

Australian Bookkeepers Association

A.C.N. 162 054 140

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Response to Guiding Questions on the Review to Assess the Effectiveness of the TPB and TASA in Regulating Tax Practitioners

Australian Bookkeepers Association (ABA) welcomes the opportunity to respond to the TPB's invitation for feedback.

About ABA

Australian Bookkeepers Association (ABA) is a non-profit organisation which provides representation and educational options for bookkeepers Australia-wide. ABA is accredited as a recognised BAS Agent Association and represents its members in various Government arenas including at ATO BAS Agent Advisory Group meetings, and Tax Practitioner Board consultative forums.

Our Interest in this Review

As a registered BAS Agent Association, our members are primarily BAS Agents. As such, they are subject to the *Tax Agent Services Act 2009* (TASA), which is presided over and enforced by the Tax Practitioners Board (TPB). We therefore have a keen interest in the effectiveness of the TPB and the TASA in regulating tax practitioners which is the focus of this review.

We now address the guiding questions for submissions:

1. Are the governance arrangements for the Tax Practitioners Board working effectively, and could they be improved?

Broadly speaking, governance frameworks structure and delineate power and the governing or management roles in an organisation. They also set rules, procedures, and other informational guidelines. In addition, governance frameworks define, guide, and provide for enforcement of these processes.

As stated on the TPB website, the Chair and other Board members of the TPB are responsible for the strategic direction and performance of the TPB. As such, they are central to its governance arrangements. For the TPB Chair and Board to operate most effectively – particularly (as per earlier) in setting rules, procedures, and other informational guidelines – it needs to be representative of the tax practitioner population that it regulates. This is currently not the case. Although BAS Agents represent approximately 20% (15,000 in total) of the tax practitioner population, there are no BAS Agents on the eight-person Board of the TPB.

Governance arrangements could also be improved by making it clear who on the Board or the executive is responsible for what. At present, there is no information (at least publically available) on who is responsible for which aspect of the TPB's operations. This goes to visibility of the governance function and accountability for specific TPB functions. This can be contrasted with the ATO, for example, where there is a clear delineation of responsibility (for example, an Assistant Commissioner for small business or an Assistant Commissioner for superannuation etc.). For all aspects of the ATO's operations, it is made clear which high-ranking individual has broad responsibility. Implementing this at the TPB, would make contact with the TPB for a particular function more effective, and the person can also then be held accountable for the performance of the area over which they preside.

Australian Bookkeepers Association

A.C.N. 162 054 140

To operate optimally, the TPB also needs to have the support and respect of the various stakeholders. Central to this, is that the TPB is independent, and perceived to be independent. While the ATO is clearly a TASA stakeholder, and the TPB has had historic budgetary constraints, care needs to be taken to ensure the TPB is (and is seen to be) truly acting independently of it. Some examples of recent close dealings between the ATO and the TPB include:

- The ATO and TPB work very closely together on joint projects, such as the current crackdown on tax practitioners' outstanding personal tax obligations
- Joint educational presentations
- Safe harbour referrals
- Referrals by the ATO to the TPB for potential TASA breaches.

The TPB's operations have historically been hampered from an acute lack of funding from the Government. Underfunding is a point that the TPB has itself acknowledged in the past. It is difficult to see that an underfunded TPB can effectively fulfil its charter. Service delivery times have in the past been compromised due to lack of funding for resources. A boost was given to funding by an increase in tax practitioner registration and renewal fees in the May 2018 Budget.

Is it sustainable or reasonable that the most recent increase in funding to the TPB (in the May 2018 Budget) was entirely funded by an increase in tax practitioner registration and renewal fees? It was justified to us that the financial burden should fall on tax practitioners as a "user pays" model; this logic ignores some of the stakeholders who should be included in a true "user pays" model. The TPB was established to protect consumers. They are users of practitioner services and clearly a stakeholder. The ATO is also a stakeholder as better tax practitioner compliance helps protect taxation revenue. We would like to see a more transparent funding model where it can be seen how much of the TPB's budget is funded by each of the stakeholders:

- Tax practitioners;
- ATO ; and
- Consumers of taxation services.

If future increases in TPB funding come from the service provider (tax practitioners) rather than the user of the services (the consumer) there may be a perceived risk to independence. Practitioners are already serviced well by industry associations, and we don't need the TPB to become another one.

2. Are the qualification and experience requirements for individuals seeking to become a registered tax practitioner, or renew their registration, appropriate?

In our view, both the experience and qualification requirements to qualify as a BAS Agent are inadequate. While it is possible for experience to cover inadequacies with qualifications and vice versa, this is not possible when both requirements are set too low. Arguably, over time, experience gained and ongoing CPE once registered should cover initial shortfalls in experience and knowledge.

On the experience front:

- Under current rules, member of professional associations can meet the 1,000 hour requirement by undertaking just five hours of BAS Agent-like work per week, or one hour per day. This is inadequate.

Australian Bookkeepers Association

A.C.N. 162 054 140

- Over the four-year period where you are to have acquired your experience, there is no minimum yearly threshold. Therefore, you can clock your 1,000 hours in year 1, and then not practice for three years, and then apply for registration. Minimum yearly thresholds should apply, such as they do with TPB-mandated minimum levels of Continuing Professional Education (CPE).
- There is no focus on the breadth of experience that a BAS Agent must have, but merely the amount. Does an aspiring BAS Agent who has acquired all of their relevant experience by undertaking work relating to a narrow range of BAS provisions (such as PAYGW, for example), or for a narrow range of client types, have the breadth of experience to practice as a BAS Agent (free to provide any kind of BAS service to any client type)?
- By recognising “experience of a kind approved by the Board”, this potentially lowers the standard of successful applicants by allowing the TPB to register an applicant who has not even worked under the supervision and control of a practitioner (such as an unsupervised person preparing and lodging BAS for the family business). While we note that the TPB provides an example of the type of experience it may accept (i.e. work undertaken as an academic teacher) there must be other types of experience that has been recognised by the TPB in this category. If so, it is to be hoped that it was of a similarly high standard, and that this discretion is only exercised in such high-standard cases as this could compromise consumer protection if registration was to be granted capriciously.
- BAS Agents have not historically been big employers (like accountants); this makes it difficult for an aspiring BAS Agent to gain the initial relevant experience. In many cases, this means that BAS Agents get registered with low levels of experience with insufficient depth and breadth. One means of countering this without increasing the initial registration requirement might be to increase the requirement in the first term of registration. 2,500 hours over three years. 15-20 hours per week, would give a BAS agent a better experience grounding and may help counter the low initial registration requirement.

Regarding current qualification requirements:

- It's reasonably widely acknowledged among professional associations that the minimum educational requirement for BAS Agent registration of the Certificate IV Accounting and Bookkeeping (or equivalent) is by itself inadequate in terms of equipping bookkeepers to practice as BAS Agents given the breadth of services that can be offered by BAS Agents, and the complexity of certain services, for example, GST and payroll. A better minimum standard would be to raise the educational benchmark to diploma level. It is our understanding that at the time the TASA was enacted, there was an emphasis in getting unregulated bookkeepers to register and then to embrace the quality tenets of the Act (Code of Conduct, qualifications, Relevant Experience CPE etc.). The trade-off was a low level qualification over a transitional timeframe for risk of “scaring the bookkeeper underground”. We are now 10 years into the operation of the TASA, and we believe the logic in a low-level qualification needs to be re-examined.
- Arguably this qualification has been weakened with the last review of the qualification and combination of Cert IV Accounting and Bookkeeping. Certain core units were removed, such as Cash and Accrual Accounting which are key tenets of the bookkeeping function and replaced with two Certificate III units as core. The ability for RTO's to further include two Certificate III level elective units further weakens the qualification.
- It should be noted that the majority of RTO's offer very basic electives in the Cert IV offering which are a stock standard offering to all enrolments. This adds minimal value to the learning outcomes especially considering the range of Certificate III level units which are acceptable.

Australian Bookkeepers Association

A.C.N. 162 054 140

Surely, if the Cert IV is the minimum qualification level, should the unit content not also be at a Cert IV level? Every learner is different as is the reason they have embarked on study, and the purpose for which these new skills will be applied. Cert III level units add value to a Cert III but not the Cert IV. We encourage industry standards to be raised and suggest enforcing the acceptable Certificate IV in Accounting and Bookkeeping contains five electives at the Cert IV level or above.

- Bookkeeping is a profession that requires a working knowledge of software including modern cloud-based packages. Closer scrutiny of the Cert IV qualification is required to ensure that a student has grounding in this essential resource. Whilst there is potential to cover cloud computing in two of the core units, specifically FNSACC416 Set up and operate a computerised accounting system or BSBSMB412 Introduce cloud computing into business operations, the unit performance criteria do not stipulate this learning as mandatory.

In 2013 with our RTO partner, we supported a submission to (ISBA) the skills council for the FNS package to include of BSBSMB412 Introduce cloud computing into business operations for the very reason that the unit could be contextualised to cover key learning on cloud accounting as there was not an FNS unit on the curriculum which specifically covers this topic, nor is there currently. Six years down the track with the emergence and prominence of cloud computing, essential learning is still not adequately addressed in the qualification. As a general rule many learning resources commercially available to RTO's only just cover the unit requirements, and seldom exceed the minimum criteria.

Furthermore much of the off the shelf learning resources used by RTO's don't include the opportunity for the student to setup and operate a computerised accounting system (desktop or cloud), they include the theory behind the concept only. We acknowledge not all RTO's use off the shelf resources and understand some do contextualise the resources to cover this essential learning however the TPB should review the learning being delivered and mandate the setup and operation of both desktop and cloud accounting systems.

- The payroll qualifications required by the TPB impliedly acknowledge the above point. If an individual was specialising in payroll services and not providing any other BAS Agent service, then they could seek a limited BAS Agent registration with a Payroll Service Provider qualification. The specialist, standalone payroll diploma/qualification they are then required by the TPB to complete in order to be registered, is very rigorous – acknowledging the complexity of the payroll service landscape. By contrast, if that same individual sought to register under the full BAS Agent registration route, they would need to complete the standard Certificate IV Financial Services (Bookkeeping) or (Accounting). This contains only one core unit which deals with payroll (“establish and maintain payroll systems”). There are eight core units overall, and five electives.

This mismatch illustrates the inadequacy of the Certificate IV – it deals with many BAS services on a level that does not reflect the complexity of those services; a complexity that is acknowledged, on the payroll front, by the more rigorous nature of the specialist payroll diploma.

- The qualification requirements do not evolve sufficiently. For example, Taxable Payments Annual Reporting (TPAR) was introduced on 1 July 2012 to help expose the cash economy activity in the building and construction industry. Given its success in that industry, the TPAR regime has since been extended to several other industries and now is a key tool in the ATO's fight against the black economy. However, if a BAS Agent completed their Certificate IV prior to 1 July 2012, they would likely have no formal training in the TPAR regime, and yet are free to provide this as a BAS service.

Australian Bookkeepers Association

A.C.N. 162 054 140

- The same problem applies to Superannuation Guarantee-related services. In August 2013, the TPB was given legislative power by Treasury to expand the definition of 'BAS service'. In June 2016, it subsequently included Superannuation Guarantee services to the extent they relate to a payroll function or payments to contractors. Again, if a BAS Agent completed their Certificate IV prior to this date, they may have no formal training in this area, which again potentially leaves the consumer vulnerable.
- Going forward, the TPB should commit to periodically reviewing the content of the Certificate IV qualification (at least the core units) to ensure that it reflects the services (and the evolving complexity of those services) that BAS Agents provide.

To some extent, a lack of experience or of formal qualifications in a particular area can be compensated by Continuing Professional Education (CPE), which tax practitioners are required to complete as a condition of their registration. However, this is diminished when the CPE requirements themselves are inadequate which we contend that they are in the following respects:

- With the BAS Agent CPE requirement set at 45 hours over a three-year period, this equates to only 17 minutes per week. While we note that this is only a minimum requirement, and that tax practitioners must "maintain knowledge and skills relevant to the BAS services that they provide" (Code of Conduct Item 8) and therefore may need to undertake further CPE/training, the minimum requirements are still nonetheless woefully inadequate. Additionally many BAS agents are not aware of their Code obligation to complete more CPE than the minimum if that is what is required to maintain competence.
- The CPE requirements should be graduated to take into account the relative experience of tax practitioners. As it currently stands, BAS Agents who are new to bookkeeping and have done little more than attain 1,000 hours of relevant experience, are required to do no more additional CPE than a BAS Agent who has been a bookkeeper for 20 years.
- The TPB should ensure there is a connection between CPE completed, and the services offered by a tax practitioner. As noted, Code Item 8 requires that tax practitioners "maintain knowledge and skills relevant to the BAS services that they provide". At the moment, however, the CPE requirements only focus on quantity, not type. We propose that any CPE guidelines including audits or checks by the TPB as well as on renewal of registration require the BAS Agent to demonstrate how the CPE they have completed reflects their service offerings. Alternatively, the TPB might consider testing an agent's knowledge and skills by examination at the time of renewal of an agent's registration combined with suggested learning experiences to maintain skills currency.

3. Are the Tax Practitioner Board's compliance and investigation powers and functions appropriate?

As noted earlier, the TPB has itself observed that it has historically suffered from a lack of funding. This logically limits its investigative powers. It can be an expensive exercise to conduct a tax practitioner investigation (particularly getting matters to the Federal Court), and to obtain sufficient evidence to prosecute. This means that the TPB sometimes must weigh which breaches of TASA are sufficiently serious to justify the high cost of a prosecution. This trade-off is not a desirable outcome in terms of protecting consumers, and deterrence.

Further on Federal Court prosecutions, where fines are imposed by the Federal Court as a result of a TASA breach (uncovered by a TPB investigation), it is our understanding that these amounts go back into Commonwealth general revenue. The amounts are not channelled back to the TPB, yet the TPB budget funds much of the cost of prosecution. This can act as a disincentive to

Australian Bookkeepers Association

A.C.N. 162 054 140

prosecute or investigate if the TPB is outlaying resources but not receiving any proceeds that come from its investigative work. The drain on the TPB budget of funding prosecutions must limit its effectiveness in other areas such as agent education, consumer awareness, complaint handling etc.

As to the appropriateness of the TPB's investigative powers and functions, we note:

- Non-BAS Agent bookkeepers arguably pose the biggest threat to consumers – providing (in some instances cut-price) services often without any formal qualifications. Yet the TPB struggles to sanction these bookkeepers, as under the TASA the TPB only have the power to regulate registered tax practitioners. Some work has been undertaken to weed out the unregistered element but budgetary constraints has limited the TPB's ability to raise awareness with both unregistered bookkeepers and businesses using unregistered bookkeepers. There is an element in the bookkeeper community that is still unaware of the need to register. There is also a low level of understanding by business of the importance in only using registered agents.
- Agents using offshore providers of BAS services are responsible for the conduct of the provider to their client under TASA. Our concern is whether there is evidence of unregistered offshore providers rendering BAS Services directly to consumers and subverting the operation of the TASA. We think this warrants investigation.
- The TPB's powers allow the TPB to fine and sanction registered individuals for certain breaches of the TASA but only have limited powers over unregistered persons rendering tax agent services. Agents facing possible TPB sanctions can simply terminate their registration which limits the TPB's ability to act. At present, only the Federal Court can take action – this is not an agile, inexpensive or efficient solution. An extension of the TPB's powers to persons not registered but rendering BAS Agent services might be worth investigating.
- The investigative powers of the TPB and the penalties they impose on tax practitioners are not particularly visible/publicised. Therefore, there is no real deterrent effect for breaching the TASA. While Federal Court penalties are widely publicised (especially in the more serious cases), unless tax practitioners read the TPB's annual report (the vast majority of whom do not) they are largely unaware of the significant lesser penalties and orders that are imposed by the TPB on tax practitioners. Greater awareness would have a deterrent effect.
- The complaints process applied by the TPB could be made more transparent. At the moment there seems to be insufficient information about the process on the TPB website. There seems to be insufficient guidance as to when a complaint can be made by consumers of taxation services. Who can lodge a complaint (spouse, relative, where no fee is charged etc.)? How does the process work? What redress does the tax practitioner have if they believe they have been unfairly treated other than to go to the AAT (daunting and expensive)? Perhaps a review or mediation process could be made available.

4. *What other legislative measures could be implemented to further protect consumers of tax services?*

As noted, the expansion of the TPB's powers enabling it to impose penalties on non BAS Agents would be welcome, and greatly assist the protection of consumers. Aside from this, we believe that generally speaking there are already adequate legislative apparatuses in place such as Consumer Guarantees (under Australian Consumer Law), and the new whistle-blower regime, which will allow employees, clients, associates of substandard tax practitioners, to expose those practitioners to the ATO or TPB without the fear of reprisal.

Australian Bookkeepers Association

A.C.N. 162 054 140

5. *Are the Safe Harbour protections for consumers effective?*

Despite affected taxpayers (those who use a tax practitioner and have a penalty imposed for lack of reasonable care, or for failing to lodge on time) generally being notified of their Safe Harbour rights on their amended Notices of Assessment there is a lack of awareness among taxpayers of the existence of these provisions. This goes to issues of consumer protection. Taxpayers are less protected from administrative penalties and failure to lodge on time penalties caused by tax practitioners, if they are not aware of the provisions designed to protect them. Without an awareness of the provisions, taxpayers will not apply for Safe Harbour. Generally therefore there is no recourse or protection for the taxpayer under these provisions unless tax practitioners instigate them.

In most cases, it falls to tax practitioners to make clients aware of Safe Harbour. However, what incentive is there for the practitioner to do this if, in the event that Safe Harbour is granted, the matter may then be referred by the ATO to the TPB for them to consider whether there has been a breach of the Code of Conduct?

Under the provisions, Safe Harbour cannot be granted where there is evidence of recklessness or intentional disregard of the law (but rather, only where there is a lack of reasonable care from the tax practitioner). The ATO state on their website that where Safe Harbour is granted, the matter may then be referred to the TPB to consider whether there has been a breach of the Code of Professional Conduct. However, the decision by the ATO whether or not to grant Safe Harbour cannot be appealed. Therefore, tax practitioners may be referred to the TPB without any avenue of appeal, and) without having demonstrated recklessness or intentional disregard of the law (as Safe Harbour is not available in those cases). Not only in this potentially unfair, but it again acts as a disincentive for tax practitioners to make clients aware of the Safe Harbour provisions.

The ATO should be more transparent around Safe Harbour referrals and make their referral guidelines clear. Perhaps, to reassure tax practitioners, they could publish a list of actions/mistakes that will not be referred to the TPB. This would then incentivise tax practitioners to make clients aware of the Safe Harbour provisions in those instances at least.

To raise Safe Harbour awareness, perhaps a fact sheet (and suggested Engagement Letter paragraph) could be produced and made available to tax practitioners as best practice, much like the Fair Work Information Statement for Employees.

6. *Are there any other suggestions to strengthen the operation of TASA*

A significant issue is consumer awareness on two levels:

1. First, the feedback we get from our BAS Agent members is that consumers are very much focussed on price when seeking assistance for tax compliance. They either do not understand or are indifferent to the potential downsides of engaging a (usually) cheap, non-BAS Agent bookkeeper. These downsides include no Safe Harbour protection, potentially no PI insurance and questionable ability due to lack of qualifications, experience and CPE compliance. Consumer protection is the key tenet of the TASA. Without taxpayers knowing the potential downsides of non-BAS Agent engagements, they are left vulnerable and less protected. Consumers need to be educated on the advantages of engaging BAS Agents, and also how to determine whether they are dealing with a BAS Agent.
2. Finally, although the TPB is charged with protecting consumers of tax services, this falls down if consumers are not aware of who it is that protects them. Many taxpayers are not aware of the existence of the TPB (or, if they are, that it is independent from the ATO), and the powers that it has to sanction tax practitioners. Without an awareness of the body that regulates tax

Australian Bookkeepers Association

A.C.N. 162 054 140

practitioners, and that it has genuine powers to sanction, consumer protection is compromised – consumers are generally not aware of who to complain to, or that anything will come from their complaint by way of sanctions (so is there any point in complaining?). To remedy this, as a matter of some urgency, a significant public awareness campaign is needed - centred around who the TPB is, what it does, and how to make contact.

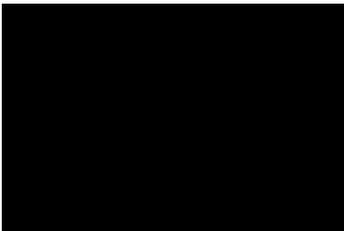
In Summary

Priority issues summarised from our submission, detailed above:

- Consumer awareness of the use of registered agents
- Low levels of qualifications at registration
- Low levels of relevant experience at registration
- Low levels of CPE required especially for new practitioners
- Low level of payroll qualifications by existing BAS and tax agents
- Unregistered bookkeepers and the TPB's limited influence over them
- Safe Harbour rules and effect on agents not transparent
- Transparency of funding of the TPB.

The Australian Bookkeepers Association (ABA) has a keen interest in the effectiveness of the TPB and the TASA in regulating tax practitioners and welcomes further opportunity to contribute to continuous improvement on behalf of our members.

Yours sincerely,



Peter Thorp
ABA Director