Review of the Tax Practitioners Board – Discussion Paper

September 2019

Introduction

The Institute of Public Accountants (IPA) welcomes the opportunity to provide our "Review of the Tax Practitioners Board – Discussion Paper" submission. We look forward to working with the Government in providing feedback on the potential reforms to the regulation of tax practitioners in Australia and the effectiveness of the Tax Practitioners Board and the *Tax Agent Services Act 2009*.

The IPA is one of the three professional accounting bodies in Australia, representing over 37,000 accountants, business advisers, academics and students throughout Australia and internationally. The IPA prides itself in not only representing the interests of accountants but also small business and their advisors.

We look forward to discussing in more detail the IPA's submission and its recommendations. Please address any further enquires to Tony Greco, General Manager Technical Policy via tony.greco@publicaccountants.org.au

02 September 2019

Mr Nick Westerink
Individuals and Indirect Tax Division
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PARKES ACT 2600

Via email: TPBreview@treasury.gov.au

Dear Mr Westerink

Review of the Tax Practitioners Board – Discussion Paper

The IPA welcomes the opportunity to provide this submission in response to the Government's 'Review of the Tax Practitioners Board (TPB) – Discussion Paper' (the discussion paper). The discussion paper discusses and outlines the potential reforms to the regulation of tax practitioners in Australia, the effectiveness of the Tax Practitioners Board (TPB) and the operation of the *Tax Agents Services Act 2009* (TASA).

This submission follows our previous comments to Treasury during the initial consultation phase of the Government's review back in March 2019. Where relevant, in addressing the consultation questions in this discussion paper, we will reiterate and expand on our former comments.

We are supportive of the work of the TPB in ensuring that the tax profession continues to uphold the integrity of the Australian tax system by protecting consumers of taxation services; that is, the Australian taxpayer. This is even more critical given that a large majority of taxpayers rely on their tax agent to ensure that they are compliant with the taxation laws. The review can assess whether TASA is meeting its legislative objective of consumer protection by ensuring tax agent services are provided to the public in accordance with appropriate professional and ethical standards.

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The importance of the role that the TPB plays in ensuring consumer protection cannot be underestimated. Due to a lack of funding and resourcing constraints, it has become apparent over the years that the level of compliance activities by the TPB to identify and curtail the activities of egregious agents, unregistered agents and promoters of tax schemes has been largely inadequate. Further compliance activities are necessary to level the playing field for tax practitioners. In that regard, we reiterate the importance of the Government providing additional funding to improve tax agent compliance. While registration fees have previously been increased to help fund the shortfall, we stress that further funding by the Government should come from the public purse. The Government needs to view this as a prudent investment in upholding the integrity of the tax system. The TPB has recently been given additional funding to address egregious tax practitioners by increasing its resources and interactions with the ATO. This was a Black Economy Taskforce recommendation which resulted in additional funding of $20.1 million over the next four years to assist the TPB in meeting its broadened responsibilities. The source of the additional funding however has been through increased agent registration fees.

Given that it has almost been a decade since the TASA was introduced, this initiative to review the TPB and the TASA is long overdue. Further, we consider this review to be timely and relevant considering changes to the nature of the profession (in terms of demographics, changing nature of work to more advisory services and digitisation) and following the financial services royal commission where the effectiveness of Australia's financial regulators has been called into question and is the subject to greater scrutiny.

Executive summary

Our views to the select questions impacting our members as posed in the discussion paper are summarised below. A detailed discussion is contained at **Appendix 1** of our submission.

- **Independence from the ATO:** Notwithstanding that the TPB is an independent regulator of tax practitioners, that independence is tarnished by

the perception that the TPB is connected to, or a part of, the Australian Taxation Office (ATO). The TPB must be and must be seen to be independent. The discussion paper outlines three possible options for the TPB to achieve independence. Of those options, it prefers that independence be obtained by:

- the Chair of the TPB acting as an accountable authority with his or her own allocated budget
- that the majority of the staff be ATO secondees, and
- that the ATO and that TPB operate under a "shared services arrangement" (Option 3).

We do not believe that this is the most appropriate option in achieving the objective of perceived independence, unless there is complete practical separation by the TPB by having its own staff and premises (option 2). The office of the Inspector-General of Taxation is one such example of this. While there are synergies and cost savings in pursuing option 3, in our view, an over-reliance on the secondment of ATO personnel for expertise may not be sufficient to demonstrate complete independence from the ATO.

- **Registration, education and qualifications**
    - **Relevant experience requirements:** The discussion paper poses the question as to whether the relevant experience requirement should be increased or decreased. For some individuals who do not hold a formal qualification, the requirement is 8 out of the last 10 years (i.e. 205 and 206 pathways). We believe that for this cohort of tax agent, the relevant experience requirement is more than adequate. Specifically, being a member of a recognised tax association adds another layer of compliance by putting in place ethical and professional standards. We note however that the TPB should be given discretion to admit an applicant to registration in circumstances where the applicant has not met the minimum experience requirements. This is something that we are supportive of and it would be appropriate in circumstances where

the applicant has returned to the profession after an extended leave for personal reasons (such as raising a family). Of course, discretion should be allowed for these to be reviewed on a case-by-case basis.

  - **Annual registration period:** The discussion paper poses the question of whether it would be appropriate to reduce the period of annual registration from three years to one year. We are open to a reduction in the annual registration period as an annual declaration is required by tax agents in any case. If the TPB were to pursue a shortened review period, this could potentially increase its administrative load. It must assess whether this is a prudent use of funds and resourcing relative to its other priorities, such as increasing its other compliance activities.
  - **Primary qualification requirements:** The discussion paper proposes whether a baseline requirement of a tertiary degree for registered tax agents is appropriate. The financial planning industry has in recent years increased its base line qualification requirements. Given the changing nature of the profession as a result of digitisation and the type of work performed (i.e. more advisory), there are merits to examining whether such a requirement is necessary. However, if such an approach is adopted, grandfathering must apply to existing registered agents to not disrupt these agents' practices, nor to cause them to exit. Any changes should only apply prospectively to new registrants. We note that if the TPB were to pursue such an approach, it would need to be mindful of the changing nature of work and that there are other career pathways that are being offered that do not require the need to have a tertiary qualification (such as those being offered by the Big 4 accounting firms - refer to detailed discussion). This could deter talent from joining the profession in the capacity as registered agents.

- **Sanctions:** The discussion paper is of the view that the TPB requires a greater range of sanctions and adequate resourcing to deal with rogue agents. It outlines a list of potential sanctions for consideration. In short, we are supportive of the exploration of a range of powers and sanctions to be

provided to the TPB in order to for breaches of the TASA to be properly and effectively enforced. In particular, we are supportive:

- of the ability of the TPB to impose interim suspensions where necessary to ensure that egregious agents can no longer practice while they are the subject of investigation (typically over a six-month period),
- any possible sanction which prevents egregious agents from cancelling their registration and rejoining the profession as an employee, with a potential ban in place, and
- improved communication between the ATO and TPB in identifying bad agent behaviour such that there is swift action in imposing any sanctions. This will ensure that the consumer of taxation services is protected before it is too late. A formal process for the timely referral of egregious tax practitioner behavior by the ATO to the TPB for prompt action is required.

Whilst we are supportive of additional sanctions such as the ability to impose interim suspensions, these powers should only be used in limited circumstances until the investigation is completed. There needs to be robust controls and oversight to ensure that these powers can only be used for egregious agents.

As an additional issue, we have also raised the issue of sanctions under the TASA being sought through the courts and being imposed by the Commissioner of Taxation. We are of the view that such sanctions should be imposed instead by the TPB so as to maintain the perceived independence of the TPB. Further, the role of the Commissioner of Taxation should be focused on the administration of the tax laws, not the supervision of tax agents.

- **Tax (financial) advisers:** The discussion paper contemplates the regulation of financial advisers and the provision of tax advice by those advisers. There have been long standing issues as to how this cohort should be regulated given that the work straddles between financial advice and tax advice. The

discussion paper outlines 7 options for consideration which primarily contemplates a co-regulator model between the TPB and ASIC, with a responsible body for the imposition of penalties and an 'opt-out' from the TPB where tax advice is not provided. Notwithstanding these, option 7 of the seven presented allows financial advisers who provide tax advice which is incidental to the provision of financial products from having to register with the TPB, with a reciprocal arrangement for accountants who provide financial advice (namely advice in relation to the setting up and winding up of a self-managed superannuation fund (SMSF)) from being subject to ASIC requirements. This is similar to the exemption that was previously available prior to 1 July 2016.

- Having considered all the options, our preferred approach for the regulation of tax advice for financial advisers would be to have the reciprocal concessions (i.e. option 7). We consider that this option would reduce the regulatory burden for both financial advisers and accountants; whilst maintaining the integrity of the system, including protecting consumers whilst also fulfilling the objective of the Future of Financial Advice (FoFA) reforms, which was to provide affordable and accessible financial advice to Australian consumers.

- One key advantage of this option is that it addresses a current market gap in which basic financial advice in relation to SMSFs and other financial advice can be provided to the community without having to seeking extraneous financial advice. Having an appropriately qualified accountant provide such advice would alleviate this gap in the market in which it is observed that consumers are not adequately serviced. Most agree that the FoFA reforms have not achieved the desired policy intent. Key findings in a recent report commissioned by ASIC (Report 627 Financial advice: What consumers really think) shows that only 12 per cent of Australians had received financial advice in the last 12 months, despite a much higher per centage wanting to access such advice. The report also highlighted barriers to getting advice, which include cost and distrust in using a financial adviser being major contributors.

Tax professionals provide tax related services as their core offering and only a relatively small number operate in the financial advice space. Similarly, financial advisers provide incidental tax advice. The current regulatory environment has created artificial, impractical boundaries which hinder the ability of both groups to have broader ranging discussions with their clients. Appropriately qualified accountants are well equipped to deal with such advice, without the need to apply for an AFSL or limited AFSL. In part, we believe option 7 offers an opportunity for the Government to address some of the policy failures of FoFA in providing affordable and accessible access to simple or limited financial advice.

We trust that you will find our submission of value. Please feel free to contact us directly should you require further clarification on any of the issues raised or other questions related to our submission.

Yours sincerely

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APPENDIX 1: Detailed Discussion[1]

3. Independence of the TPB from the ATO

The discussion paper, consistent with views that we have previously expressed, acknowledged the need of the professional associations for the TPB to be and seen to be independent from the ATO. The confidence of the tax agent community is impeded by the perception that the ATO and the TPB is one and the same entity.

As noted in the discussion paper, since its inception, the ATO has provided staffing, facilities, and funding to the TPB for it to perform its functions and exercise its powers. The TPB's funding is determined as part of the ATO's overall allocation, with the Board members and the CEO being paid by the ATO and the ATO acting as the 'accountable authority'.

We therefore concur with the views expressed in the discussion paper that, amongst other things, the TPB must be entirely independent and control its own budget.

To address the independence issue, the discussion paper presents three preliminary options for consideration, namely:

1. To retain the status quo
2. Establish the Chair of the TPB as the relevant accountable authority and develop a model such that the TPB employs its own staff, is located in its own premises, and is responsible for its own budget and reporting.
3. Establish the Chair of the TPB as the relevant accountable authority responsible for its own budget and reporting. However, many of the staff would be ATO secondees and the ATO and the TPB would operate under a "shared services arrangement".

We note that the preferred option by the review panel is option 3 on the basis that it "retains the benefits of the current system as well providing the TPB with

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[1] Where appropriate we have referred to relevant question/section posed in the discussion paper.

independence". The discussion paper cites advantages of this option to include significant cost savings in infrastructure costs by having the TPB located on ATO premises, that it may be appropriate for the TPB to continue to be staffed by ATO secondees to assist with obtaining staff who have the necessary skills, and that co-location allows both agencies to collaborate and consult effectively.

Having considered the relevant options presented in the discussion paper, our preference would be for the TPB to adopt a model that is in keeping with option 2 as described above.

While we can appreciate the review panel preferencing option 3 as a means to minimising the cost to the Australian taxpayer and to leverage from existing ATO premises and personnel with the appropriate skillset, we consider the continued and considerable reliance placed on ATO personnel by the TPB diminishes the perceived independence of the TPB from the ATO. We consider that the TPB should act as a stand-alone regulatory body not too dissimilar to the office of the Inspector-General of Taxation (IGOT).

Further, an over-reliance on ATO personnel in meeting the skill and expertise requirements of the TPB, can potentially lead to groupthink; which in turn, can hamper the perceived independence of the TPB. In our view, having a diverse workforce that extends beyond that of the ATO (by recruiting externally) would enhance the TPB's effectiveness.

While it is not uncommon for various government agencies to share the same infrastructure (i.e. building and technology) to reduce costs; again, we consider that practical separation between the TPB and the ATO, even if it is within the same business premises, would better address any perceived independence issues, whether perceived or real.

In addition, we do not necessarily agree with the discussion paper's view that co-location would ultimately lead to more effective collaboration. By way of example,

the office of the IGOT can still deliver strong outcomes in its collaboration with the ATO without necessarily working from the same location.

Based on the foregoing, we consider that the better approach would be for the TPB to be practically separated from the ATO from a resourcing and a location perspective. While admittedly, this would come at a greater cost, this would best address the actual and perceived independence issues currently encountered. Overall, we consider this genuine independence to be in the public interest.

5. Registration, education and qualifications

The TASR currently provides various pathways for individuals to register as a tax agent, BAS agent and tax (financial) adviser, based on minimum qualification, education and experience. Those pathways are outlined on pp. 34-35 of the discussion paper.

As noted in the discussion paper, technological innovation and changes to the way that tax practitioners work (in terms of the composition of work undertaken, and flexible working arrangements) necessitates a review by the TPB as to whether the registration requirements currently in place are fit for purpose. Further, changes to the minimum educational requirements for those in the financial advice industry has also warranted some reflection as to the requirements for those providing tax services to the community.

Our comments in relation to the specific questions posed in the discussion paper with respect to the registration, education and qualification requirements are as follows:

5.2 & 5.3 Time for relevant experience and flexibility of TPB

The TASR prescribes the numerous timeframes for individual's having the necessary experience in order to be a registered tax agent, BAS agent or tax (financial) adviser. The length of time is premised on the primary qualification obtained and whether certain TPB approved courses have been completed.

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The relevant experience required is longer where the individual does not have any formal qualifications (e.g. a university bachelor's degree). By way of example, an individual – to be a registered tax agent – must be a member of a recognised tax agent association and must also have relevant experience for 8 of the last 10 years. The same level of relevant experience is also required where the individual does not have any primary qualification but has completed all the prescribed TPB approved courses (205 pathway).

In comparison, where the individual has a tertiary qualification and has completed the relevant approved courses, then only 12 months of relevant experience in the last 5 years is required (201, 202 and 204 pathways).

At this stage, we consider that the current lengths of relevant experience required - depending on the primary qualification and the TPB approved courses conducted – are appropriate for each type of registration. We do not believe that either an increase or decrease to the timeframes are necessary.

For those who do not have a formal qualification and are members of a recognised tax association, the 8 out of 10-year requirement, in our view is more than sufficient. The continuous professional development standards and code of conduct imposed by these associations provide an additional layer of compliance that the individual must satisfy.

We do note however that there may be situations where the individual may not meet the relevant experience requirements imposed under the TASR. In those circumstances, we believe that the TPB should be given discretion to provide registration to those who do not meet the relevant experience requirements but who have demonstrated they have the right type of experience over a reasonable period which warrants their registration as a tax practitioner.

For example, those individuals who have returned to practice after an extended period of leave due to personal or family reasons is a circumstance where the TPB

could exercise its discretion where the standard requirements with respect to having the relevant experience have not been satisfied.

To provide transparency to applicants, it would be appropriate for the TASR to outline the relevant factors that the TPB should take into consideration in exercising its discretion to grant registration where the relevant experience under the standard requirements are not adequate. It would also be useful for guidance to be issued by the TPB to detail the circumstances where discretion would typically be exercised under the relevant experience requirement. This guidance should be indicative but not determinative.

5.5 Annual registration period

Current registrations under the TPB are for a period of three years; however, registered tax practitioners are still required to make an annual declaration to the TPB that they still satisfy the relevant requirements to practice.

The discussion paper poses the question of whether the registration period should be renewed annually. Given that an annual declaration is required to be made in any case, we do not believe that it would too onerous for practitioners to undertake an annual renewal instead.

The renewal process should therefore be reviewed and streamlined by the TPB to facilitate such annual renewals. Further, additional funding and resources may be required to ensure that renewals are processed.

While we are open to the idea of having an annual renewal process, the TPB must assess whether this is a prudent use of resourcing against its other compliance activities and priorities.

5.6 Primary educational requirement for tax agents

As noted above, the TASR contains various pathways for an individual to register as a tax agent.

Under these pathways, those who hold a tertiary qualification in accountancy, law or another discipline, and have completed the necessary approved courses, are not required to have extensive relevant experience (12 months in the past 5 years). Those who do not hold a tertiary degree as a primary qualification are required to have considerably more relevant experience (i.e. 8 years in the last 10 years under the pathways 205 and 206).

The discussion paper contemplates whether the primary educational requirement for tax agents be increased to a degree qualification as a baseline. It cites the financial planning industry as an example of where the baseline requirement has been lifted for those in that industry.

As observed by the office of the IGOT in its review of the future of the tax profession, the nature of the profession is indeed changing with digitisation and the leaning towards more advice-based work. That progression will require a different set of skills, knowledge and process by future tax agents in order to appropriately service their clients. In that regard, having a tertiary qualification as a baseline to be a registered tax agent warrants consideration by the TPB.

If that were to be the preferred baseline, the new requirement must be grandfathered so that existing tax agents are not impacted and that they can continue to practice under the current requirements. Any changes should only apply prospectively to new registrants.

We consider this appropriate for the following reasons:

- The demographic for registered tax agents is ageing with the average age of practitioners being in their 50s. To impose a tertiary qualification as the primary qualification without any grandfathering would jeopardise the practices of these older agents who do not hold a tertiary qualification and will inevitably force them into retirement. This form of disruption cannot be afforded by the profession.

- The recent uplift in education standards that have been imposed by the financial services industry should not necessarily be used as a model for the tax profession. In our view, to ensure that consumers of financial advice are protected in an industry where poor advice was rife, it was necessary to impose a baseline educational requirement where there was previously none before the establishment of FASEA. The same cannot be said for the tax agent profession. Those tax agents who do not hold a tertiary qualification would typically be a member of a recognised tax association under the 206 pathway. These tax agents are bound by professional and ethical standards, continuous professional development requirements and are subject to disciplinary action if they breach the requirements of these associations, which would ensure that standards are maintained, and consumers of tax services continue to be protected.

If the baseline educational requirement was uplifted to a tertiary qualification, consideration must be given to whether this is the only minimum acceptable qualification. It is not necessarily always the case that a tertiary degree is required to work in the profession nor is it the only pathway. By way of example, PwC is recruiting candidates under its 'Higher Apprenticeship Program'[2] where it is not necessarily the case that the candidate will end up with a tertiary qualification[3].

The above is an illustration of the changing nature of work. If the TPB were to introduce a tertiary degree only as a baseline requirement, this could deter talent from being able to register as an agent because they have chosen an alternative pathway in working in the tax profession.

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[2] https://www.pwc.com.au/careers/student-careers/higher-apprenticeship.html

[3] https://www.smh.com.au/education/pwc-to-end-university-degree-employment-requirement-20170424-gvrb7c.html

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7 Sanctions

As we have noted in our previous submission, in order to effectively deter tax practitioners from egregious behavior or for being unregistered, the TPB must be provided with appropriate powers of imposition and enforcement. We had noted that the current powers are ineffective when it comes to the imposition of civil penalties and enforcement for contraventions of the TASA.

Further, in order for the TPB to do its job successfully, it will need to be adequately resourced so that egregious tax agents can be identified and sanctioned. This will require further funding from the Government for this objective to be achieved. Over the years, we have observed that the TPB has not been adequately resourced with its level of compliance activity being largely inadequate.

The discussion paper was in agreeance with our views and those of other submissions on the issue of sanctioning bad agent behaviour. The paper indicates that the TPB's effectiveness in imposing sanctions on egregious tax practitioners requires reform and proposes an agile sanctions regime to deal with emerging issues in the profession. This should also be coupled with increased resourcing.

The discussion paper outlines a list of additional sanction tools which could be employed including:

- QA audits for internal control weaknesses
- Enforceable undertakings
- Interim suspensions
- External interventions
- Transparency of unregistered agents
- Sanctions for deregistered agents
- Administrative sanctions and infringement notices, and
- Permanent disbarment from the tax profession

All of the above proposals warrant consideration in strengthening the powers of enforcement by the TPB. More specifically however:

- We consider that the imposition of interim suspensions warrants closer examination as a possible sanction. Given that the TPB has a maximum of six months to conduct its formal investigation, this measure would be prudent to protect consumers from egregious tax agents who may continue to do the wrong thing while they are under investigation. The TPB should be granted such a power to eliminate any immediate risk which may arise.

- For egregious agents who choose to deregister themselves before any investigation is commenced, we agree that sanctions should be introduced to prevent such agents from re-entering the profession where such behavior has been demonstrated. Permanent disbarment from the tax profession, is also an option worth exploring for those who have caused harm to integrity of the tax system.

- An overarching aspect with respect to the imposition of sanctions by the TPB is that it must act swiftly to ensure that consumers are protected before it is too late. Apart from complaints from the public, a major source of information regarding egregious agent behavior is from the ATO. At times, it has been observed that there is a lack of information sharing between the ATO and TPB on identified patterns of egregious agent behavior and this has resulted in delayed responses. In that regard, there must be a formal process of communication established between the ATO and the TPB to identify and to facilitate the swift imposition of sanctions where appropriate.

Lastly, one aspect that should be evaluated by the Government is whether the powers to enforce civil sanctions should continue to rest with the ATO. As it presently stands, if the TPB wishes to impose a civil penalty for a breach of the TASA, it must apply to the Federal Court of Australia for an order to pay that penalty. Any penalty imposed by the Court is enforceable by the Commissioner of Taxation.

As noted previously, the need by the TPB to obtain an order from the Court imposes undue process and costs, particularly where the maximum civil penalty for the contravention is already contained under the law. Providing the TPB with powers to impose, enforce and collect civil penalties would without doubt remove the red tape that is currently in place.

Further, having the ATO removed from enforcing penalties that arise as a result of the TASA would also demonstrate independence of the TPB from the ATO (as discussed earlier above).

10 Tax (financial) advisers

Currently, financial advisers must register with the TPB where tax advice is provided in the course of giving financial product advice. For this cohort, this has increased the regulatory burden as there is currently oversight by ASIC, TPB and others.

Further, registered tax agents from 1 July 2016 could no longer provide advice in relation to the setting up or winding down of a superannuation fund unless they held an AFSL or limited AFSL to do so (this was previously referred to as the accountants' exemption). The change created additional regulatory burden for accountants and has created uncertainty as to the type of financial advice that accountants can provide to the clients. The current regulatory environment has created artificial, impractical boundaries which hinder the ability of both groups to have appropriate discussions with their clients.

In our view, there is a need to simplify the regulation of financial advice provided by financial advisers, tax agents and BAS agents, but at the same time ensuring full compliance. This has become even more salient following the recommendations in the Final Report of the Financial Services Royal Commission.

The discussion paper outlines seven options as to how the regulation of tax financial advisers could operate. These options are reproduced from the discussion paper below.

Option 1

The status quo remains. This means that ASIC is responsible for the regulation of financial advice and any financial advisers that provide tax advice as part of their financial services for a fee or reward must be registered with the TPB as a TFA and therefore are subject to the TPB regulatory regime.

Option 2

ASIC operates as a 'one stop shop' for the regulation of financial advice and tax advice. The TPB would have no direct role in the regulation of financial advisers.

Option 3

ASIC and the TPB operate as co-regulators of financial advisers and ASIC is responsible for the imposition of sanctions for tax related matters. TPB registration as a TFA automatically attaches to all financial advisers, who can then 'opt out' of the TPB regime if they do not provide tax advice.

Option 4

ASIC and the TPB operate as co-regulators of financial advisers and the TPB is responsible for the imposition of sanctions for tax related matter. TPB registration as a TFA automatically attaches to all financial advisers, who can then 'opt out' of the TPB regime if they do not provide tax advice.

Option 5

ASIC and the TPB operate as co-regulators of financial advisers and ASIC is responsible for the imposition of sanctions for tax related matter. TPB registration as a TFA attaches to all financial advisers that 'opt in' to the TPB regime if they provide tax advice.

Option 6

ASIC and the TPB operate as co-regulators of financial advisers and the TPB is responsible for the imposition of sanctions for tax related matter. TPB registration as a TFA attaches to all financial advisers that 'opt in' to the TPB regime if they provide tax advice.

Option 7

This would allow financial advisers that provide incidental tax advice to not have to be registered with the TPB. At the same time there are reciprocal arrangements that permit tax advisers/accountants to provide incidental financial advice which in effect restores the concession that was previously available to accountants that are registered tax practitioners.

Having considered the relevant options with respect to how financial advisers should be regulated with respect to the provision of tax advice, we prefer option 7 as the most pragmatic and appropriate approach. For both financial advisers and tax practitioners alike, we consider that this option would provide certainty and reduce the regulatory burden on all professions, whilst satisfying the policy objective of FoFA, which was to provide Australian consumers with affordable, accessible and competent financial advice.

The other options only give consideration to the co-regulation of financial advisers and enforcement with respect to the provision of taxation advice but fail to specifically address nor consider the roles played by tax agents and BAS agents in the provision of any incidental financial advice (specifically in relation to SMSFs and other general financial advice). In any case, it would be difficult for financial advisers to opt-out from being regulated by the TPB as the provision of tax advice is an inherent part of the financial products which they recommend in their advice.

One key advantage of this option is that it addresses a current market gap in which basic financial advice in relation to SMSFs and other financial advice can be provided to the community without having to seek more detailed advice from a financial

adviser, which most are reluctant to obtain. Having an appropriately qualified accountant provide such advice would alleviate this gap in the market in which it is observed that consumers are not adequately serviced.

Most agree that the FoFA reforms have not achieved the desired policy intent. Key findings in a recent report commissioned by ASIC (Report 627 Financial advice: What consumers really think) shows that only 12 per cent of Australians had received financial advice in the last 12 months, despite a much higher percentage wanting to access such advice. The report also highlighted barriers to getting advice, which include cost and distrust in using a financial adviser being major contributors.

Our observations in relation to both professions are as follows:

Financial advisers and incidental tax advice

Incidental tax advice arising as part of providing financial product advice in our view should not warrant a financial adviser registering with the TPB. Guided by their professional standards, the financial adviser should be in a position to advise their client to seek specific advice from a registered tax agent where the taxation implications extend beyond that relating to the financial product.

For these situations, it would therefore be incumbent on the TPB to provide guidance as to what constitutes 'incidental tax advice' in order for financial advisers to make an assessment. Registration would be mandatory where the services provided by the adviser extend beyond such incidental advice. This would reduce the number of advisers who may need to register with the TPB.

Accountants and SMSF advice

On the flipside, we consider that registered tax agents who provide basic financial advice including that related to SMSFs (setting up and exiting) should not be required to obtain an AFSL or limited AFSL. There are valid reasons for accountants to be allowed to provide basic SMSF and other financial advice.

Firstly, good accountants, as trusted advisers, are typically entrenched in their clients' affairs such that questions are part and parcel of their day to day interactions. The inability for accountants to provide SMSF-related and other financial advice because they do not hold an AFSL or limited AFSL ultimately means that accountants cannot properly service their clients. Those who do hold a limited AFSL cannot provide comprehensive advice. This can lead to 'clunky' advice as certain services must be referred to a financial adviser because it is beyond the scope of the accountant's limited AFSL.

Secondly, accountants in their ordinary course of practice would typically advise their clients on the best holding structure for their affairs; such as whether assets should be held in a trust (including trustee type), company, partnership or in personal names. The omission of a SMSF as a possible investment structure because of the restrictions imposed on accountants appears incongruous with the other structures that accountants can advise on without restriction. In fact, we contend that accountants would be best placed to advise on SMSFs given their understanding of the tax implications and the rules under the *Superannuation Industry (Supervision) Act* 1993. The implications in relation to setting up and winding down should be inherent in the accountant's tool kit.

Lastly, the accounting profession has had a long history of being trusted by the community. In our view, this is in part due to the professional and ethical standards imposed by the professional associations on its members. Unfortunately, those in the financial planning industry, because of events in the past, do not hold the same credibility, with the community more likely to turn to their tax accountant for financial advice.[4] In the absence of an exemption for accountants in the provision of incidental financial advice, the ATO has recently conceded that this has resulted in a gap in the market place for basic advice services that is not being met (between full

[4] https://www.accountantsdaily.com.au/business/12339-opportunity-for-accountants-as-financial-advisers-reach-distrusted-rating

financial advice and smaller matters).[5] ASIC's recent report[6] (August 2019) confirms the level of distrust of the financial advice industry. The report findings also confirm significant unmet demand for getting financial advice despite consumers wanting to seek this service.

Ultimately, it is the end consumer of financial advice that loses from the inability of suitably qualified accountants being restricted in what they can offer clients. Clients do not have anywhere to go if they wish to obtain basic financial advice and are unwilling or unable to pay for more complex advice. In our view, option 7 would alleviate those concerns and reduce the regulatory burden for advisers so that resources of the regulatory bodies could be diverted to more critical issues.

We have tabled in Annexure 1, a policy proposal to Government that addresses the difficulties faced by accountants in the current regulatory environment. More importantly, the proposal assesses whether there is market failure following the introduction of the FoFA reforms and concludes there is. It then seeks to provide a way forward for addressing FoFA's failure by allowing suitably qualified accountants who continue to be trusted advisers, to play an important role in providing general financial advice to a marketplace that is seeking alternative sources for such advice that is currently unserviced.

If the preferred alternative view for the regulation of financial advisers is that there is co-regulation between ASIC and the TPB, then the powers and responsibilities of the regulatory bodies must be shared equally and give rise to effective outcomes such that contraventions are identified, and with a broad range of sanctions to act as a deterrent and to ensure compliance.

[5] https://www.accountantsdaily.com.au/smsf/12782-ato-points-to-market-gap-after-accountants-exemption-ditched

[6] ASIC Report 627 Financial advice: what consumers really think

ANNEXURE 1: Proposal for 'Qualified Accountants Financial Services Licensing Regime'

Introduction:

In April 2010, the then Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP, announced the Future of Financial Advice (FoFA) reforms. The FoFA reforms represented the Government's response to the 2009 Inquiry into Financial Products and Services in Australia by the Parliamentary Joint Committee on Corporations and Financial Services (PJC Inquiry), known as the Ripoll Report. The reforms were continued under a Coalition government. Part of the FoFA reforms was the removal of what is referred to as the 'accountants' exemption'.

Essentially, the policy objective of the reforms was to provide affordable and competent financial advice for Australian consumers. The IPA contends that there has been a market failure in that financial advice has not become more affordable and competent and that there remains an unmet demand for financial advice.

In order to address this situation, the IPA recommends that the *Corporations Act 2001* (Corporations Act) and/or *Corporations Regulations 2001* (Corporations Regulations) be amended so that 'qualified accountants' be allowed to provide limited financial advice. Further, that the professional accounting bodies be recognised for the existing regulatory function which they perform with respect to qualified accountants.

Background:

Prior to 1 July 2016, under the Corporations Regulations, Reg 7.1.29A, accountants had an exemption from requiring a financial services licence to provide advice on establishing or winding up an interest in an SMSF. After 1 July 2016 the exemption relating to SMSFs was removed, meaning that accountants need to be appropriately licensed to provide SMSF related financial advice. However, accountants can still provide specific services relating to SMSFs under existing exemptions.

ASIC has issued Info Sheet 216 to explain what accountants can and cannot say to clients. It may be fair to say that the legislation has proved difficult to interpret and apply in practice.

For instance, accountants can still provide administrative, procedural, accounting and tax work relating to SMSFs (Corporations Regulations, Regs 7.1.29 and 7.1.33A). It does not mean that accountants can give financial advice or make recommendations relating to SMSFs, but they can give advice to ensure the client remains compliant with the *Superannuation Industry (Supervision) Act 1993*, around the establishment, operation, structuring or valuing of an SMSF. This can include advice on:

- the practical/factual steps that need to be taken to establish or wind up an SMSF
- how to add new trustees and members to an existing SMSF
- the different ways an SMSF could be structured
- how to process transfers or rollovers of funds
- assist clients to complete paperwork (eg to acquire securities through the SMSF, as long as you do not influence the decision to acquire those securities)
- help clients to add new members and trustees to a fund or to exit a fund
- arrange to wind up an SMSF on a client's behalf (once they have made a decision which you cannot influence).

Financial advice is provided on a continuum which means there is scope for ambiguity and greyness. Indeed, Info Sheet 216 refers to situations where an accountant may easily stray into giving financial advice during the course of providing administrative/ procedural/ accounting/ tax advice and warns that accountants must be alert to this possibility.

As ASIC states in Info Sheet 216:
The advice you give about establishing, operating, structuring or valuing an SMSF must not amount to an explicit or implied recommendation to establish an SMSF, or to acquire or dispose of an interest in an SMSF (or another superannuation product). However, we recognise that advice given to a person about the establishment of an SMSF may also carry an implicit recommendation that the person acquire an interest in the SMSF. Therefore, you are more likely to be able to rely on the exemption when your client has already made a decision to establish the SMSF before seeking your assistance to take the next steps. For example, you may recommend the best structure for an SMSF to suit your client's situation, once they have made the decision to establish an SMSF.

Advice can also be provided on asset allocation in a very broad sense. This can be easily confused with advice on investment strategies which requires an AFSL. This is a particularly grey area. Accountants don't need to be licensed to provide recommendations or statements of opinion on distributing available funds among different categories of investments such as shares, debentures, bonds, deposit products etc (eg shares but not which classes of shares such as international shares or industry sectors or shares with franked dividends).

What type of advice can't accountants provide?

Accountants cannot provide advice about:

- the acquisition or disposal by a superannuation fund, including an SMSF, of specific financial products or classes of financial product
- whether a person should acquire or dispose of a superannuation product
- a person's existing holding in a superannuation product, for the purpose of modifying an investment strategy or a contribution level.

As ASIC states in Info Sheet 216:

Without an AFS licence, you may not advise your client about their retirement investment strategy, including whether your client should increase or decrease their contributions into their SMSF, what their overall investment strategy should be (eg what the target investment return should be and how to achieve this), or what contributions they should make to their SMSF relative to any other superannuation fund of which they are a member.

The IPA believes that the explanations given by ASIC indicate that the law and its application are confusing and may lead to unintentional consequences.

We question whether the best interests of the client are being served by these arbitrary lines, especially when accountants were mostly able to provide this advice prior to 1 July 2016. The Treasury *Super System Review* (chapter 8 Self-managed super solutions) released in November 2015, called the accountants' exemption 'clearly a quite artificial exemption'. Despite recommendation 8.7 that the accountants' licence exemption should not be replaced by any new exemption or restricted licensing framework, we contend that this undermines the policy objective of FoFA.

Policy objective:

General outline and financial impact

CORPORATIONS AMENDMENT (FUTURE OF FINANCIAL ADVICE) BILL 2011

The Corporations Amendment (Future of Financial Advice) Bill 2011 (the Bill) implemented the first components of the FoFA reforms. The reforms focus on the framework for the provision of financial advice. The underlying objective of the reforms is to improve the quality of financial advice while building trust and confidence in the financial planning industry through enhanced standards which align the interests of the adviser with the client and reduce conflicts of interest. The reforms also focus on facilitating access to financial advice, through the provision of
simple or limited advice. To this end, the Bill sets up a framework with the following features:

- a requirement for providers of financial advice to obtain client agreement to ongoing advice fees and enhanced disclosure of fees and services associated with ongoing fees (charging ongoing fees to clients); and
- enhancement of the ability of ASIC to supervise the financial services industry through changes to its licensing and banning powers.

The reforms also include the introduction of a requirement for advisers to act in the best interests of clients and a ban on conflicted remuneration, including commissions, volume payments and soft-dollar benefits.

Market failure:

As stated above, the policy objective of FoFA was to provide affordable and competent advice to Australian consumers. According to ASIC *Report 224* (December 2010) a recent survey at the time suggested that 60% to 80% of adult Australians have never used a financial adviser. In the eight years since this report and the introduction of FoFA, which was meant to increase the number of Australians accessing financial advice, we find that the numbers have not changed. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in *Background Paper 6 (Part A), Some Features of the Australian Financial Planning Industry*, 2018, stated "Public information indicates that between 20% and 40% of the Australian adult population use, or have used, a financial planner or adviser. The Productivity Commission observed that 48% of Australian adults indicated having unmet financial advice needs (*Draft Report: Competition in the Australian Financial System,* January 2018). Even though the number of financial advisers has grown by 41% from 2009 to 2018.

The PC report found that the five main types of advice sought by consumers were:

1. Superannuation and retirement advice
2. Loan and investment advice
3. SMSF advice
4. Other services – such as estate planning
5. Tax advice.

ASIC *Report 562: Financial Advice: Vertically Integrated Institutions and Conflicts of Interest*, January 2018, reviewed financial institutions' approved product lists and found that they comprised 21% in-house products and 79% external products. However, as a result of receiving personal advice from the licensees advisers, 68% of the total funds invested by customer were placed into in-house products, with 32% of such funds invested in external products. The ASIC report continues to state that the review found that overall, customers were not better off from the advice and that their best interests were not served. 44% of advisers (both aligned and non-aligned) operate under a license controlled by the largest 10 financial institutions.

Investment Trends 2017 *Financial Advice Report* found that demand for advice from financial planners is at a record high, with numbers of people intending to access advice increasing since 2013. However, financial planners are not able to turn this demand into actual clients with planners typically losing three clients for every two they gain. One of the main problems is the substantial difference between the amount that Australians are willing to pay for advice ($750 on average) and planners' estimated cost of delivering advice ($2,500 on average). Over nine in ten potential planner clients are open to conducting review meetings with someone other than their planner if it meant a reduction in fees.

Under the Corporations Act, generally before the financial service is provided, a retail client must be provided with a Financial Services Guide (FSG) that contains information about

remuneration, including commissions or other benefits to be received by an adviser.
If personal advice is provided, the retail client also generally receives a Statement of Advice (SOA) from an adviser which includes information about the advice and remuneration and commissions that might reasonably influence the adviser in providing advice. Before a product is provided, a retail client must further receive a Product Disclosure Statement which must also include information about the cost of the product and information about commissions or other payments that may impact on returns. By this stage the cost of advice has become more than some consumers are willing to pay.

Given the PC, ASIC, Hayne Royal Commission and Investment Trends outcomes, the IPA contends that there has been a significant market failure which has occurred despite the FoFA reforms coming into operation, and which warrants government intervention. Refer to:

www.financialservices.royalcommission.gov.au

https://www.pc.gov.au/inquiries/completed/financial-system#report

https://download.asic.gov.au/media/1343546/rep224.pdf

Proposal:

The IPA proposes that the Government amend the licensing regime under the Corporations Act and Regulations to allow qualified accountants (defined under section 88B of the Corporations Act) to provide personal financial advice on SMSFs on the same or similar basis to what existed prior to 1 July 2016. Further, that the scope of advice should be extended to include the type of advice stated above in Info Sheet 216.

To ensure regulatory oversight we propose that the three professional accounting bodies (IPA, CA ANZ and CPAA) be 'accredited' to regulate their respective members, including the provision of legislative/regulatory powers (such as being able to compel information).

Members of the three professional accounting bodies must have the requisite qualifications, undertake Continuing Professional Development (CPD) on average 40 hours per annum, comply with a Code of Ethics (independently oversighted by the Accounting Professional and Ethical Standards Board) and are subject to disciplinary action for breaches of the Standards. We contend that the co-regulatory system for accountants worked well before 1 July 2016 and continues to do so. Accountants continue to be the trusted adviser (refer to recent research).

Further, to ensure transparency and accountability, the accounting bodies could report annually (to ASIC) against an agreed set of criteria which would be developed to indicate whether the new regime is operating effectively and as intended and to ensure the policy objective of the FoFA reforms are being met. Additional monitoring and reporting

requirements could be developed through consultation. We note that the code monitoring bodies under FASEA are an example where the Government has accepted a more formal co-regulatory regime.

Even though these accountants are already regulated by the three professional accounting bodies, the most severe penalty that can be applied is forfeiture of membership. Accountants do not need to be a member of an accounting body in order to practice accounting. Unlike the terms 'financial adviser' and 'financial planner', the term 'accountant' is not defined in law (or prospectively). For this reason, it may be prudent to consider, after due consultation, how the accounting bodies may have their co-regulatory position enhanced. The ability to compel information under legislation (or regulation) from members under investigation would be a worthwhile consideration.

How it would work in practice:

The proposed Qualified Accountants Financial Services Licensing Regime would operate to introduce a new class of licence for appropriately qualified accountants who are regulated by the accounting bodies. The scope of advice would include the areas currently included under the limited AFSL. Qualified accountants would be able to provide limited advice in these circumstances. That is, to assist in meeting the unmet demand from Australian consumers, we propose that qualified accountants be licenced to provide financial product advice that is either personal or general in nature about specific products relating to: interests in an SMSF; superannuation products in relation to a client's existing holding to the extent required for making a recommendation to establish an SMSF or providing advice about contributions or pensions under a superannuation product. They can provide class of product advice that is either personal or general in nature relating to superannuation products, securities, general insurance, life risk insurance and basic deposit products; and simple managed investment schemes. They can arrange for another person to deal in a financial product, including applying for, acquiring, varying, issuing or disposing of financial products on behalf of another relating to interests in an SMSF.

In order to ensure that qualified accountants are supervised and monitored we propose that only those accountants who are defined as 'qualified' pursuant to section 88B of the Corporations Act be allowed to qualify under this new proposed regime.

Advantages/winners:

Australian consumers would have another option for accessing financial advice, although with limitations. However, it would cover a considerable amount of the areas for which consumers are or would seek financial advice. It would be (more) affordable as the fixed costs of licensing fees would be removed. Given the advent of regtech and fintech and robo-advice, accountants can also use technology to reduce costs even further.

Disadvantages/losers:

The main negative impact would be on AFS licensees who have accountants as authorised representatives (ARs). They would lose the licensing fees. How many accountants have chosen to become ARs has yet to be determined, however, we know that far fewer accountants have gone into financial services than was expected during the FoFA consultations.

We are not aware of any other disadvantages.

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