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By email only: tpbreview@treasury.gov.au

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Dear Nick,

REVIEW OF THE TAX PRACTITIONERS BOARD – DISCUSSION PAPER

Thank you for meeting with us on 16 August 2019 and thank you for the opportunity to contribute our thoughts and observations to this important review - *Review of the Tax Practitioners Board (the Review)*.

The Inspector General of Taxation and Taxation Ombudsman (IGTO) believes it is important for this Review to clarify what the role of the Tax Practitioners Board (TPB) should be within a system of good tax administration. That is, to examine not merely its current objects and purpose as set out in the *Tax Agent Services Act 2009* (TASA) but in the current regulatory climate and emerging commercial and market trends, what the role of the TPB should be. This will assist to direct some conclusions on other issues raised as part of the Review – including the membership of the Board, tax intermediaries, registration requirements, and independence of the TPB.

We are of the view that this would be an opportune time to remediate any gaps in the role and powers of the TPB to support tax practitioners in fostering good tax administration system.

We set out below the IGTO observations on the role tax practitioners perform within a good tax administration system.

The Role of Tax Practitioners

The IGTO has undertaken two broad reviews which focused on tax practitioners - namely the reviews into the *Australian Taxation Office's (ATO) Services and Support for Tax Practitioners*¹ and the *Future of the Tax Profession*². In both reviews, we drew on a broad body of research to highlight the important role of tax practitioners.

International perspective

Internationally, there is clear support for the role of tax practitioners within the tax system, which is borne out in research and commentary published by the Organisation for Economic Cooperation and Development (OECD).³ The OECD has observed that tax practitioners perform a broad range of tax-related activities on behalf of a significant proportion of the taxpayer population such as preparing and filing tax returns, providing advice on the application of the tax laws and representing taxpayers in dealing with the revenue authority.⁴ As a result of their activities, tax practitioners are an invaluable source of knowledge and practical experience which may be drawn upon to develop more effective and efficient tax laws and administrative practices.⁵

The OECD has also observed that:

*Across the whole range of taxpayers, taxes and circumstances, the vast majority of tax advisers help their clients to avoid errors and deter them from engaging in unlawful or overly-aggressive activities.*⁶

The OECD further noted that the importance of the tax practitioner role within a system could be tested by asking the question: would compliance with tax laws be improved if tax practitioners did not exist? The OECD did not find any jurisdiction in which the answer to that question was yes.⁷

The Australian perspective

The role of tax practitioners within the Australian tax system is arguably more significant than in most other jurisdictions simply due to the high proportions of taxpayers who rely on tax practitioner services – the ATO's *Taxation Statistics 2016-17* reported that more than 90% of income tax returns had been lodged by a tax agent.⁸

¹ Inspector-General of Taxation and Taxation Ombudsman (IGTO), *Review into the Australian Taxation Office's Services and Support for Tax Practitioners* (2015).

² IGTO, *The Future of the Tax Profession* (2015).

³ Organisation for Economic Cooperation and Development (OECD), *Study into the Role of Tax Intermediaries* (OECD Publishing, 2008); OECD, *Together for Better Outcomes: Engaging and Involving SME Taxpayers and Stakeholders* (OECD Publishing, 2013); OECD, *Increasing Taxpayers' Use of Self-Service Channels* (OECD Publishing, 2014).

⁴ OECD, 'Self-service channels', *Ibid*, p 35.

⁵ OECD, *Together for Better Outcomes: Engaging and Involving SME Taxpayers and Stakeholders* (OECD Publishing, 2013).

⁶ OECD, 'Tax intermediaries', *above n 3*, p 14.

⁷ *Ibid*.

⁸ Australian Taxation Office (ATO), *Taxation Statistics 2016-17* <www.data.gov.au>; Sourced from 2017 income tax returns processed by 31 October 2018.

The IGTO agrees with the OECD that at their core, tax practitioners' services tend to relate to preparation and lodgment of returns, advice on tax laws and representation of taxpayers in dealing with the ATO. However, they also perform a broader role in supporting the taxation system as a whole.

To illustrate, Figure 1 below sets out a range of processes, functions and oversight within the administration of Australian tax and superannuation system and identifies the key stakeholders and participants in relation to each of these functions.

Figure 1 – Overview of the Administration of the Tax and Superannuation System



Tax professionals (including but not limited to registered tax practitioners) participate in five out of twelve sectors - namely:

- Process tax filings and lodgements, including information collection;
- Collect and remit tax;
- Advise or represent taxpayers;
- Provide education, training, guidance and information; and
- Advocate for Reforms.

Given the significant client-facing role that tax practitioners play within the tax administration system, the IGTO has previously suggested that tax practitioners could play a more active role in assisting the ATO with some of its compliance activities. For example, providing assurance that applicants for Australian Business Numbers (ABN) meet the necessary requirements and understand the obligations of holding an ABN - which would assist to minimise compliance costs for the ATO.⁹

ATO Research

The ATO has also undertaken its own internal research, measuring small business taxpayer preferences for seeking advice and their perceptions of tax professionals (such as accountants) and the ATO against nine criteria: capability, trust, reliability, knowledge, consistency, approachability, efficiency, accessibility and cost-effectiveness.

Across all nine criteria, small businesses expressed a preference to seek advice and engage with tax professionals. The research found that small businesses preferred seeking advice from tax professionals (such as accountants), whom they perceived to prioritise their best interests, understood their specific needs, offered tailored and holistic services, offered them 'peace of mind' and saved them time.¹⁰

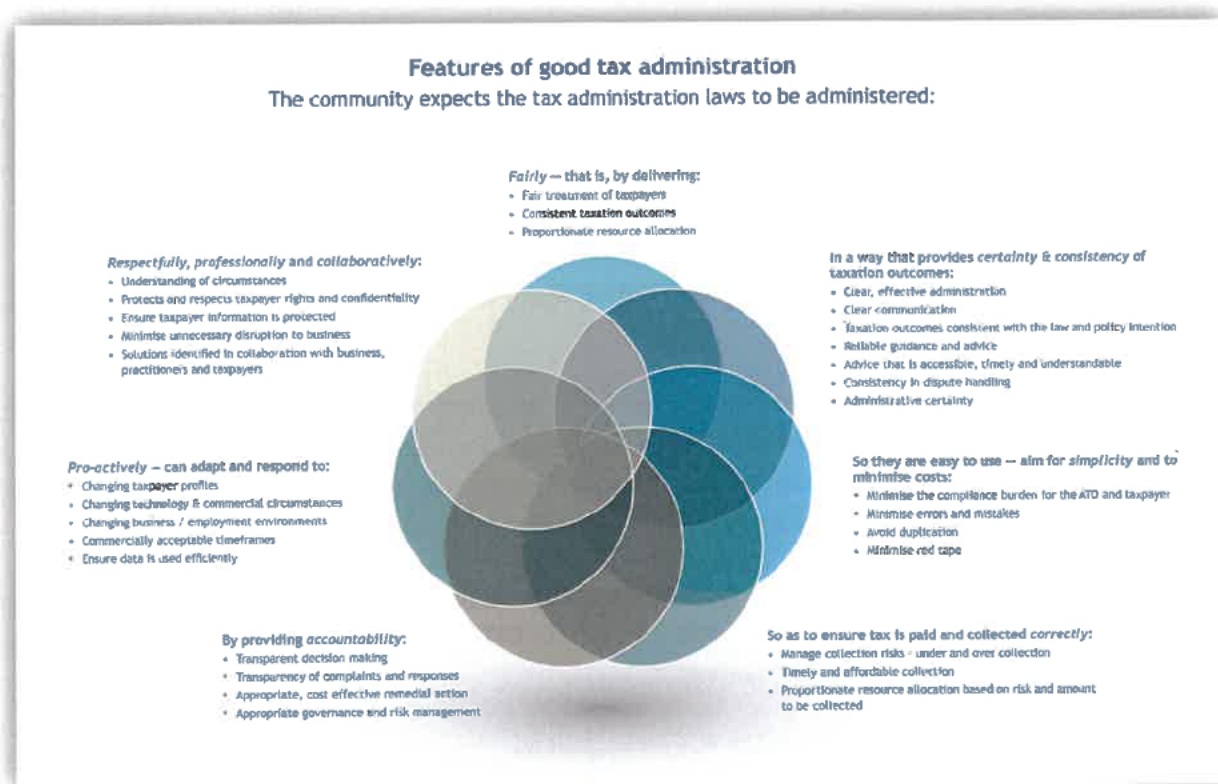
The IGTO's draft framework on the features of good tax administration¹¹ is set out below. This framework similarly identifies the key features which foster good tax administration – fairness, certainty and consistency, simplicity and minimising costs, tax is paid and collected corrected, accountability, pro-activeness and, respectful, professional and collaboration.

⁹ IGTO, above n 2, pp 83, 85.

¹⁰ ATO, *Small Business Engagement Research* (2018).

¹¹ Public consultation on this draft framework is currently in progress for broad community feedback

Figure 2 – Features of Good Tax Administration



The criteria used by the ATO and the IGTO's features of good tax administration are largely aligned, as set out in the table below:

Table 1 – Reasons for using Tax Professionals and Features of Good Tax Administration

ATO criteria in small business perception research	IGTO feature of good tax administration
Capability	Certainty and consistency; Tax is paid and collected correctly
Trust	Providing accountability
Reliability	Tax is paid and collected correctly
Knowledge	Certainty and consistency
Consistency	Certainty and consistency
Approachability	Respectful, Professional and Collaborative
Efficiency	Aim for simplicity and to minimise costs
Accessibility	Aim for simplicity and to minimise costs; Proactive
Cost-effectiveness	Aim for simplicity and to minimise costs

IGTO considers that tax practitioners are both important and key in achieving the principles of good tax administration. Without practitioners acting as intermediaries to assist taxpayers navigate a complex system of taxation laws and interface with the ATO, it is difficult to imagine any of the features of good tax administration being realised. As the Assistant Treasurer recently stated:

*Accountants and advisers are pivotal to the success of small business clients and it's not just tax matters that they are asked to assist with but a plethora of business and non-business needs. There are few professionals who hold this trusted relationship.*¹³

The one feature which is included in the IGTO draft framework that is not reflected in the ATO criteria is fairness.

Tax professionals may not have direct influence is ensuring that the system is fair but they can indirectly advocate for fair laws and regulations, participate in ATO Committees to monitor fair tax administration and also assist taxpayers to lodge complaints with the IGTO or manage disputes through the Administrative Appeals Tribunal or through the court system.

In summary, the role of tax professionals in the system of good tax administration is important and varied and not simply about tax lodgements. Additionally, many tax professionals are themselves members of professional bodies including:¹⁴

- Chartered Accountants Australia and New Zealand
- CPA Australia
- Institute of Certified Bookkeepers
- Institute of Public Accountants
- Law Society of New South Wales
- SMSF Association
- The Tax Institute

The intersection of professional and regulatory standards is an area where there is potential for greater collaboration (between the TPB and the professional associations) and reduction in red tape. These themes are explored in further detail below.

¹³ Jotham Lian, 'Accommodate the Profession: Assistant Treasurer sends warning to the ATO,' *Accountants Daily* (5 September 2019) <www.accountantsdaily.com.au>.

¹⁴ The TPB is empowered to accredit professional associations as a recognised Tax Agent, BAS Agent or Tax (Financial) association. A complete list of recognised associations is available on the TPB website: <https://www.tpb.gov.au/recognised-professional-associations>.

Future challenges

In the *Future of the Tax Profession* review, the IGTO observed that technology and other developments are enabling greater cross-border interactions for many business owners. As tax laws develop and evolve to keep pace with these changes, it is likely that taxpayers will need and expect their advisers to be well-informed on their ever more complex compliance requirements.¹⁵

Furthermore, the *Future of Tax Profession* report identified increasing cybersecurity risks as a result of increased automation and digitisation of services.¹⁶ While tax practitioners will have their own responsibilities to ensure safe environments to store and use sensitive taxpayer information, it is possible that they as trusted advisers to taxpayers (particularly small businesses) will be asked to provide advice and guidance on these new areas.

With increasing automation of the taxation system, it is likely that taxation advice will be embedded or coded in the software and systems developed commercially to assist taxpayers manage their tax compliance obligations. The unseen advisor is of no less influence in securing good tax administration outcomes for the system.

Expansion of the tax profession

The IGTO has previously reflected on the tax profession of the future.¹⁷ The IGTO notes that some stakeholders call for a broad, encompassing definition of 'tax professional' while others preferred a narrower one.¹⁸ While the IGTO did not come to a concluded view on the precise scope of the tax professional, the IGTO did note that while the task may be difficult, it was important to consider which professionals may be regarded as tax professionals by virtue of the services they delivered to the community.¹⁹ Furthermore, the IGTO observed:

6.63 The key objectives are to protect taxpayers who are seeking taxation services and to ensure that there is a level playing field amongst the professionals offering such services. It is also important to recognise the complexities of the relationship between the various intermediaries and the community. For example, there are those who serve the community directly, such as tax practitioners, and those who do so indirectly by providing services or products to the tax practitioners or revenue agencies.

The commercial models and participants providing tax services and support in the future is changing and will respond to the regulatory framework. It is safe to say that the participants will likely expand beyond traditional professions such as accountants, tax agents, BAS agents and lawyers. The role of DSPs, data experts and those working to develop automated and artificially intelligent business systems cannot be understated.

¹⁵ IGTO, above n 2, p 48.

¹⁶ IGTO, *ibid*, pp 103-110.

¹⁷ IGTO, *ibid*, pp 125-133.

¹⁸ IGTO, *ibid*, p 125.

¹⁹ *Ibid*.

Accordingly and assuming the role of the TPB is fundamentally a consumer protection role,²⁰ it is important to provide sanctions and consequences for those participants in the tax system that are not meeting minimum or baseline conduct standards.

Tax Clinics

A more recent development has been the establishment of Tax Clinics (funded by Government as part of a pilot program) affiliated with a number of universities around Australia. Tax Clinics provide another avenue of free tax service support for the community. The clinics are autonomous and provide pro bono taxation advice and/or other tax service to unrepresented or partially represented taxpayers in relation to their tax affairs or disputes with the ATO. As the clinics do not charge taxpayers for the services provided, they are currently exempt from registration under the TASA. Although this exemption removes a compliance requirement for the Clinic, it limits the rights of access and protection that they and their clients enjoy, compared with other tax practitioners and taxpayers, namely:

- no access to ATO systems via the tax agents portal;
- no requirements for the clinic to maintain levels of accountability and professional standards expected of other tax practices;
- no recognition by others within the tax system of the services provided by the clinic; and
- an unclear level of protection for taxpayers under the safe harbour provisions against failure to take reasonable care and making false and misleading statements resulting in a shortfall or failure to lodge a document by the due date.

The exemption of tax clinics appears *prima facie* to give rise to differential standards of protection for taxpayers seeking independent tax advice. Unrepresented taxpayers unable to afford other tax services and using pro-bono services, such as the tax clinics, should be entitled to the same level of protection that a registered tax practitioner is required to provide. On the face of current discussion paper, it is not clear whether these issues are to be considered from a policy perspective.

It is our view that this is an area that warrants further consideration.

The role of the TPB

The TPB is a unique organisation and the IGTO has not been able to identify any directly comparable organisations in any other jurisdictions. In some jurisdictions we considered, tax practitioners are regulated by the revenue authority itself,²¹ are self-regulated²² or a hybrid of the two²³.

²⁰ *Tax Agent Services Act 2009*, s 2-5.

²¹ IGTO, above n 2, p 20.

²² IGTO, *Ibid*, p 23.

²³ IGTO, *Ibid*, p 39.

Based on our prior research, we believe that there is scope to bolster the current TASA framework to provide the TPB with a sufficiently broad remit that is supportive of tax practitioner contributions toward a good tax administration system and the protection of consumers of tax services. Specifically in relation to the latter point, we note that no reference is made in the TASA to consumer protection despite it being a clear purpose²⁴ and noted in some submissions that have been made to Treasury on this review²⁵.

The TPB's purpose, as stated in the TASA, is to **"to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct"**. The TASA further provides that the objects are to be achieved through three mechanisms, namely registration, a Code of Professional Conduct and sanctions for breaches.

Many Professional associations and organisations provide similar functions to the TPB including:

1. a 'licence' or certificate to practice;
2. a sufficient baseline of educational standards to practice taxation;
3. assurance of an appropriate professional insurance policy;
4. an avenue for clients to seek redress from wrongdoing;
5. standards for ethical and professional conduct;
6. minimum standards of service for consumers; and
7. a public education role.

IGTO would encourage the Review to consider ways in which improved collaboration between the Profession and the TPB can streamline standards of performance (and accordingly harmonise consumer protections) and reduce red tape and compliance.

Registration

With the exception of access to a specialist ATO information portal, registration per se, appears to overlap significantly with existing professional standards of associations.

In addition, there is a registration and licensing function performed by other Government organisations – namely the Australian Securities and Investments Commission, the Australian Prudential Regulations Authority, Financial Adviser Standards and Ethics Authority, various Legal Services Commissioners, Law Societies and Bar Councils throughout the country, as well as new bodies to be established following recommendations of the Financial Services Royal Commission.

The Review should consider whether TPB registration should be a residual registration – that is, where there is no existing professional affiliation or registration. At their option, professionals could always

²⁴ Treasury, *Review of the Tax Practitioners Board* (April 2019) <www.treasury.gov.au>.

²⁵ CPA Australia, *Submission to the Review of the Tax Practitioners Board* (23 April 2019) <www.cpaaustralia.com.au> p 7; Chartered Accountants Australia and New Zealand, *Submission to the Review of the Tax Practitioners Board* (8 May 2019) <www.charteredaccountantsanz.com.au> p 3.

choose to duplicate their membership where the branding or designation is preferred. This could reduce red tape without diminishing consumer protection.

Other suggestions that have been made to the IGTO include the establishment of a single, super regulator for all tax professional.²⁶ In our view, there would be significant costs, legal and constitutional issues with establishing such a body. By way of example, it would be difficult to have a tax legal representative in such a structure due to the devolved and state-based approach for registering and regulating barristers and solicitors.

If the Review was to consider this as an option, we believe that a thorough and holistic review of the regulatory framework which currently impacts on tax professionals to identify opportunities to streamline requirements, reduce costs and enhance oversight would be beneficial. Such a review could be referred to the Productivity Commission.

ATO Portal Access

An ancillary consideration and one which is not directly administered by the TPB is that registration provides registered practitioners with access to the Tax Agent Portal (via the ATO). Practitioners who are not entitled to or not required to be registered (such as tax clinics) would not have portal access. Interestingly, not all tax practitioners who are registered have portal access, such as Tax (Financial) Advisers.

The IGTO does not understand the reasons for limiting portal access only to certain classes of practitioners registered with the TPB. This appears to create an uneven playing field amongst the range of tax intermediaries and professionals assisting taxpayers.

If the portal is intended to streamline services and support tax professionals who assist taxpayers with taxation compliance, then it should be available to all tax professionals (subject to them meeting any relevant data security requirements). That is, regardless of registration.

Code of Professional Conduct

A key aspect of the registration requirement with the TPB is that it brings those registered under the remit of the TASA and, accordingly, the Code of Professional Conduct set out in Part 3 of that Act. With few exceptions²⁷ the requirements of the Code such as Honesty and Integrity, Competency, Confidentiality and Independence largely accord with those of other professional associations and bodies. As noted above, there is significant overlap with existing professional Codes of Conduct. A short illustrative comparison is provided in Table 2 below.

²⁶ IGTO, above n 2, p 131.

²⁷ *Tax Agent Services Act 2009*, s 30-10(11)-(14).

Table 2: Comparison of Codes of Conduct and Ethics

Tax Agent Services Act 2009 Code of Professional Conduct²⁸	APES 110 Code of Ethics for Professional Accountants²⁹	Legal Profession Uniform Law Australian Solicitors Conduct Rules³⁰
Honesty and Integrity You must act honestly and with integrity. You must comply with the taxation laws in the conduct of your personal affairs. If: (a) you receive money or other property from or on behalf of a client; and (b) you hold the money or other property on trust; You must account to your client for the money or other property.	Integrity To be straightforward and honest in all professional and business relationships.	Be honest and courteous in all dealings in the course of legal practice Avoid any compromise to their integrity and professional independence
Independence You must act lawfully in the best interests of your client. You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax agent or BAS agent.	Objectivity To not allow bias, conflict of interest or undue influence of others to override professional or business judgments.	Avoid any compromise to their integrity and professional independence
Confidentiality Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission.	Confidentiality To respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the	Confidentiality

²⁸ *Tax Agent Services Act 2009*, s 30-10.

²⁹ Accounting Professional and Ethical Standards Board, *APES 110 Code of Ethics for Professional Accountants* (November 2018), pp 26-30.

³⁰ Law Council of Australia, *Australian Solicitors Conduct Rules* (24 August 2015) pp 5-6.

Tax Agent Services Act 2009 Code of Professional Conduct²⁸	APES 110 Code of Ethics for Professional Accountants²⁹	Legal Profession Uniform Law Australian Solicitors Conduct Rules³⁰
	information for the personal advantage of the Member or third parties.	
Competence You must ensure that: A *tax agent service that you provide, or that is provided on your behalf, is provided competently. You must maintain knowledge and skills relevant to the tax agent services that you provide. You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing you are doing on behalf of the client. You must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client.	Professional competence and due care To maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent Professional Services based on current developments in practice, legislation and techniques and act diligently and in accordance with applicable technical and professional standards.	Deliver legal services competently, diligently and as promptly as reasonably possible
Other responsibilities You must not knowingly obstruct the proper administration of the taxation laws. You must advise your client of the client's rights and obligations under the taxation laws that are materially related to the *tax agent services you provide. You must maintain the professional indemnity insurance that the Board requires you to maintain.	Professional behaviour To comply with relevant laws and regulations and avoid any action that discredits the profession.	Comply with these Rules and the law

Tax Agent Services Act 2009 Code of Professional Conduct ²⁸	APES 110 Code of Ethics for Professional Accountants ²⁹	Legal Profession Uniform Law Australian Solicitors Conduct Rules ³⁰
You must respond to requests and directions from the Board in a timely, responsible and reasonable manner.		

The IGTO considers that, if the intent of the purpose of the TASA, is to ensure that tax agents' services are delivered to certain professional and ethical standards, then the applicable (baseline) Code should be relevant for all persons and entities providing tax services. The registration requirement becomes redundant except where there is no other or alternative professional registration.

There are potentially two ways in which this may be achieved.

1. The Code under the TASA could be developed to apply on an opt-in basis with professional associations adopting by becoming signatories to the Code. In this way, their members providing tax services would be bound to provide baseline professional conduct and competency in their services.
2. Alternatively, the TPB together with other professional associations and regulators who deal with tax professionals could seek to develop a harmonised Code of Conduct using consistent terminology. In this way, their respective codes of conduct would be identical at an agreed baseline of standards.

We believe these approaches to be more administratively and legally achievable than to seek to bring all tax professionals under a single super regulator. The adoption of a universal Code or one to which professional bodies can sign up to would assist to bring a broader spectrum of tax professionals under the TPB's remit and oversight.

Sanctions and disciplinary action

IGTO considers that taxpayer (consumer) protection should be a core ongoing function for the TPB. We consider that increased compliance activity by the TPB would assist to increase awareness of it as a regulatory body and enhance its standing as a consumer protection body within the tax system. Accordingly, we suggest that the Review consider:

- the current resourcing and workforce capabilities of the TPB to develop comprehensive active compliance programs to address risks within the tax profession, including the prevalence of unregistered persons providing tax services;
- the future resourcing and workforce capability needs to enable the TPB to develop comprehensive active compliance programs to address risks that may emerge, including those arising as a result of technology developments (e.g., tax services being offered in the gig and sharing economies); and

- whether the range of disciplinary actions and sanctions available to the TPB need to be enhanced to enable them to address risks or behaviours identified as part of the compliance program.

If the registration function of the TPB is to be 'shared' with professional associations and a more consistent or universal Code of Conduct adopted, or opted into, we believe that the disciplinary action and imposition of sanctions could also be more collaborative between the TPB and the professional associations. For example, where following an investigation, it is identified that a registered tax agent or tax professional has not complied with one or more requirements of the Code, and that tax agent is also a CA or CPA, consultation with the relevant professional body on the appropriate disciplinary action and sanction, would ensure a consistency in approach.

Furthermore, as the IGTO has previously identified, where it may not be possible for the TPB to undertake a high volume of compliance activities, consideration should be given to enabling information sharing and other arrangements with other bodies who may be able to assist in investigation and disciplinary actions.³³ It will be necessary to consider how best to leverage a network of regulators to cover the field and ensure that consumers are protected in future. That is, where it is accepted that the population of professionals who are likely to offer tax services in the future will grow and if the jurisdiction of the TPB is not proposed to be expanded to cover these professionals. In order for this to be effective, we consider that the Review will need to consider what existing statutory mechanisms there are for the TPB to refer and share information with other regulators to facilitate effective investigation, disciplinary action and sanction for those professionals not falling directly within its remit, and vice versa.

* * * * *

We trust that these comments and observations are useful to the Review. We would be happy to explore any of these themes (and our earlier reports) in further detail. We look forward to our discussion scheduled for Tuesday 10th September 2019. We may lodge a supplementary submission to expand on some of these views subsequent to those discussions. In the meantime, please don't hesitate to call me on [REDACTED] if you would like to discuss any of these matters further.

Yours sincerely,

[REDACTED]

Karen Payne
Inspector-General of Taxation & Taxation Ombudsman

³³ IGTO, above n 2, p 133.