavily focused on the need for a tax agent to have prepared a large volume and many different types of tax return (individual, company, partnership, trust etc) in order to have "relevant experience" in that subject matter. See the TPB's online registration application forms. In addition, the further impact of the definition of "tax agent services" is that emerging digitalised tax services provided by Digital Service Providers (DSPs) may not fall within the scope of the current definition. The IGoT raised this issue in his Future of the Tax Profession report at 6.70 - 6.71.
5. "Professional associations"	5.1 The TASA contemplates "professional associations" and "professional qualifications in section 20-10, however the Regulations again have different slant on what is a "professional association" compared with the ordinary meaning of the term "professional". The legislative scheme and the scheme of the Regulations are poorly resolved, reconciled and aligned in terms of their purpose, vision for who is regulated, how and why. It is arguably questionable as to whether some recognised associations should be regarded as "professional associations", e.g. if there is an absence of a professional conduct function in the association to regulate their members as 'professionals'.	5.1 The professional conduct function, including quality review and disciplinary processes are important but burdensome tasks for professional associations who are regulating a profession or group of professionals. We consider that there must be disciplinary consequences and sanctions by an association to its members in order to be a "professional association", as well as Quality Review. The Regulations should reflect this, not the current design which has allowed the Board to take an extremely expansive view of what is a "professional association", far beyond what we believe was originally intended when the TASA was legislated. The subsequent design and implementation of the Regulations created a disconnected between the Act and the Regulations.
	5.2 Annual Declarations – becoming an indirect 'audit' of associations, when it was intended that the Board would use a process of Annual Declarations.	5.2 The onus regarding the TPB's verification of professional associations' eligibility for accreditation has shifted. We would hope that this is only a temporary

		trend, and not a permanent approach of the Board to associations. The law does not contemplate 'audits' of associations, and the Board itself has acknowledged and expressly stated this. For the last two Annual Declaration processes, the TPB's extensive inquiries and requests for information have become much more like an audit than a self-assessment and declaration process. The process to respond to the information requested was very comprehensive and time-consuming.
6. Continuing Professional Development (CPD)	6.1 Inconsistency between the CPD requirements of multiple regulators and professional bodies	6.1 The main impacts of the TPB having its own CPD requirements are (i) the overlap with the requirements of professional associations; and (ii) the inconsistency / gaps between the TPB's requirements and that of professional and industry associations. This creates a risk and a burden for tax practitioners because there are a myriad of differing requirements that all need to be complied with. Complexity is the enemy of compliance.
	6.2 CPD Topics – should some topics be specifically mandated in the law? (a) Ethics (b) Risk management	6.2 (a) Ethics – given the Code of Conduct duties to act with honesty and integrity, and act in the interests of the client, these duties are not supported very well by ongoing CPD requirements as there is no mandatory requirement for CPD on Ethics under the TPB's policy. By contrast, we understand that lawyers have to do mandatory CPD on ethics, which may provide a model for consideration.

		(b) Risk management skills and processes are at the heart of tax practitioners responding appropriately to the vast range of risks and complexities and obligations that they encounter in the provision of their tax services. Poor risk management is likely to be associated with many of the existing threats to the tax system that are occurring. Lack of risk management skills is therefore a contributor to tax practitioners finding themselves taking aggressive tax positions, e.g. in claiming deductions, by practitioners failing to take steps to eliminate or manage those risks in the first place. Risk management is an important part of the process required to take reasonable care in applying the tax laws and in ascertaining the client's state of affairs, which are the two competency duties under the Code of Conduct.
7. Professional Indemnity Insurance (PII)	7.1 Cyber security – mandate coverage of PII?	7.1 Cyber security is one of the most significant risks facing a tax agent's practice and their clients' businesses and data security, in the context of the rapidly growing digitalisation of the tax system and broader economy.
8. Civil penalty provisions	8.1 Civil penalty provisions by their nature can only apply to registered Tax agents and BAS agents, not to registered Tax (financial) advisers. This is because the civil penalty provisions that apply to registered practitioner are about returns lodged and statements made to the Commissioner, which by definition is not a type of tax (financial) advice service.	8.1 The impact of this is that the most significant sanctions under the TASA cannot apply to a critically important sub-set of the tax practitioner population – Tax (financial) advisers – and as such, the TASA lacks credibility and serious disincentives from misconduct or negligence in relation to the provision of tax-related financial advice.
9. Disclosure of matters to and by the Board	9.1 Secrecy provisions - disclosure of matters *by* the Board Under the secrecy provisions, outcomes of investigations against members are able to be communicated to the professional association.	9.1 The impact of the secrecy provisions and the associated criminal sanctions is that they create significant obstacles and barriers to being able to deal with conduct matters, given the very limited information which is published in the Government Gazette. This is

	However, due to the secrecy provisions in the TASA, and the associated criminal sanctions, professional associations are unable to use this information unless it is published in the Government Gazette.	important as the information provided by the Board to professional associations regarding decisions about members is unable to be used for the purpose of conduct matters. The very limited information published in the Government Gazette makes it difficult for professional associations to properly investigate and discipline relevant members. In addition, the secrecy provisions mean that professional associations are also precluded from dealing with conduct matters in an efficient and timely manner. This is important as some matters may involve circumstances that make it desirable to urgently refer a potential conduct matter to a professional association.
10. Powers of the Board	10.1 Investigation - inadequate powers to commence an investigation?	10.1 We understood from discussions at a recent TPB Consultative Forum that the Board has found itself unable to investigate some areas in which it may otherwise have wished to pursue compliance action because it has not received a complaint from any taxpayers, e.g. investigation of egregious allegations in tax compliance services such as over-claimed work-related expenses on tax returns. Another example is aggressive or fraudulent claims by R&D advisers where there has been no complaint by a client nor a referral from the ATO. However, Subdivision 60-E of the TAS law does not require a 'complaint' before an investigation can be commenced. Consequently, we are uncertain whether the Board's investigatory limitations are more about having sufficient grounds and satisfying natural justice requirements, so that these can be stated in the 'notice' that is issued to

		commence the investigation, or whether the Board is lacking some particular investigatory powers. If it is only the former, then the Board's inability to undertake wider compliance may be more of a resource constraint issue rather than an investigatory power issue that is preventing the TPB from establishing more strategic compliance and enforcement programs. In addition, it may also be due to a need for a formal referral process from the ATO to the TPB to be fully implemented to enable sufficient information to support the commencement of investigations.
	10.2 Sanctions – not fit for purpose	10.2 The TPB's current powers to impose sanctions should be retained, but are not sufficient, namely a written caution (s30-15(2)(a)), an order to complete further education or training (s30-20(1)(a)), an order to be supervised (1)(b) or provide only a limited range of services (1)(c), suspension (s30-15(2)(c)) or termination (s30-15(2)(d)) of a practitioner's registration. Sanctions for breach of the Codes of Conduct are personal to the individual service provider, and if they are a sufficiently harsh and are enforced, they have the potential to be very effective as a deterrent. Civil penalty provisions provide the heaviest and most effective sanctions. However, they are not applicable to tax (financial) advisers in practice as, provided they are registered, the civil penalties only apply to preparation of returns and statements which tax (financial) advisers do not undertake.

11. Independence of the Board	11.1 Lack of Independence from ATO The TAS Regulations state: 11 Administrative assistance to the Board (1) For section 60-80 of the Act: (a) the Commissioner must, after consulting the Board, make available to the Board a person: (i) engaged under the Public Service Act 1999; and (ii) performing duties in the Australian Taxation Office; to be the secretary of the Board; and (b) the Commissioner must make available to the Board persons: (i) engaged under the Public Service Act 1999; and (ii) performing duties in the Australian Taxation Office; to provide administrative assistance to the Board; and (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.	11.1 The impact of the lack of structural independence of the TPB from the ATO is potentially mostly perceived, however it could also be actual in practice since the Secretariat and a high proportion of TPB staff are seconded to from the ATO. The perception negatively impacts the optics of the independence of the TPB from the ATO. Independence is an important legal principle to ensure that natural justice is done, with confidentiality and secrecy obligations upheld, and impartiality, and no undue influence or heavy-handedness by the ATO and the TPB, only referrals made in accordance with the law when matters are being investigated (e.g. without proper lines of separation and independence, there is a risk of actions being influenced by revenue raising pressures).
12. Conflicts of Board members	12.1 Board members as registered Tax agents, BAS agents, etc	12.1 The appointments to the Board of registered tax agents and BAS agents are a perceived conflict of interest. Furthermore, there is the potential for actual conflict of interests to arise in relation to decisions of the Board, such as the Legislative Instruments that the Board has issued/registered which have expanded the statutory scope of “BAS services” that can lawfully be provided by BAS agents.

	12.2 Board members as close affiliates of recognised associations or training organisations	12.2 We believe that the Board has at times consisted of close affiliates of recognised associations (e.g. not just members but in governance roles). In addition, the Board has engaged external members who are affiliated with recognised associations or training organisations in order to develop the mandatory academic requirements. Given that such action has the potential to uniquely advantage certain recognised professional associations or training organisations who are primarily in the business of developing and selling a variety of educational courses on taxation in Australia, such associations or organisations should not be involved in informing the Board's guidance and policy decisions on that subject matter, in the sense of being engaged and paid to provide that advice.
13. Safe harbour	13.1 The effectiveness of the 'safe harbour' provision in subsection 284-75(6) of Schedule 1 to the *Taxation Administration Act 1953*	13.1 The safe harbour provision is drafted in quite an obscure way, which at first glance appears to be counter intuitive or the opposite of how the provision should work. However, its effect is essentially that a client receives the benefit remission of an administrative penalty if they used a tax agent, provided all relevant information to the agent, and the misstatement was either from negligence or taking a position in which the agent is able to demonstrate that they took reasonable care in reaching that position, e.g. a diligent process and/or a reasonably arguable position. The client will only be denied the safe harbour if the agent's misstatement was from recklessness or intentional disregard. Feedback from some agents is that they dislike the provision as it requires them to admit negligence in order for their clients to receive the penalty remission. However, technically they do not have to do so, as the provision also operates where there was no

		negligence. Only recklessness or intentional disregard prevents the safe harbour from being available. We understand that if the latter two events occurred (recklessness or intentional disregard), then the intention of the provision was that the client should instead rely on the agent's professional indemnity insurance to recover the cost of the penalty imposed.
14. Board's Symbol	14.1 The TPB symbol has taken on a life of its own as if it is a qualification.	14.1 The TPB symbol is not a qualification. It is a registration provided to ensure that practitioners are not in breach of the civil penalty code. It does not provide qualifications, nor membership to a particular entity. It is a not a 'brand' of the practitioner, and it is not a mark of quality or standard of qualifications or skills being possessed. The TPB does not have a Quality Review and Assurance program for its registrants. By contrast, however the Symbol seems to portray that it holds some status for registered tax agents, beyond just merely being a registration number so that practitioners don't provide advice unlawfully. It therefore could be misleading. It also competes against professional associations and other associations who do provide many of the features mentioned. The sole intention is to show that a practitioner is a registered tax practitioner, which gives the client the consumer protection oversight. We believe that the registered practitioners' registration number is adequate. This is how it is done by the Office of Fair Trading for Builders' Licences. The current Symbol is problematic and undesirable. For example, CA ANZ is aware of registered practitioners who

		were including statements in their advertising and website that they were “members” of the TPB. We believe that the TPB Symbol is the exact style of “branding” or “logo” that creates that misunderstanding and expectation in practitioners, and certainly in consumers who do not have any information about the TASA regulatory regime.

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