



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

12 September 2019

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

Email: TPBreview@treasury.gov.au

Dear Mr Westerink

Review of the Tax Practitioners Board – Discussion Paper

The Financial Planning Association of Australia¹ (FPA) welcomes the opportunity to provide feedback in response to Treasury's Review of the Tax Practitioners Board.

The FPA welcomes and supports Treasury in its efforts to complete a post implementation review on the Tax Agent Services Act 2009 and the operational effectiveness of the Tax Practitioners Board, particularly in relation to the regulation of tax (financial) advisers.

We would welcome the opportunity to discuss with Treasury the issues raised in our submission. If you have any questions, please contact me on ben.marshan@fpa.com.au or 02 9220 4500.

Yours sincerely

Ben Marshan CFP® LRS®
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Financial Planning Association of Australia

¹ The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,720 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
- We built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- We are recognised as a professional body by the Tax Practitioners Board.



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Review of the Tax Practitioners Board Discussion Paper

Submission to Treasury

12 September 2019



Background to the FPA's feedback

There is a general issue with regulation in the financial services section in Australia in that laws and regulators are initially put in place for very specific purposes, with very specific functions, but over time as the financial services industry develops, laws are changed, the roles of regulators are expanded in particular areas, and it is easy for regulatory duplication and inefficiency to grow. This can lead to a regulatory environment which has the potential to become unworkable unless the law makers sit back and consider what a law, or where a regulator, fit within the larger regulatory ecosystem that an industry or profession operate under.

Financial planners for example (ignoring the strategies and products they use to provide a financial advice service to their clients which have their own significant complexity) must comply with four laws, which are then regulated by 7 different regulators, subject to complaints handling and disciplinary interpretations by three different bodies, and subject to authorisation, supervision and monitoring by a licensee (again, ignoring voluntary membership with Professional Associations). While in theory there is logic for these different bodies of law and regulation, it has become an almost unworkable proposition to provide advice to consumers over the last 10 years due to a lack of consultation and discussion between these different bodies. Professional Associations – whose primary focus is development of professional community for the good of the community who they serve, have been left frustrated by the lack of discussion and consultation between these bodies – which has left in some instances crippling regulatory cost and burden.

Table 1. Regulation and investigation of financial planners

Laws	Regulators/Standards Setting	Investigative Bodies	Authorisation, Monitoring and Supervision
Corporations Act 2001	ASIC	Courts	Australian Financial Services Licensee
Tax Agent Services Act 2009	TPB	AFCA (compensation)	
Privacy Act XXXX	AOIC	Code Monitoring Bodies (Discipline from 1 January 2020)	
AML/CTF Act	AUSTRAC		
	FASEA		
	ATO		
	APRA		

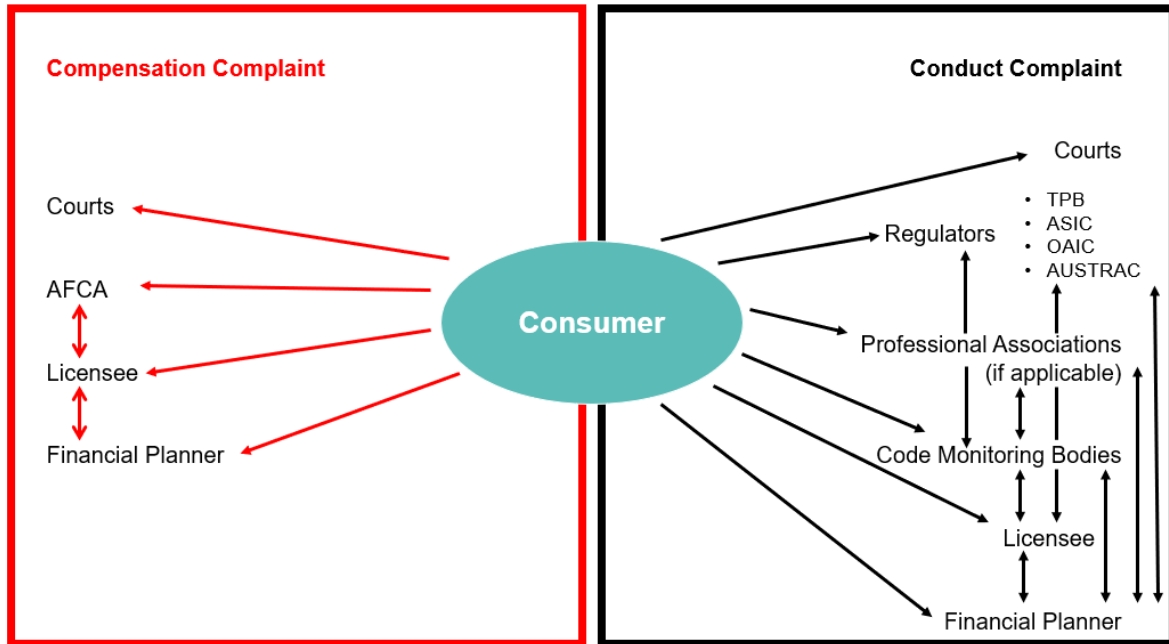
As stated, the lack of consultation and agreement between all of these entities on a set of minimum standards under which the profession of financial advice is able to operate under, the outcome has been a significant amount of duplication and additional cost created by this unworkable regulatory environment. What is worse, when a consumer has a complaint, there are 10 different entry points (although 14 when you consider the number of regulators) at which a consumer can take their complaint up at. To this point - at some points there are multiple bodies and regulators.

Further, if a financial planner has made a mistake, sanctions may be imposed by all 7 regulators,



three investigative bodies and their licensee for a single error (plus professional associations if applicable).

Diagram: Consumer Complaints



For this reason, it is critically important that this review considers what areas the TPB and TASA are uniquely able to regulate tax (financial) advisers, protect consumers and reduce the red tape professional financial planners are subjected to.

Noting Treasury is generally responsible for most of the laws and regulators involved in regulating the conduct of financial planners, we would hope that Treasury would consider more broadly making recommendations on how to improve this situation. Our overarching recommendation therefore is that Treasury recommend that the Productivity Commission, Australian Law Reform Council, or as part of the Financial Services Royal Commission Recommendation 2.3 – Review of measures to improve the quality of advice - consider these issues to ensure the broader regulation of financial advice providers is streamlined and there is a removal of much of the regulatory duplication and inefficiency which pervades the profession currently.



FPA Response to Consultation points

Whole of Government interactions

The discussion paper considers the ways in which the TPB can interact and share information with other government regulators and agencies, including the ATO, ASIC, APRA, FASEA, Code Monitoring Bodies, Inspector General of Taxation and AFCA. The TPB in response to this suggests it should strengthen its ability to share information with other regulators, but focuses mostly on its role investigating and responding to specific complaints rather than policy development or regulatory approach. Treasury has noted the importance of clear communication with tax (financial) advisers due to the existence of multiple regulators and has asked the following questions:

- 2.1 *We invite submissions on our preliminary views.*
- 2.2 *Could the sharing of information between the TPB and other Government agencies also be improved?*

As noted in our introduction, regulators working together is a significant concern for the financial planning profession. From this perspective, both the TPB and other regulators could all significantly improve in their levels of information sharing and consultation on policy areas. It is also somewhat disappointing that the TPB has the view that it shouldn't get heavily involved in working with other regulators on Policy development given the Code lends itself well to being a lens through which professionalism can simplify regulatory interpretation.

In the view of the FPA, the TPB is uniquely placed to work with other regulators on ensuring regulations work across the entire regulatory environment for two reasons. Firstly, while the TPB does register companies as tax agents, the TPB's regulatory focus is generally more focused on individual behaviours and service delivery. For this reason, the TPB is uniquely placed to assist other regulators in understanding the implications of regulatory decisions on individual practitioners across the entire spectrum of tax agents. Secondly, and using financial advice as an example, it is the view of the FPA that financial advice is primarily focused on strategic advice. Consumers generally benefit most from a financial advice relationship with a tax (financial) advisers on behavioural and strategic recommendations rather than the products used to implement the strategy (although there is obviously an advantage to professional assistance making sense of the significant variety of financial products available). In this regard, we would argue that there is more tax implications to most strategic financial advice provided – considering cashflow; debt management; structuring; risk management; estate planning; and investments – rather than product - based on this reality. From this perspective, there is arguably a more central role for TPB to play in setting regulatory standards and consumer protection for financial advice delivery.

For example, during TPB consultation on TPB(I) D31/2015 – Code of Professional Conduct – Confidentiality of client information for tax (financial) advisers – the TPB proposed that the relationship between a tax (financial) adviser and their licensee was a third party relationship with the client. Noting that an AFS Licensee must authorise, monitor and supervise the advice and services provided by a tax (financial) adviser, where a client did not consent to their information being shared, it would have made it impossible for an AFS Licensee to meet their monitoring and supervisory requirements over the advice and authorised TFA. At the time, the TPB indicated that they had not discussed the issue with ASIC, and did not understand that this interpretation of the law would have made it impossible to comply with ASIC's regulation of the Corporations Act. We would note that following



advocacy from the FPA, the TPB and ASIC were able to come to a mutual understanding and resolve a positive outcome with the final release of TPB(I) 32/2017 Code of Professional Conduct – Confidentiality of client information for tax (financial) advisers, but better engagement between regulators on policy issues prior to public consultation could have avoided the unnecessary questioning of whether a regulator – in this case the TPB - understood the full regulatory obligations one of their registered tax agents operated under.

We would further point to examples of individuals who have been banned by ASIC but are still registered tax agents and visa versa. This appears to be due to regulators being unable and/or unwilling to share information with each other to the detriment of the consumers regulators are ultimately there to protect.

We would therefore recommend that across the Government, there be an ability for regulators to not only share information about their regulated population with each other where there is a clear cross over, but be required to work with each other to determine who the most appropriate regulator is to reduce red tape. For example, if another regulator has higher entry standards for a registered tax agent, then the TPB should defer to these entry standards (noting that they may need to work with the other regulator to ensure coverage of any regulator specific education requirements – i.e. tax knowledge for the TPB), in this instance - FASEA. This isn't to argue that an individual who operated across multiple regulatory regimes shouldn't be registered with multiple regulators, but that where one regulator sets higher standards which meet the requirements of the other regulator, the second regulator should defer to the firsts regulation. Where there is an overlap or a disagreement, regulators should be required to come to consensus position they are both willing and able to implement. Where there is an obvious regulatory gap, then this is where the regulator should regulate. This will significantly improve the regulatory environment for the regulated population.

For this reason, the FPA recommends that Treasury recommend that the Productivity Commission, Australian Law Reform Commission or as part of the Financial Services Royal Commission Recommendation 2.3 – Review of measures to improve the quality of advice, consider how regulators are able to work openly and collaboratively with each other to reduce regulatory red tape and cost for the regulated population and to better protect consumers through open and transparent information sharing and setting of regulations.

Independence

The FPA makes no recommendations on the independence of the TPB from the ATO, but offers the following observations.

The FPA does not consider independence to be a significant issue in regard to the relationship between the TPB and the ATO. The FPA would prefer Government departments and regulators work to efficiently manage costs and resources in all instances, particularly where their roles and functions are similar. If the perception of independence is an issue by co-locating with the ATO and using the ATO as the HR function for the TPB, consideration should be given to moving the TPB to another like department or regulator. Consideration could be given to housing the TPB within ASIC given the synergies between the two regulated populations.



Membership of the Board

The FPA makes no recommendations on the makeup of the Board, but offers the following observations.

It would seem appropriate for there to be a skills matrix developed for Board member positions to ensure there is Board expertise across all regulated populations, noting there does not currently appear to be a Board member who is a dedicated specialist in BAS agent services or an equal representation of TFA specialist Board members compared to the regulated proportion of tax agents. We would suggest based on this, that there would be some logic for the Board to be proportionally represented across the types of tax agents registered with the TPB, and should additional categories of membership be brought in over time for the TPB Board to be temporarily expanded to ensure for a smooth transition, and to be reconstituted following implementation, or reweighted at the next opportunity.

TPB Visibility

The FPA has been critical directly to the TPB in the past of its lack of visibility in both the community but also in the tax (financial) adviser space, especially given this is in reality a more recently integrated profession and broadly less aware of the role and functions of the TPB.

We would note that this appears (and has been relayed to the FPA) to primarily driven by budgetary constraints, and should TPB visibility be of significant concern to Treasury the obvious solution would be to increase the TPB's budget to allow this to occur. Irrespective of this outcome, we would also encourage the TPB to engage in market research to better understand how to get the best visibility outcomes through the channels they use to engage with consumers and tax agents.

Registration, education and qualifications

The discussion paper considers a review of the registration period for the TPB and a reduction from three years to an annual registration. Treasury has not offered a view on this proposed change, but has asked the following question:

5.5 *Should the registration period be converted to an annual period (rather than every three years)?*

The FPA questions the need for a re-registration process at all given there is a need to comply with TASA and TPB and the TPB's use of the annual declarations process, and a requirement to actively terminate registration when it is no longer required. For this reason, the FPA recommends that registration occurs once at commencement and does not expire.

This recommendation would naturally flow to how regularly fees are collected by the TPB. The FPA does not offer a recommendation on this, but would suggest that it would be appropriate to consider this question in conjunction with a review of the TPB budgetary process and cost recovery models. To some extent and to simplify the process, there would appear to be logic to aligning the annual declaration process with a fee payment, although we note that not all regulators operate in this



manner with a variety of different models in place.

5.9 We invite submissions on our preliminary views regarding being a fit and proper person.

The discussion paper has also considered the fit and proper person test and posited that it should be reviewed and strengthened to provide better consumer protection. The paper considers whether the test could include consideration of conflicts of interest and upholding the integrity of the tax system, among other possible changes.

Again the FPA points to instances where the TPB has maintained registrations of individuals who have had regulatory and legal action against them by other regulators, and therefore consideration should be given to improving the fit and proper person test for the TPB given this situation is occurring.

We would note however, the supervisory model which is able to operate under the TPB registration model allows individuals who may not be fit and proper, and who would not meet the TASA requirements to operate as a tax agent to operate without constraint under corporate registrations and supervision. The FPA recommends that Treasury consider whether the TPB supervision and sufficient model provided for corporate registrations offer appropriate consumer protection and instead focus on the registration and behaviour of individuals who are ultimately responsible for the behaviour and consumer outcomes. We would note that this was a strong finding of the Financial Services Royal Commission, that in general, supervision and monitoring is done poorly, and is prone to the corporate (tax agent in this case) often using their position of power as the employer (or authoriser) and supervisor for tax agent purposes to require the individual to act in a way which is not appropriate for their clients.

We would suggest Treasury consider that this is the model being rolled out by Government for tax (financial) advisers more broadly under the FASEA and Code Monitoring Body frameworks – i.e. individual registration, individual compliance with the FASEA Code of Ethics, and individual monitoring by a Code Monitoring Body – and reducing the influence of their corporate authorised representative business or AFSL.

Code of Professional Conduct

The discussion paper considers the operation of the TASA Code of Professional Conduct and whether the TPB should be able to amend the Code to ensure it is dynamic and able to respond to emerging and/or best practice behaviours. As the Code currently sits in the Tax Agent Services Act, it can only be amended through the legislative process of Parliament.

Treasury has given in-principle support to this change and has asked the following question:

6.1 We invite submissions on our preliminary views regarding making the Code a more dynamic instrument.

The FPA supports in principle the ability for the TPB to more proactively make amendments to the TASA Code of Professional Conduct, however we note that in general the Code operates as set of principles, and should in general be used to promote professional behaviours rather than address specific behaviours or trends. The FPA therefore would suggest that if there is a need to amend the Code to cover professional behaviour more broadly than it currently does, there be an attempt to make it as broad as possible (similar to a set of ethical principles) and use regulatory guidance to address specific behaviours and issues as they emerge or change.



Sanctions

The discussion paper considers whether a range of new sanctions should be available to the TPB in managing disciplinary matters for registered tax agents and tax (financial) advisers.

Treasury has asked the following questions:

- 7.1 *We invite submissions on our preliminary views.*
- 7.2 *Should the TPB be able to demand information before formally commencing an investigation?*

The FPA supports the TPB having a broader set of powers available to make preliminary investigations and sanctions following a determination available to ensure it is able to operate effectively in its monitoring, supervision and disciplinary functions. The FPA notes that the TPB is better placed to make recommendations on what additional powers and sanctions might be required to be proposed, and will consider these more specifically when they look to be legislated, however, there does not appear to be any issue with the proposals made in this paper.

Tax (financial) advisers

The review has considered the inclusion of tax (financial) advisers in the TPB's remit since 2014 and how the TPB operates within the broader regulatory framework for financial advisers. The discussion paper identifies a range of issues with the current arrangements, including the regulatory burden on financial advisers from reporting to multiple regulators. Further, the paper acknowledges the significant number of recommendations made from the Financial Services Royal Commission including Recommendation 2.10, which set out requirements for a new approach to discipline for financial advisers. Key amongst these is that there should be a single disciplinary system for financial advisers.

The paper then sets out seven possible options for the registration of financial planners with the TPB.

Treasury has then asked the following questions:

- 10.1 *We invite submissions on our preliminary views.*
- 10.2 *Are there any other suggestions to reduce the regulatory burden on TFAs whilst maintaining community confidence?*

As noted in our introduction, there is significant regulatory duplication and overlap for financial planners, but tax (financial) advisers in particular. For this reason, we support a regulatory environment where it is clear which regulator is regulating any particular obligation, and regulators should have the ability to work with and defer to regulations of others where they are fit for purpose. In saying this, it is critically important that regulators know who their regulated populations are and have the budget and resources available to regulate the areas they are required to regulate for a particular population. The FPA therefore offers these recommendations and observations.

As notes in table 1 and the diagram in our introduction, the environment in which financial planners operate is highly regulated, highly complicated, and has become very expensive to operate in. We therefore initially recommend that sorting this out is going to take a broader review of the financial planning profession than offered by this limited review of the TPB. The FPA therefore recommends that Treasury recommend a wholistic review of financial planning regulation be conducted by the



Productivity Commission, Australian Law Reform Commission or as part of the Financial Services Royal Commission Recommendation 2.3 – Review of measures to improve the quality of advice.

We would further note, that in asking our members about their views of the TPB, there was generally a high level of support for registration as tax (financial) advisers and a general appreciation of the regulatory behaviour of the TPB as compared to other regulators. While an additional regulator and additional cost are not highly desirable, our members acknowledge that financial advice has tax implications in all instances, consumers benefit from tax (financial) advisers being able to assist them in providing (limited) tax agent services, and that there are significant benefits to: the proposed legislative instrument; potential ATO tax portal visibility; and potential tax deductibility of financial advice fees offered through being regulated in the same manner as other tax agents. In saying this – there is significant frustration in delays to these policies being implemented – particularly where it is due to regulator inaction (the former two) rather than a change to Government policy (the later).

We would therefore frame our response in recommending that the TPB move forward with the proposed legislative instrument and assistance in working with the ATO on a portal visibility solution for tax (financial) advisers, or there is little incentive for TFA's to be open to the options recommended by the Treasury discussion paper.

TFA Registration

Firstly – as noted above – where an individual is providing services to consumers which are regulated by a particular regulator, the FPA believes the individual must be registered with that regulator to ensure the regulator is aware of their regulated population. This also ensures the individual is aware of their obligations when providing these regulated services (although as discussed, the supervision model undermines this outcomes). Further, where it is identified that an individual is not registered as they should be, the regulator must have the power to intervene to protect consumers. This in particular is something the TPB could improve on, both in terms of action and visibility.

Also as stated, all financial product advice as covered by ASIC licensing authorisations, have tax implications for the client of a financial planner - for example investments, insurance, budgeting, debt management and estate planning all have tax implications and superannuation in particular is a tax structure - the FPA believes that there is sound regulatory and consumer protection logic for financial planners to be required to be registered with the TPB. We would further note, there was sound logic in acknowledging that there is a gap in ASIC's knowledge and expertise to make determinations in relation to the tax implications of financial advice given ASIC's focus on financial services conduct and product regulation, therefore either tax agent services should be regulated by the TPB or ASIC's knowledge and skill gap needs to be closed.

The FPA therefore recommends TFA registration should be reviewed as part of a broader review of financial advice regulation by the Productivity Commission, Australian Law Reform Commission or as part of the Financial Services Royal Commission Recommendation 2.3 – Review of measures to improve the quality of advice are conducted and make an informed recommendation.

Multiple registrations

Noting that regulators should regulate only where there is a clear gap in the regulatory environment, businesses – both AFSL's and CAR's – are registered and regulated by ASIC in all areas covered by the TPB. For this reason there does not appear to be good logic for these entities needing to also be registered with the TPB. The FPA further notes examples of self-licensed financial planners who



operate their own AFSL and use a CAR model to authorise their practice, will need to register three times to cover a single financial planner. On the other hand, large licensees may operate with virtually no registered TFA's through use of a supervision model and the sufficient numbers test.

The FPA recommends that individuals who provide tax (financial) advice services be registered individually, and businesses not be required to register. This change would require a change to the "for fee" component of the definition of a tax (financial) advice service. This would also have the benefit of stopping an individual who is sanctioned by the TPB from providing services to consumers under the supervision of another individual which would better protect consumers. There are a number of examples of where this has and continues to occur.

Relationship with other regulators

The FPA believes that the TPB should be required to operate cooperatively with all other financial advice regulators to ensure a specific service or conduct is only covered by a single regulator. This will reduce cost and red tape for the profession. The FPA therefore recommends the TPB should be required to enter into MOUs or via legislation to work collaboratively with other regulators in regard to both the regulation and discipline of TFA's with the other regulators in the space.

From this perspective, TPB is best placed to make regulation and discipline individuals in regards to the tax implications of advice which is provided, but given ASIC regime regulates the process of providing financial advice as well as the disclosure obligations, these should be left to ASIC to regulate via code monitoring bodies. If the TPB identifies a regulatory gap, they could either work with ASIC to close this gap, or regulate it themselves.

Regulatory Effectiveness

One of the significant frustrations for consumers of tax (financial) advice is the inability of a TFA to obtain information from the ATO which is required to provide tax (financial) advice services or represent them in relation to superannuation issues. We note that the TPB has been in the process of creating a legislative instrument and registering it in Parliament for over three years to allow these services to be provided. This seems like an unduly long time frame.

The proposed services are matters which TFA's through education and experience have significant skill and knowledge of and are better placed than other tax agents to provide these services, and yet their clients are left to deal with the ATO themselves, or pay significant additional fees to work with another tax agent due to the inefficiencies of the TPB. This also creates inefficiencies, additional processes (third party authorities and service delivery) and enquiries for the ATO to deal with.

We note that while there is generally frustration expressed by TFA's at being required to be registered with the TPB - particularly where multiple registrations are required for self-licensed financial planners - in discussing this consultation with members, FPA members who provided feedback agreed that the cost and effort to be and maintain registration with the TPB would be significantly outweighed by their ability to engage with the ATO to assist their clients with superannuation issues, and have visibility of financial information which the ATO has available within their tax agent portals, to ensure the advice they provide is appropriate and in the best interests of their clients. Treasury should recommend these outcomes be implemented as soon as possible.



Entry standards

The FPA recommends that the TPB defer regulation of minimum education and experience requirements to the new entry requirement standards set by FASEA given they significantly raise the education and experience standards set by the TPB. We note that the TPB has expressed concern with the Professional Year standard set by FASEA, however we would note that there appears to be little meaningful difference between the two requirements, and the supervision, mentoring, coaching and education requirements of the FASEA set professional year would generally be significantly greater than the experience most TFA's would have been subject too to date under the TPB set standard.

CPE

We again recommend that given FASEA has set significantly higher CPD/E standards for financial planners than TPB has set for tax agents, that the TPB defer CPE standards for TFA's to the FASEA standard. We further highlight that the TPB as per their CPE FAQ consider CPD to be the same as CPE. Therefore there is no justification for an subordinate CPE standard being set by the TPB.



Summary of Recommendations

1. The FPA recommends that Treasury recommend the Productivity Commission, Australian Law Reform Council, or as part of the Financial Services Royal Commission Recommendation 2.3 – Review of measures to improve the quality of advice, that a review be conducted to consider the multi-regulator, multi-compensation and multi-disciplinary regime financial planners are subject to.
2. The FPA recommends that across the Government, there be an ability for regulators to not only share information about their regulated population with each other where there is a clear cross over, but be required to work with each other to determine who the most appropriate regulator is to reduce red tape.
3. The FPA recommends that tax agent registration occurs once at commencement and does not expire.
4. The FPA recommends that Treasury consider whether the TPB supervision and sufficient model provided for corporate registrations offer appropriate consumer protection and instead focus on the registration and behaviour of individuals who are ultimately responsible for the behaviour and consumer outcomes.
5. The FPA recommends that the Productivity Commission, Australian Law Reform Commission or as part of the Financial Services Royal Commission Recommendation 2.3 – Review of measures to improve the quality of advice are conducted and make an informed recommendation.
6. The FPA recommends that businesses not be required to register with the TPB.
7. The FPA recommends the TPB should be required to enter into MOUs or via legislation to work collaboratively with other regulators in regard to both the regulation and discipline of TFA's with the other regulators in the space.
8. The FPA recommends that the TPB defer regulation of minimum education and experience requirements to the new entry requirement standards set by FASEA.
9. The FPA recommends that the TPB defer CPE standards for TFA's to the FASEA standard.