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# The tax profession's response to the recent review of the TPB, the TASA 2009 Code of Professional Conduct, investigations, and related sanctions

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***Abstract***

A much anticipated review of the Tax Practitioners Board (TPB) and *Tax Agent Services Act 2009* (Cth) was released by the Australian Treasury in October 2019 detailing 28 recommendations with regard to the operation and function of the TPB. The government responded to those recommendations supporting 20 in part, full or principle, while rejecting eight. This study gathers the views and insights of 20 Australian tax practitioners via semi-structured interviews, as to their acceptance or otherwise of the recommendations. Interview data provides evidence surrounding the Code of Professional Conduct, investigations, sanctions and safe harbour recommendations. We find that whilst in many cases practitioners both agreed and disagreed with particular recommendations, preliminary or indicative themes emerged which complicated perceptions and warrant further investigation. These preliminary or indicative themes have the potential to impact perceptions and agreement with the TPB recommendations and raise questions as to whether recommendations will ultimately achieve their objectives. Practically, the findings of this study feed into the tax policy debate, by providing insights and information to the Tax Practitioner Governance and Standards Forum and Professional Standards Council. This study answers a call for further research into tax practitioners' attitudes and behaviour and adds to the limited existing empirical literature in this space. Importantly, the research findings have the capacity to potentially break new ground in determining whether the review's recommendations will achieve their objectives.

**Keywords**: tax profession, investigations, sanctions, code of conduct, safe harbour, Tax Practitioners Board, Tax Agent Services Act 2009, Tax Practitioners Governance and Standards Forum, tax policy

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## 1. INTRODUCTION

The *Tax Agent Services Act 2009* (Cth) (TASA 2009) was designed to regulate the operation and behaviour of registered tax practitioners, Business Activity Statement (BAS) agents and previously tax (financial) advisers. Since the enactment of the TASA 2009, few amendments have been made regarding registration, the Code of Professional Conduct (Code), the civil penalty regime and the Tax Practitioners Board (TPB), which make up the essence of the legislation. Despite previous attempts to address inefficiencies under the legislation and improve the overall operation of the TPB governing body, the TASA 2009 and Code therein have largely remained the same. There has also been opposition and resistance levied at the Code and its application to both individuals and organisations.[1] Given this background, the recent external review of the TPB (the Review) was overdue and has been well received, resulting in over 90 submissions from interested parties and key stakeholders alike.[2]

Given the wide-ranging review of the TPB and TASA 2009 legislation, this study is timely in that it provides some much-needed empirical evidence from tax practitioners themselves as to the merits of the TPB recommendations and how they will impact upon tax practitioners' businesses and livelihoods. Previous studies, including Marshall, Armstrong and Smith (1998),[3] Devos and Kenny (2017),[4] and more recently Devos, Morton, Curran and Wallis (2023),[5] have provided empirical evidence with regard to tax practitioners' attitudes and beliefs. Significantly, this study is well positioned to build on this prior work.

This study gathers the views and insights of 20 tax practitioners, as to their level of acceptance of selected proposed recommendations with respect to the Code, investigations, sanctions, and safe harbour. The findings are relevant to the tax policy debate, including the work of the Tax Practitioner Governance and Standards Forum (TPGSF), as well as the Professional Standards Council (PSC) and government as to whether the said recommendations are fit for purpose. After interviewing 20 tax practitioners, the authors are of the view that the said recommendations are generally fit for purpose; however some important caveats have been raised that warrant consideration. The evidence herein indicates that there is a clear, logical, and convincing case that these recommendations will potentially become law in the near future. This includes exposure draft legislation on several of the Review's recommendations: Treasury Laws Amendment (Measures for Consultation) Bill 2022: Tax Practitioners Board Review and more recently, the Treasury Laws Amendment (Measures for Consultation) Bill 2023 along with the Tax Agent Services Amendment (Register Information) Regulations 2023 (a discussion of which is beyond the scope of this article).

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[1] Rex L Marshall, Robert W Armstrong and Malcolm Smith, 'The Ethical Environment of Tax Practitioners: Western Australian Evidence' (1998) 17(12) *Journal of Business Ethics* 1265.
[2] Australian Treasury, *Review of the Tax Practitioners Board: Discussion Paper* (July 2019); Australian Treasury, *Independent Review of the Tax Practitioners Board: Final Report* (31 October 2019) ('The Review'). The Review was led by former Board of Taxation member and Deputy Chair Mr Keith James.
[3] Marshall et al, above n 1.
[4] Ken Devos and Paul Kenny, 'An Assessment of the Code of Professional Conduct under the TASA 2009 – Six Years On' (2017) 32(3) *Australian Tax Forum* 629.
[5] Ken Devos, Elizabeth Morton, Michael Curran and Chris Wallis, 'Tax Practitioner Perspectives on Selected 2019 TPB Review Recommendations' (2023) 38(1) *Australian Tax Forum* 151.

The article is structured as follows. Following the introduction, in section 2 we outline the background to the Code, investigations, penalties, sanctions, and safe harbours with respect to the Review and government response. This is followed by section 3 which briefly outlines the relevant literature, before section 4 outlines the research design. Therein, we outline the research objective and questions derived from the prior literature (in particular, Devos and co-authors, 2023, referred to above). Section 5 provides a discussion and analysis of the in-depth tax practitioner perspectives while section 6 summarises and concludes.

## 2. BACKGROUND

### 2.1 The key recommendations

This section provides a brief background to the key recommendations which are the focus of this study, as summarised in Table 1 (see Appendix). These recommendations relate to the Code regulating tax practitioners' operation and behaviour, the investigative powers of the TPB which assists in ensuring tax practitioner compliance with the Code and thirdly, the penalties and sanctions for non-compliance and any safe harbour protections that may be available.

### 2.2 The TASA Code of Conduct

The Code has now been in place for some 13 years amidst recent technological change (digital environment). Also, the activities and behaviour of some tax practitioners have been difficult to deal with and address effectively under the Code. For the Code to be able to deal with these challenges in real time requires legislative intervention. As such, the key recommendation (Recommendation 5.1) with regard to this issue was that the relevant Minister be given the legislative power to be able to supplement the Code to address emerging and existing behaviour.[6] The rationale was that a dynamic Code would assist the TPB 'scope out' possible behaviour and practices that were undesirable and streamline and standardise the Code where possible.[7]

There has been opposition by key stakeholders to this recommendation including the Australian accounting professional bodies (Chartered Accountants Australia and New Zealand and CPA Australia), who strongly believe the Code should remain in the Act as it now stands (Discussion Paper, Chartered Accountants Australia and New Zealand and CPA Australia). The professional bodies believe that the Code is principle-based and that making changes would make it too prescriptive.

Other concerns this recommendation raises include the level of government control and the independence of the TPB. The need to collaborate and consult with key stakeholders, regulators and professional bodies is an important function of the TPB and this recommendation of ministerial power may endanger that. It also raises the issue of whether the relevant Minister has the required expertise to make the Code changes or whether the Minister could possibly be subject to political pressures or Australian Taxation Office (ATO) influence which may result in biased decisions. In this regard it is critical for the Minster to be independent of the TPB so as to ensure confidence amongst practitioners. If tax practitioners are going to have faith in the legitimacy of

[6] Australian Treasury, The Review, above n 2.
[7] Devos et al, above n 5.

ministerial power being granted to supplement the Code, they need to be convinced this will actually be the case.

The Australian Treasury has supported Recommendation 5.1 with the caveat that any proposed changes would first be considered by the newly established TPGSF, as an independent body which could oversee the process.[8] Note that Recommendation 5.1 is one of the subjects of published draft legislation.[9] The Exposure Draft Explanatory Materials confirm that the Minister can specify additional obligations that registered tax and BAS agents must comply with, including with respect to (i) subjects that are already referred to in the Code, and (ii) new subjects relating to *personal* and *professional*[10] conduct.[11]

The Exposure Draft Explanatory Materials go on explaining some limitations to the power. First, the ministerial power does *not* include the ability to reduce existing obligations and secondly where conflict occurs between the Code and the ministerial power, the conflicting provisions have no effect – thus providing some scope for checks and balances in reference to the notion of 'supplement'.[12]

The Exposure Draft Explanatory Materials also reiterate the importance of consultation:

> The legislative instrument process also ensures appropriate consultation with key stakeholders and parliamentary oversight, while also creating a proactive regime where emerging changes to behaviours and practise can be promptly adapted to by the regulator (para 1.75).

Note that the proposed amendment does not explicitly codify this consultation,[13] nor does the overarching process of legislative instrument.

## 2.3 Investigations

The TPB Review had indicated that changes needed to be made to improve the investigative powers of the TPB. Specifically, the Review recommended (Recommendation 6.2) that:

a) investigations could commence and/or continue once a registered tax practitioner either has their registration terminated, chosen not to re-register, or is seeking to surrender their registration;

b) the limitation on the TPB formally gathering information prior to commencing and notifying a tax practitioner of an investigation be removed;

c) the six-month timeframe to conduct investigations be removed.

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[8] Australian Treasury, *Government Response to the Review of the Tax Practitioners Board 2019* (November 2020) ('Government Response').
[9] See Treasury Laws Amendment (Measures for Consultation) Bill 2022: Tax Practitioners Board Review, Exposure Draft Bill (18 November 2022), https://treasury.gov.au/consultation/c2022-338098.
[10] Note the proposed legislation does not use the phrase 'personal'; it refers to professional and ethical.
[11] See Explanatory Memorandum to the Exposure Draft Bill, above n 9, para 1.72.
[12] See ibid, para 1.73.
[13] The proposed amendment is via new sub-sections 30-10(16), 30-12(1) and 30-12(2) within the *Tax Agent Services Act 2009* (Cth) ('TASA 2009').

With regard to (a), currently the TASA 2009 requires the TPB to institute a formal investigation to impose a sanction for a breach of the Code. While this requirement arguably draws out the time involved and hinders efficiency, common law procedural fairness/natural justice principles need to be adhered to. Further with regard to (b), similar procedural fairness issues are raised to enable tax practitioners to be able to prepare and defend their case against any potential investigation. On the other hand, the recommendation does have the potential to address an integrity issue, where higher risk tax practitioners are able to circumvent the investigation process and avoid disciplinary action by voluntarily deregistering before a formal investigation commences.[14]

While acknowledging that there is a need to support legislation that enhances the integrity of the tax system, such as Recommendation 6.2, some concerns have been raised that the recommendations may be too broad. In particular, the Institute of Financial Professionals Australia (IFPA)[15] has indicated that the proposed amendments with respect to investigations may unintentionally draw in tax advisers and their clients who neither have the intention nor opportunity to engage in the egregious activities that prompted the recommendation.[16] This will ultimately lead to increasing compliance costs, financial risk and regulatory scrutiny for them.[17] Whilst the IFPA's concern to ensure the legislative changes do not unfairly impact honest tax practitioners is valid, for those practitioners who do the right thing these safeguards should not cause any fear or unnecessarily heavy burdens.

Recommendation (c) to remove the six-month time frame for a formal investigation can arguably create problems. It is possible that the open time frame could lead to lengthy and inefficient investigations. However, the decision to extend would also be a reviewable decision. Currently, the TASA 2009 only allows a one-off extension due to matters that are outside the TPB's control. As an alternative, the TPB has indicated that formal information gathering powers under the TASA 2009 could be amended such that they are not triggered by the commencement of a formal investigation.[18]

Overall the professional bodies have supported the recommendation in principle. The government supports the Review's recommendation in part, agreeing with Recommendation 6.2 (a) and intends to amend the law to enact this change. However, with regard to (b) and (c), the government has indicated it would consult further to investigate the implications of such a change.[19]

It is important to note that the investigation powers of the TPB are wide and contained in Division 60-E of the TASA 2009. It could be noted that this power is augmented by sections 8C and 8D of the *Taxation Administration Act 1953* (Cth) (TAA 1953). Section 8C is an absolute liability provision and section 8D is a strict liability provision.[20] This limits the defences available. If a person does not produce documents or answer questions and so forth, then they could be subject to the penalties set out in section 8E.[21]

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[14] Devos et al, above n 5.
[15] Institute of Financial Professionals Australia, 'Exposure Draft Bills: Response to PwC Tax Leaks' *Daily Update* (21 September 2023).
[16] Ibid.
[17] Ibid.
[18] Australian Treasury, The Review, above n 2; Devos et al, above n 5.
[19] Australian Treasury, Government Response, above n 8. See also Devos et al, above n 5.
[20] See *Criminal Code Act 1995* (Cth) sch 1, ss 6.1 and 6.2.
[21] *Taxation Administration Act 1953* (Cth) s 8E ('TAA 1953').

It should also be noted that in some circumstances the penalties include imprisonment for up to 12 months.

## 2.4 Penalties, sanctions and safe harbours

While the Review had indicated that the majority of tax practitioners do the right thing and act within the law, there was nevertheless a small minority of 'egregious' tax practitioners who choose to operate outside the law. These practitioners contribute to the high error rate in tax returns (78 per cent amongst agents) and undermine the integrity of the tax system thereby contributing to the tax gap through their reckless behaviour and intentional disregard for the law.[22]

In order to deal with this inappropriate behaviour, the Review indicated that there was a limited range in the severity of sanctions available to the TPB. For instance, the TPB had little choice in applying low level sanctions such as a written caution or further education or a high-level sanction, such as suspension or termination of registration and civil penalties. Broad support was received in the submissions for the TPB to have more flexibility when finding or determining a breach has occurred and consequently six additional sanction tools were made available to cover a broad range of misconduct.[23] The issues of maintaining procedural fairness and providing the correct level of regulation are still paramount and it is important that the increased sanctions do not jeopardise the power and independence of the TPB. The following range of sanctions were introduced in (Recommendation 6.1):

- infringement notices;
- enforceable undertakings;
- quality assurance audits;
- interim suspensions;
- permanent disbarment, and
- external intervention.

In addition to the range of penalties on offer to the TPB, to act as a deterrent to those tax practitioners who continue to operate outside the law, the Review recommended (Recommendation 6.3) that a register of identified unregistered practitioners would provide further transparency to both prospective employers and clients, and should be implemented.[24] As the compliance literature indicates that public naming and shaming can be effective[25] and improve public trust, determining exactly what details of unregistered practitioners are provided and how long it remains published requires careful consideration given that people's livelihoods are at stake.

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[22] Australian Treasury, The Review, above n 2.
[23] Devos et al, above n 5.
[24] Ibid.
[25] John Braithwaite and Peter Drahos, 'Zero Tolerance, Naming and Shaming: Is There a Case for it with Crimes of the Powerful?' (2002) 35(3) *The Australian and New Zealand Journal of Criminology* 269.

Prior studies have also indicated that reputational damage can be quite detrimental and can severely impact the practitioner's ability to operate in the future.[26] In this regard, the register needs to balance the need for public information against safeguarding the tax profession. Information regarding those practitioners who have breached their obligations needs to be present for sufficient time to also allow for rehabilitation and continued future operation, where continuation of practice is appropriate.

Along with the proposed amendment in respect to Recommendation 5.1 outlined above, the draft legislation proposes the introduction of 'Disqualified Entities' provisions in a new Division 45 of the TASA 2009. These would require that a registered tax or BAS agent give notice to the TPB if they are employing or using the services of a disqualified entity to provide tax agent services on behalf of the agent without the Board's approval. Furthermore, the disqualified entity would be required to give notice to the tax or BAS agent when seeking to provide or are providing tax agent services on behalf of the agent.[27]

Where the tax agents had 'knowingly' made false or misleading statements in the preparation of tax returns and demonstrated intentional disregard with respect to the tax law, the Review recommended further penalties (Recommendation 6.4). This was premised on the taxpayer acting in good faith and complying with their obligations under the law, but where this was found not to be the case, it was suggested that some apportionment of the penalty be applied to both parties according to their respective behaviour.[28]

To add to the current safe harbour protections afforded under the TAA 1953 which establishes the administrative penalty regime, the Review recommended (Recommendation 6.5) similar protections to cover instances of recklessness and intentional disregard with the trade-off being the imposition of penalties on high-risk tax intermediaries that break the tax law.[29] Consequently, as the penalty could be applicable to whoever was at fault this could be difficult to establish in practice. The basis on which to apportion the penalty could become problematic and the relevance of a safe harbour may be questionable given that taxpayers will still have the right to take legal action to recover costs against the tax practitioner. Note, however, that pursuing a remedy against the practitioner can be long and costly, in terms of both economic and psychological costs.

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[26] Devos and Kenny, above n 4.

[27] The definition of a disqualified entity in the proposed s 45-5 of the draft Bill is very wide. Broadly speaking it is defined, amongst other things, to include an entity that is not a registered tax or BAS agent and, within the last 5 years has committed a serious offence, committed a serious taxation offence, had its registration terminated or suspended, been convicted of an offence involving fraud or dishonesty or is an undischarged bankrupt. The term 'serious taxation offence' is defined in s 90-1 of the TASA 2009, above n 13. However, the term 'serious offence' is not defined in the TASA 2009. Nonetheless, s 3-5 provides that if a term is not defined in the TASA 2009, then it will take on the meaning of the definition contained s 995-1 of the *Income Tax Assessment 1997* (Cth) ('ITAA 1997'). Here it is given the meaning outlined in s 355-70 in Sch 1 of the TAA 1953, above n 21. Section 355-70(10) defines a serious offence as an offence against an Australian law that is punishable by a term of imprisonment exceeding 12 months. By comparison, this is a wider than the definition of a serious offence in s 23WA of the *Crimes Act 1914* (Cth), which stipulates that a serious offence is one that is punishable by a maximum penalty of imprisonment for life or 5 years or more.

[28] Australian Treasury, The Review, above n 2.

[29] Ibid.

## 3. LITERATURE REVIEW

This section provides a brief review of some of the main research studies conducted over the last 30 years regarding tax practitioner ethics, the Code, investigations, penalties, sanctions, and safe harbour provisions.

Part 3, Division 30 of the TASA 2009 incorporates the Code. Specifically, it comprises the key attributes of tax practitioners, including *honesty* and *integrity*, *independence*, *confidentiality*, *competence* and *other responsibilities*.[30] In investigating *integrity*, tax practitioners' judgments have been found to be impacted, making them either less or more likely to choose a favourable tax outcome.[31] When it comes to the attribute of *independence*, tax practitioners have also found themselves to be conflicted between the needs of the client and their loyalty to the tax system.[32] Independence has also been found to be a problem in that tax practitioners do not always *realise* they have a potential conflict of interest between allegiance to their client and to the revenue authority.[33]

The attribute of *confidentiality* needs to be observed in any communications between tax practitioner and client, noting that while documents may not be subject to *legal professional privilege*, an administrative/statutory protection can be extended to tax advice provided by accountants.[34] Professional *competence* requires tax practitioners to be qualified and to stay up to date to satisfy the various needs of the public.[35] *Other responsibilities* of the accountant also include, among others, responding to requests and directions from the TPB in a timely manner. These and other aspects relating to the Code are explored throughout this study.

The TPB may decide to investigate tax practitioners if initial enquiries suggest they should. They have the power to do so pursuant to section 60-95 of the TASA 2009. It is noted that the TPB may also investigate without having made any enquiries or received any complaints. The investigations could arise due to a number of actions. These include registration applications, breach of the Code, as a result of making false or misleading statements, advising or supplying services when unregistered, and other types of misconduct. Currently, an investigation involves an 8-step process which affords the tax practitioner natural justice and appeal rights.[36] Since 2010 a significant body of Administrative Appeals Tribunal (AAT) decisions have developed in this area.[37]

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[30] TASA 2009, above n 21, s 30-10.
[31] Darius Fatemi, John Hasseldine and Peggy Hite, 'The Influence of Ethical Codes of Conduct on Professionalism in Tax Practice' (2020) 164(1) *Journal of Business Ethics* 133.
[32] Brian Erard, 'Taxation with Representation: An Analysis of the Role of Tax Practitioners in Tax Compliance' (1993) 52(2) *Journal of Public Economics* 163; Michael Walpole, 'Ethics and Integrity in Tax Administration', UNSW Law Research Paper No 2009-33 (2009).
[33] Gordon Cooper, 'The New Regulatory Regime for Tax Practitioners' (Paper Presented at the Tax Institute Tasmanian State Convention, 17-18 October 2008) 16-22.
[34] Devos and Kenny, above n 4.
[35] Julie H Collins, Valerie C Milliron and Daniel R Toy, 'Factors Associated with Household Demand for Tax Preparers' (1990) 12(1) *Journal of the American Taxation Association* 9.
[36] See 'Investigations', *Tax Practitioners Board* (Web Page, last modified 10 October 2022), www.tpb.gov.au/investigations.
[37] For example, see *Middlebrook and Tax Practitioners Board* [2020] AATA 3698; *Ridden and Tax Practitioners Board* [2020] AATA 422; *Re Li and Tax Practitioners Board* (2014) 141 ALD 201; *Re Tung and Tax Practitioners Board* (2012) 90 ATR 480; *Rent to Own (Aust) Pty Ltd and Australian Securities and Investments Commission* [2011] AATA 689; *Re Allen J Middlebrook & Associates Pty Ltd and Tax Practitioners' Board* [2010] AAT 622.

Limited studies have been carried out on investigations per se, but the Review largely supports the recommendation to commence or continue an investigation for tax practitioners that have chosen not to reregister. The TPB also indicated that formal investigations could be curtailed as long as procedural fairness requirements are met.[38] It is important to note that the TPB is not bound by the rules of evidence and is able to exercise a discretion as to this procedure.[39] Previous case law has provided some guidance as to what is acceptable in exercising this discretion in regard to the rules of evidence.[40]

However, while tax practitioners are made aware of an investigation by the TPB under section 60-95(2) of the TASA 2009, they 'might not be aware of a note in section 60-125 which lists out outcomes of investigations'.[41] As Arthur Athanasiou indicates, section 60-95 'mandates that the TPB act transparently by giving notice to a tax agent beforehand', meaning it can 'potentially act with impunity by stealthily investigating the fitness and propriety of a tax agent, forming a decision and then unilaterally terminating a tax agent's registration'.[42] Consequently, it is imperative that tax practitioners take a proactive approach and be transparent with the TPB and see whether matters can be resolved before the TPB commences an investigation.[43] Practitioners should be aware that the issue of investigating high-risk tax practitioner behaviour remains high on the agenda with the Board Conduct Committee (BCC) investigating large numbers in 2022.[44]

The Final Report recommendations do raise some potential issues when it comes to investigations, for example, the requirement of the TPB having to conduct a formal investigation before it could apply sanctions under section 30-15 of TASA 2009, despite

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[38] Australian Treasury, The Review, above n 2.

[39] This is subject to the requirement to observe procedural fairness: see, eg, Tax Practitioners Board, 'Tax Practitioner Service Charter', item (4), https://www.tpb.gov.au/tax-practitioner-service-charter, as cited in Robin Woellner, 'TASA and the Life-Cycle of a Tax Practitioner – Current Law and Proposed Reform' (2021) 36(3) *Australian Tax Forum* 443, 448.

[40] As Brennan J (quoted by Member Grigg in *Norman v TPB* [2021] AATA 848, [67]-[68]) observed in *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492: 'To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force' and subsequently (quoting Evatt J in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256), that the fact that the Tribunal is not bound by the formal rules of evidence (see now s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth)) 'does not mean that all rules of evidence may be ignored as of no account'. See also, eg, *Baini v Federal Commissioner of Taxation* [2012] AATA 440, [117]-[129] (Forgie DP). In practice the TPB generally applies the evidentiary rules: cf *Knox v FCT* [2011] AATA 906, [22]-[58] (Forgie DP); Hon Justice Garry Downes, 'Practice, Procedure and Evidence in the Administrative Appeals Tribunal' (Paper Presented at the NSW Land and Environment Court Annual Conference, Sydney, 5 May 2011) 1-5, https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pres/practice-procedure-and-evidence-in-the-administrat, cited in Woellner, above n 39, 448, n 42.

[41] Jotham Lian, 'Practitioners Cautioned over TPB "Stealthy" Investigation Tactic' *Accountants Daily* (28 February 2020) (citing Arthur Athanasiou), https://www.accountantsdaily.com.au/business/14080-practitioners-cautioned-over-tpb-stealthy-investigation-tactic.

[42] Ibid quoting Arthur Athanasiou.

[43] Amber Agustin, 'Tips for Managing Disciplinary Matters with the TPB' *Clayton Utz Insights* (1 May 2017), https://www.claytonutz.com/insights/2017/may/tips-for-managing-disciplinary-matters-with-the-tpb.

[44] See the Tax Practitioners Board, above n 36.

the TPB already holding adequate information on which to base those sanctions.[45] This is counter-productive and can potentially lead to a waste of valuable resources given that there is no need for the investigation. This leads to the issue of sanctions themselves.

A much broader body of literature[46] has emerged over the last 30 years with regard to the impact of sanctions upon tax practitioner behaviour.[47] In particular, the subtle balance between penalties per se and their enforcement has been a common theme. For example, it was found that perceptions of tax laws and the penalties thereon were stronger than perceptions of enforcement activities and the probability of detection by the ATO.[48] In contrast, other studies have found that penalties without the possibility of detection reduces their effectiveness and that both elements are required to influence compliance attitudes.[49] Having clear penalties that were also enforced has also been found to be effective where practitioners are more conservative in their decision-making.[50] In attempting to temper tax practitioner aggressiveness and behaviour that potentially exploits the tax law, further studies have confirmed that strong penalties are important, in that where penalty fines were low, tax practitioner compliance was also low.[51]

However, as a slight variation to this, other studies have found that increased penalties had little influence on curbing tax practitioner aggressiveness where issues were ambiguous.[52] Consequently, the greyness and complexity of Australian tax law provides many opportunities for non-compliance. Supporting this contention were the results of Erard's study, which in this case found that an American CPA member would take any tax position as long as there was a realistic possibility of it being sustained, either administratively or judicially, if challenged.[53]

One resolution to the issue of tax law complexity and ambiguity would be to simplify the tax law. However, this is easier said than done. Numerous attempts have been made to simplify and streamline the tax law over the years with limited success.[54] Therefore, given the inherent nature and complexity of Australian tax law, it is suggested that penalties per se should be complemented with greater awareness and education of tax

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[45] Woellner, above n 39; Robin Woellner, 'Updating the Tax Agents Services Act 2009' *Austaxpolicy: Tax and Transfer Policy Blog* (Online, 23 September 2022), https://www.austaxpolicy.com/updating-the-tax-agents-services-act-2009/.
[46] For a more in-depth survey of the relevant literature please refer to Devos et al, above n 5.
[47] Ibid.
[48] Rex Marshall, Malcolm Smith and Robert Armstrong, 'The Impact of Audit Risk, Materiality and Severity on Ethical Decision Making: An Analysis of the Perceptions of Tax Agents in Australia' (2006) 21(5) *Managerial Auditing Journal* 497.
[49] Michael L Roberts, 'Tax Accountants' Judgment/Decision-Making Research: A Review and Synthesis' (1998) 20(1) *Journal of the American Taxation Association* 78.
[50] Philip M J Reckers, Debra L Sanders and Robert W Wyndelts, 'An Empirical Investigation of Factors Influencing Tax Practitioner Compliance' (1991) 13(2) *Journal of the American Taxation Association* 30.
[51] S G Nienaber, 'Factors That Could Influence the Ethical Behaviour of Tax Professionals' (2010) 18(1) *Meditari Accountancy Research* 33.
[52] Andrew D Cuccia, Karl Hackenbrack and Mark W Nelson, 'The Ability of Professional Standards to Mitigate Aggressive Reporting' (1995) 70(2) *The Accounting Review* 227.
[53] Erard, above n 32.
[54] See generally the Review of Business Taxation (John Ralph, chair), *A Tax System Redesigned: More Certain, Equitable and Durable* (1999) (Ralph Review) and Australia's Future Tax System Review Panel (Dr Ken Henry, chair), *Australia's Future Tax System: Report to the Treasurer* (December 2009) (Henry Review) where many recommendations were either not feasible or adopted.

practitioners.[55] Ultimately it is balancing both enforcement and education/training of the practitioners by the TPB that will potentially deliver the best results regarding compliance with the Code.[56]

It should also be noted that in creating adequate deterrents for undesirable tax practitioner behaviour, the literature has been quite strong on the impact of reputational damage.[57] In this regard, naming and shaming tax practitioners in the public register can be quite contentious. While having the desired effect of acting as a general deterrent, this must also be weighed against the potential damage that could be caused to a tax practitioner's livelihood.[58] The contents of the register and how long certain information remains in the register then becomes critical and the discretion would be with the TPB.

The establishment of safe harbour for taxpayers in cases of where the tax practitioner had intentional disregard of the tax law was also an issue explored in this study. Building on the work of Devos and co-authors (2023),[59] the focus was on the extension of the protections afforded in section 286-75(1A) of Schedule 1 of the TAA 1953 regarding recklessness and intentional disregard for the law.[60] In particular, the findings of the Review indicated the imposition of the penalty for intentional disregard and raised the contentious issue of apportioning the penalty between the two parties according to their respective behaviour.[61] Also, in the case of fraud and evasion, it was recommended that the onus of proof be on the ATO instead of the taxpayer.[62]

Clearly, this topic of the Review was going to generate strong debate with regard to expanding safe harbour protections to cover instances of recklessness and intentional disregard, with the trade-off being the imposition of penalties on high-risk tax intermediaries that break the tax law.[63] It should also be noted that submissions to the Review indicated a lack of awareness of the safe harbour protections amongst tax practitioners generally, and that the ATO should do more to ensure the protections are

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[55] Scott A Yetmar and Kenneth K Eastman, 'Tax Practitioners' Ethical Sensitivity: A Model and Empirical Examination' (2000) 26(4) *Journal of Business Ethics* 271.
[56] Devos and Kenny, above n 4.
[57] Yuka Sakurai and Valerie Braithwaite, 'Taxpayers' Perceptions of Practitioners: Finding One Who is Effective and Does the Right Thing?' (2003) 46(3) *Journal of Business Ethics* 375; Cuccia et al, above n 52; Braithwaite and Drahos, above n 25.
[58] For example, Peter-John Collins and PwC's reputation has been impacted in recent times due to breaches to the Code. In particular, Peter-John Collins was deregistered for a period of two years following their failure to comply with the Code, including with respect to acting honestly and with integrity, as well as having adequate arrangements for managing conflicts of interest: Tax Practitioners Board, 'Peter-John Collins', https://www.tpb.gov.au/tax-practitioner/tax-agent/39805002. PwC was similarly found to have breached the Code regarding adequate arrangements in place to manage conflicts of interest: Tax Practitioners Board, 'PriceWaterhouseCoopers', https://www.tpb.gov.au/tax-practitioner/tax-agent/16226000. See also Neil Chenoweth and Edmund Tadros, 'PwC Leaks Scandal Widens' *Australian Financial Review* (Online, 16 February 2023), https://www.afr.com/companies/financial-services/pwc-leaks-scandal-widens-20230215-p5ckvv (also reporting that at a Senate estimates hearing TPB's Michael O'Neill addressed the activities of between 20 and 30 PwC staff and their involvement in the sharing of confidential information).
[59] Devos et al, above n 5.
[60] Australian Treasury, The Review, above n 2.
[61] Devos et al, above n 5.
[62] Lois Maskiell, 'Accounting Groups Back Calls for Taxpayer Bill of Rights to Better Protect SMEs' *SmartCompany* (Web Page, 27 October 2021), https://www.smartcompany.com.au/business-advice/politics/accounting-groups-taxpayer-bill-rights/.
[63] Devos et al, above n 5.

published.[64] This finding was also consistent with the findings of Devos and Kenny (2017)[65] concerning potential education deficiencies amongst some tax practitioners.

## 4. RESEARCH DESIGN

### 4.1 Research objective

The objective of this project is to investigate Australian tax practitioners' perceptions of the recent recommendations made concerning the Code, investigations, sanctions, and safe harbours. We extend upon the work by Devos and co-authors (2023), which examines overall perceptions to the TPB recommendations examined in this study.[66] They found that whilst in many cases survey participants agree (disagree), preliminary or indicative themes emerged which complicated perceptions and warrant further investigation.

Consequently, this study extends their work by gaining an in-depth understanding of tax practitioner perceptions. As Australian tax practitioners act on behalf of a substantial proportion of Australian individual taxpayers (approximately 75 per cent), they have an enormous capacity to influence taxpayer compliance, which has always been a challenge for the ATO. Understanding the attitude and behaviour of tax practitioners who act on behalf of taxpayers is a key to improving compliance outcomes. This study provides an opportunity to investigate further the attitude and behaviour of tax practitioners in terms of the Code, investigations, sanctions, and safe harbours, thereby directly addressing this challenge.

There is an overarching concern that although the majority of tax practitioners conduct themselves appropriately, some engage in high-risk behaviour, such as money laundering activities, which impacts on the profession and demands further investigation.[67] This is relevant to the profession, community regulators (PSC), policy-setters and the government generally. The government has been clear with the injection of increased funding in the recent October 2022 Federal Budget for the TPB[68] to up-scale compliance activity with regard to detecting and addressing egregious tax practitioner behaviour.

### 4.2 Research questions

#### *4.2.1 With respect to supplementing the Code*

Extant research by Devos and co-authors (2023) referred to above suggests that on balance tax practitioners are supportive of Recommendation 5.1; however this research has indicated several issues including (i) caveats with respect to the degree of agreement with the Recommendation, (ii) concern over government control and independence, and (iii) concern over the lack of expertise and political bias.[69]

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[64] Australian Treasury, The Review, above n 2, 72.
[65] Devos and Kenny, above n 4.
[66] Devos et al, above n 5.
[67] Australian Treasury, The Review, above n 2.
[68] Australian Treasury, *Budget Paper No 2: Budget Measures October 2022-23* (25 October 2022) 20. The government will provide AUD 30.4 million to the Tax Practitioners Board (TPB) to increase compliance investigations into high-risk tax practitioners and unregistered preparers over four years from 1 July 2023.
[69] Devos et al, above n 5.

This project therefore examines the recommendation relating to the Code and seeks to gain in-depth insights into the indicative themes found therein:

***RQ$_{1.1}$**: Why do Australian tax practitioners agree or disagree with Recommendation 5.1?*

***RQ$_{1.2}$**: To what extent, if any, are Australian tax practitioners concerned about the level of government control and independence that Recommendation 5.1 suggests?*

***RQ$_{1.3}$**: To what extent, if any, are Australian tax practitioners concerned about the proposed Minister having a lack of expertise to make changes to the TASA Code of Professional Conduct?*

***RQ$_{1.4}$**: To what extent, if any, are Australian tax practitioners concerned that the proposed Minister may be subject to political pressure or ATO influence which could lead to biased decisions?*

### *4.2.2 With respect to investigations*

Extant research by Devos and co-authors (2023) suggests that whilst tax practitioners on balance agree with Recommendation 6.2 (a) regarding investigating tax practitioners no longer registered, on balance tax practitioners disagree with Recommendations 6.2 (b) and (c), which relate to formal information gathering and the six-month time frame. With respect to each component of Recommendation 6.2, the research results raised several aspects that may underpin these findings.[70]

This project therefore examines the recommendation relating to investigations and seeks to gain in-depth insights into the indicative themes found therein:

***RQ$_{2.1}$**: Why do Australian tax practitioners agree or disagree with Recommendation 6.2?*

***RQ$_{2.2}$**: To what extent, if any, do Australian tax practitioners believe that investigating de-registered tax practitioners, as proposed by Recommendation 6.2 (a), is a valuable and good use of government resources?*

***RQ$_{2.3}$**: To what extent, if any, are Australian tax practitioners concerned about the impact of investigating de-registered tax practitioners, as proposed by Recommendation 6.2 (a), on the principles of natural justice and procedural fairness?*

***RQ$_{2.4}$**: To what extent, if any, do Australian tax practitioners believe that tax practitioners, as proposed by Recommendation 6.2 (b), have a right to know they are being investigated?*

***RQ$_{2.5}$**: To what extent, if any, are Australian tax practitioners concerned about the impact of removing the six-month timeframe, as proposed by Recommendation 6.2 (c), on the effectiveness and efficiency of investigations?*

### *4.2.3 With respect to penalties and sanctions*

Extant research by Devos and co-authors (2023) referred to above suggests that tax practitioners on balance agree with Recommendations 6.1, 6.3 and 6.4. These

[70] Ibid.

recommendations relate to increasing the number and type of sanctions, increasing the level of detail on the public TPB register concerning tax practitioner sanctions, and the introduction of an administrative penalty regime with respect to intentional disregard. Whilst the research finds on balance agreement with the recommendation, several issues or concerns have been indicated.[71]

This project therefore examines the recommendation relating to penalties and sanctions and seeks to gain in-depth insights into the indicative factors that may impact tax practitioner perceptions found therein:

***RQ*$_{3.1}$***: Why do Australian tax practitioners agree or disagree with Recommendation 6.1, 6.3 and 6.4?*

***RQ*$_{3.2}$***: To what extent, if any, do Australian tax practitioners believe that sufficient penalties are needed to curb undesirable behaviour?*

***RQ*$_{3.3}$***: To what extent, if any, do Australian tax practitioners believe that the proposed sanctions, as proposed by Recommendation 6.1, offer balance between regulation and procedural fairness?*

***RQ*$_{3.4}$***: To what extent, if any, are Australian tax practitioners concerned about the impact of increasing sanctions, as proposed by Recommendation 6.1, on the power and independence of the TPB?*

***RQ*$_{3.5}$***: To what extent, if any, do Australian tax practitioners believe that the proposed publication of further detail in the TBP Register, as proposed by Recommendation 6.3, will improve transparency and public trust?*

***RQ*$_{3.6}$***: To what extent, if any, do Australian tax practitioners believe that the proposed administrative penalty regime, as proposed by Recommendation 6.4, will be effective in dealing with high-level misconduct?*

***RQ*$_{3.7}$***: To what extent, if any, do Australian tax practitioners believe that an appropriate avenue of appeal is required with regard to the proposed administrative penalty regime, as proposed by Recommendation 6.4?*

#### *4.2.4 With respect to safe harbour*

Extant research by Devos and co-authors (2023) referred to above suggests that whilst tax practitioners on balance agree with Recommendations 6.5, this research has indicated several issues that may complicate tax practitioner perceptions. These relate to (i) caveats with respect to the agreement with the Recommendation, (ii) consideration of both the agent and the client, and (iii) concern over whether safe harbour is relevant.[72]

This project therefore examines the recommendation relating to the proposed safe harbour for instances where the tax agent has demonstrated recklessness or intentional disregard and seeks to gain in-depth insights into the indicative factors that may impact tax practitioner perceptions found therein:

[71] Ibid.
[72] Ibid.

***RQ$_{4.1}$**: Why do Australian tax practitioners agree or disagree with Recommendation 6.5?*

***RQ$_{4.2}$**: To what extent, if any, do Australian tax practitioners believe that it is important to identify whether the taxpayer is at fault in addition to the tax practitioner?*

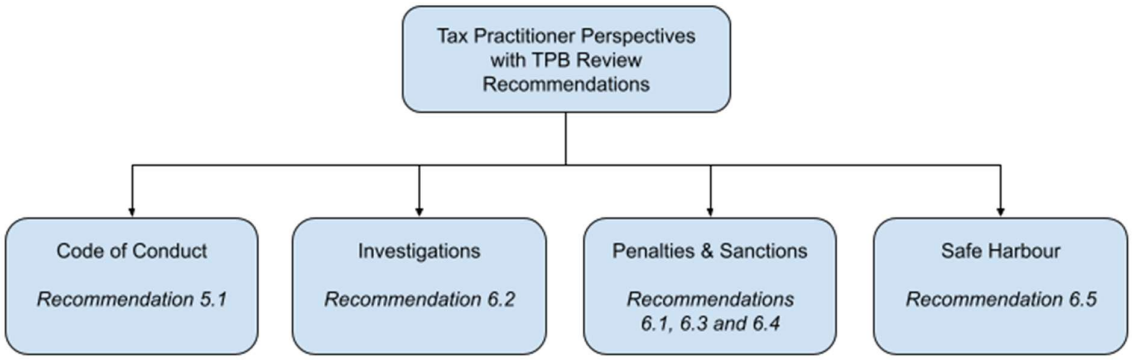
***RQ$_{4.3}$**: To what extent, if any, do Australian tax practitioners believe that the imposition and apportionment of penalty between the taxpayer and tax practitioner is appropriate?*

***RQ$_{4.4}$**: To what extent, if any, do Australian tax practitioners believe that the proposed safe harbour regime, as proposed by Recommendation 6.5, is relevant given taxpayers can take legal action to recover costs?*

## 4.3 Research method

The project employs a qualitative methodology consisting of semi-structured interviews of Australian tax practitioners. Interview methodology allows for in-depth perceptions not capturable via quantitative research methods and follows on from findings established by Devos and co-authors (2023) which indicate several issues and/or concerns that may impact perceptions and agreement with the TPB recommendations.[73] The semi-structured interviews revolve around the four substantive areas set out in the research question sets above, as well as an establishment of basic demographic data: Figure 1.

**Fig. 1: Interview Framework**




## 4.4 Data collection

Interviewees were identified through their status as an Australian tax practitioner, whether operating as a sole practitioner, employee, partner, or director of or within a firm/office. The recruitment process and interview schedule ran between June and September 2022. Recruitment occurred via email invitation, with support from a

[73] Ibid.

selection of professional bodies as well as the researchers' professional networks. Invitations to participate were promoted through the following set of recruitment avenues:

1) Tax Practitioners Board weekly newsletter, '*eNews*', promoted in the June 2022 issue (no. 66).

2) The Tax Institute email invitations to various state councils, engagement committees and local tax clubs at the Institute's discretion, from June 2022.

3) CPA Australia email invitations to various committees and tax discussion groups at their discretion, from June 2022.

4) Professional Networks of chief researchers (including email and LinkedIn), between June and August 2022.

All interviewees were provided with the interview question guide and participant information and consent form (PICF) ahead of the scheduled interview. Following the interview, interviewees were given the opportunity to review the transcription and make any necessary adjustments. For their time and participation in the project, interviewees were given an AUD 50 e-voucher.

Interviews were conducted online through Microsoft Teams between June and September 2022. In all, 20 interviews running between 32 minutes to 1 hour and 19 minutes were conducted. All interviews were carried out by the two chief investigators of the project, with the same chief investigator leading lines of questioning to aid reliability of findings. In this way, whilst we acknowledge subjectivity in all qualitative research, including interviewer/interviewee and response biases, interviews were conducted as consistently as practicable.[74]

Interviews were recorded for transcription purposes with the consent of each interviewee. Transcripts were de-identified. Interviewees are labelled as 'Practitioner 1' through to 'Practitioner 20'. Table 2 provides an overview of interviewee spread.

**Table 2: Interviewee Spread**

| Practitioner | Duration (HH:MM:SS) | Gender | Age Range | Location |
|---|---|---|---|---|
| 1 | 01:08:46 | Male | 40-49 | NSW |
| 2 | 00:41:09 | Male | 60-69 | NSW |
| 3 | 00:39:15 | Male | 40-49 | VIC |
| 4 | 00:38:24 | Male | 40-49 | VIC |
| 5 | 01:19:22 | Male | 60-69 | NSW |
| 6 | 00:52:32 | Male | 30-39 | QLD |
| 7 | 01:06:32 | Female | 40-49 | QLD |

[74] The study followed a procedure that allowed for systematic analysis of the data through repetition. The systematic approach of framework analysis allowed for constant comparative analysis of each interview against previously collected interviews. The fact that tax practitioners themselves provided this information and had industry-specific knowledge of the subject matter also provided a degree of reliability to the data collected albeit there may have been some inherit bias.

| | | | | |
|---|---|---|---|---|
| 8 | 00:51:19 | Female | 50-59 | VIC |
| 9 | 00:44:44 | Male | 50-59 | NSW |
| 10 | 00:44:33 | Male | 40-49 | QLD |
| 11 | 01:07:57 | Female | 50-59 | VIC |
| 12 | 00:40:29 | Female | 40-49 | VIC |
| 13 | 01:08:18 | Male | 50-59 | VIC |
| 14 | 00:32:02 | Male | 40-49 | QLD |
| 15 | 00:47:38 | Female | 40-49 | VIC |
| 16 | 00:48:04 | Male | 50-59 | WA |
| 17 | 00:47:02 | Male | 70-79 | VIC |
| 18 | 00:53:12 | Male | 50-59 | VIC |
| 19 | 00:50:55 | Male | 50-59 | NSW |
| 20 | 00:37:47 | Male | 50-59 | VIC |

Of the tax practitioners interviewed, the majority were male (75 per cent male, 25 per cent female), which is comparable to related prior research.[75] Half of the practitioners were from Victoria, whilst similar representation between New South Wales (25 per cent) and Queensland (20 per cent) is noted. As such, there was a higher representation from Victoria compared to the TPB statistics.[76] The majority of practitioners interviewed were between 40 and 59 years of age (80 per cent), spread equally between 40-49 and 50-59 year cohorts. While it is acknowledged that the limitation of the sample size meant that the results were not totally representative of the wider tax practitioner cohort this was expected and is accepted in conducting qualitative research.

Following each interview, the two investigators debriefed on the key themes emerging and saturation. Transcripts were summarised and assembled, allowing for principal themes to become apparent, including relevant relationships between themes and emerging categories. These interim summaries form the basis of regular discussion and testing between the chief researchers. A third researcher then coded and analysed the qualitative data to form an independent examination. This enabled the research team to explore, develop and test themes and propositions in a holistic and systematic manner before finalising the findings of the study. This included triangulation with the TPB Review findings, the government's response, and the existing literature.[77]

## 5. IN-DEPTH PRACTITIONER PERSPECTIVES

The following sections outline the research findings with respect to each area of examination: (i) supplementing the Code; (ii) with respect to investigations; (iii) penalties and sanctions, and (iv) safe harbour.

[75] Devos et al, above n 5; Devos and Kenny, above n 4.
[76] Ibid. The TPB Annual Report reports a spread of 34 per cent New South Wales and 27 per cent Victoria.
[77] This methodology improved the reliability and validity of the findings. Throughout the process, researchers also compared interview notes with the recorded transcriptions and non-verbal clues for discrepancies. No discrepancies were discovered in this process, which aided in validation of perceptions.

### 5.1 With respect to supplementing the Code

We find mixed support for Recommendation 5.1 and re-affirm the inherent factors playing a part in tax practitioner perspectives. In principle, there is support for increasing the agility, timeliness, and responsiveness of the Code. Since the Code's introduction in 2009 – over 13 years ago – we have seen a rapidly changing environment, both in terms of technology, globalisation and more recently the Covid-19 pandemic. There is a clear recognition that reform, including increased powers, can enable responsiveness within a contemporary environment. Ministerial power can provide more timely responses than the formal legislative processes.

Although the TPB may be well placed to act, there is some concern that it may be restricted in its capacity to take action. As one interviewee describes, the TPB '*is a bit like a toothless tiger*'. Reform that both increases the powers of the TPB and also strengthens the Code can be welcomed to prevent further wrongdoings. One of the core issues we face is the timeliness – responding to issues *before* they cause significant further harm; whilst there are numerous anecdotes of egregious behaviour being caught – the concern being the harm done in the meantime.

As noted with the current PwC scandal[78] both the ATO and TPB have responded swiftly with increased resources being devoted to tackle breaches of the Code. As will be explored throughout the four areas examined, there is a real benefit in creating a holistic toolkit for the TPB to respond to the needs of the profession.

There is also generally a sense of faith in the system – both in terms of the tax profession as a community and with respect to the relevant Minister carrying out their duty with integrity and accountability. There is generally a perception that the power entrusted in the Minister would not be abused. Whilst it is not unusual for a Minister to have such powers, it was felt that it is unusual for these to be abused.[79] Where questions are raised, proper process would (or should) follow to investigate and ensure integrity is maintained.

> You do need to be able to deal with emerging behaviours or behaviours that haven't been envisaged. But at the same time … [having] one person who has the ability to do that, there has to be some sort of subsequent oversight.

Proper process seeks to have appropriate checks and balances. On this basis, the power could complement the proper functioning of the profession; as one interviewee described, '*providing also that the Prime Minister doesn't take on additional ministerial responsibilities*'.

However, reform, including the introduction of ministerial powers, needs to be appropriate. Clear concern over the danger in power was observed. Appropriateness

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[78] Hon Jim Chalmers (Treasurer), Hon Katy Gallagher (Minister for Women, Minister for Finance and Minister for the Public Service), Hon Mark Dreyfus (Attorney-General) and Hon Stephen Jones (Assistant Treasurer and Minister for Financial Services), 'Government Taking Decisive Action in Response to PWC Tax Leaks Scandal' (Joint Media Release, 6 August 2023), https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/government-taking-decisive-action-response-pwc-tax-leaks.

[79] Interviewees noted several instances, including tennis player Novak Djokovic, that went to the Federal Court which affirmed that the Minister had correctly exercised his power, and the more unusual instance of the former Prime Minister having been secretly appointed to five ministries. Whilst neither have been found to be unlawful, they raised public concern and/or scrutiny.

here is in terms of the reform's objectives relative to existing processes, as well as in terms of the role and function of key stakeholders within the greater ecosystem. Reform, however, also needs to balance the impact on stakeholders, including tax practitioners. As will be explored throughout the four areas examined, the recommendations fundamentally interrelate with the livelihood and wellbeing of tax practitioners, their teams, their clients (ie, taxpayers), and their respective families. In this instance, power affecting livelihoods is being placed in one person's (the Minister's) hands.

Proper processes already exist. Questions were raised over the concept of 'supplementing' the Code and the practical need for quicker responsiveness in contrast to the existing process, including engagement with the profession. For example, the Code being principles-based, as indicated by the professional bodies,[80] enables implicitly the agility to address emerging issues and corresponding TPB guidance assists in the interpretation thereof. Concern was raised over whether ministerial power could lead to the erosion of proper process. Moreover, questions arose as what situation would require such a response. For example:

> In what circumstance would it be way too slow to be changed and just give one person the power to do that without it going through the proper authorities? … What would be the urgency for something like that? … I can't think of a situation where there would be such…

The complex web of regulatory frameworks was also raised. It is critical to appreciate and understand the relationship between the professional/regulatory bodies (as well as the courts and the Australian Federal Police) and the greater ecosystem in which the profession operates. Concern was raised over the potential for unnecessary overlaps and increasing complexities, or even so far as the potential to be perceived as interfering. This raises the fundamental question over where the role and function of the TPB starts and stops, and therefore, what are the actual gaps that ought to be filled, compared with the perceived gaps that arise due to other factors (eg, resourcing constraints, regulatory lag)?

We need to be sure we truly need this additional layer and whether real change will ensue. Part of this is also turning our minds to those that are doing the right and wrong thing; notions of red tape and cost impositions for those doing the right thing in comparison to whether those doing the wrong thing continue to simply ignore their responsibilities.

For example, the question arises as to why the Minister should be brought in, when the TPB has been established, a body that has fundamental standing within the profession. Moreover, it is arguably more about how the TPB interprets and issues guidance for practitioners. As one Practitioner notes:

> …[T]here's a stronger argument in my view on getting the guidance put down as legislative instruments, which a lot of them aren't in the process for. That's quite convoluted. So, if it was me, I'd be focusing on the guidance and giving that legislative power and a more streamlined way rather than having you know

[80] Chartered Accountants Australia and New Zealand and CPA Australia, 'Review of the Tax Practitioners Board – Discussion Paper' (Joint Submission, 6 September 2019) 'Appendix A – Chapter 6', https://www.cpaaustralia.com.au/-/media/corporate/allfiles/document/media/submissions/taxation/tax-practitioner-board-review-joint-submission.pdf.

> this as a safety net thing. All else fails, Minister changes the law, which I don't think is a good way of doing things from a structural point of view.

Where ministerial powers are sought, there needs to be further deliberations underpinning the introduction of those proposed powers. For example, the explicit definition of the powers is important, when the powers can be utilised (eg, practice or behaviour of a particular level of severity), whether the measures implemented would be temporary or permanent, whether they would be reserved as emergency powers. This fundamentally goes to the heart of the question – what it truly means to be 'supplementary' to the Code – and ensuring that the enactment of reform aligns with this objective. Whilst it can be interpreted as an additional power over and above those already vested in the TPB, the Review did not specifically define the term.

Powers should not be unfettered nor opaque. Concern over the bypassing of industry consultation was raised in this regard. The administration of the powers needs to include a rigorous process to demonstrate integrity in the reform. This covers adequate communication, transparency, and consultation processes: '*There is no real risk as long as there's conversation*'.

A key issue identified was the decision-making process itself. Not only should the process to reach a decision be sufficiently articulated, but also the basis for the ultimate decisions made by the relevant Minister. Proper reporting of decisions overall is found to be a critical element of proper process. Transparency and accountability are fundamental components of the system.

This relates to the potential for increased uncertainty for practitioners with (i) the potential for increased frequency of changes and lack of clarity, and (ii) the lack of continuity with Ministers changing as the political landscape evolves. Inherently change is ever present.

> … [I]f you go back to 2009 and come to 2022, the number of ministers that have been in that role is a lot. So, there's a lack of continuity and without being disrespectful to the ministers, not all of them have the level of knowledge that you would need to make an informed decision. So, I think as a matter of legal principle, I don't think it's a sound one…

Linked to this are questions over expertise and bias, and the way in which political interference can impact procedural fairness and independence. The majority of interviewees had concern over political influence and pressure.

There are also the issues of independence and power of politics, evident in the three-year election cycle. These create confounding variables for the TPB.

> …[T]he relevant minister would normally be more in the space of constraining whatever the ATO is trying to do rather than encourage it…. [a] recent example of that was when the ATO released their new draft ruling on Section 100A and it was quite aggressive and very different… the Assistant Treasurer came straight out with the press release saying, 'oh, if we get back in, we'll fix this legislation'.

To what extent ought the Code be dependent on who is in government and who is the Minister, in contrast with who is in the ATO and who is on the TPB? Yet, the notion of

'who' is comparable to what drives the impetus for reform – the rapidly changing environment.

Yet, the Minister may in reality be more constrained. The framing of political influence is inherently considered as a negative. Here, we find perspectives on the alternative. The public facing role is likely to mean more scrutiny – making it more challenging to go against the profession:

> … I don't find in my 26 years in public practice that Ministers are generally wanting to pick a fight with the tax profession… I expect this is a power that they would probably use very sparingly, if ever.

This can be linked to issues of expertise. Whilst Ministers may not have strong experience, it is the connection with the tax profession that ought to overcome this limitation: '*Most ministers have little experience and hopefully rely on the recommendations of TPB and the Profession*'. Simply put, the relevant Minister has the capacity to obtain expert advice. As such, whilst this power may defer decision-making to the relevant Minister, through appropriate consultation, it ought not result in siloed decisions.

The implications of these findings raise three main issues: (i) there is no certainty that Ministers will undertake such processes; (ii) pressures from stakeholders/lobbyists may drive decision-making, and (iii) lobbying can be private or public. However, this may not necessarily lead to negative outcomes for the profession. We have seen in recent times the positive outcomes of lobbying by stakeholders with respect to section 100A of the *Income Tax Assessment Act 1936* (Cth) and the resulting impact of amending the draft ruling ahead of the release of Taxation Ruling TR 2022/4, 'Income Tax: Section 100A Reimbursement Agreements' (8 December 2022). Lobbying can come from all directions – practitioners, TPB, ATO and so forth:

> …[T]he Minister, if that's the person who has this responsibility, will we copping it from both ends… people who represent various stakeholders, will, you know, seek to have the ear of the Minister. If that means that the whole process should be more transparent with, you know, any lobbying being made public as opposed to private lobbying, then you know that framework can be put in place … making the whole process more transparent to avoid the sense that [they are] being leaned on by stakeholders or political pressures being applied to, you know, influence [their] decision-making.

The key is open and transparent dialogue for this process, whilst also acknowledging that consultation may not always result in real change or real outcomes. Checks and balances are not just for the system, but to protect processes for the making of neutral decisions and avoid opaqueness:

> …[C]onsultation doesn't always result in real change being made. I think it very much depends on the participants in the consultation and the extent to which they want to take feedback on board – and so sometimes you see really good processes run where you know consultation is quite valuable and is listened to – but in other cases it is (and if someone's already set on their view) … to tick the box. So … I think in many instances it would help, but not always.

In further reflection on notions of independence, the TPB is seen as an extension of the ATO. Staffing interdependencies exist. As such, independence between the two can be

merely a perception at most. Whilst this can be interpreted in a number of ways, the key issue that arises is the connectedness of the TPB with practitioners. While the culture of the ATO will inherently be prevalent in the Board, there is concern over how this ultimately translates: not only in the influence on the TPB or the relevant Minister, but also in a lack of awareness or experience of pressures that arise in private practice:

> …[I]f the board is consisting of ATO officers and only ATO officers, how are they able to understand and sympathise with the pressure from a private practitioner? From this perspective, the Review's Recommendation to establish a Forum (TPGSF) should assist in these issues, being well placed to consider further profession representation. Issues of power and independence are considered further in later subsections.

Table 3 (see Appendix) breaks down the findings based upon the level of agreement or concern with each element of Recommendation 5.1 and the research questions set.

## 5.2 With respect to investigations

The majority support for Recommendation 6.2 is re-affirmed, with some mixed results and strong caveats present throughout, consistent with Devos and co-authors' (2023) preliminary themes.[81] There is a desire to improve standards within the profession, particularly in respect to networks of bad culture – '*weed out the cowboys*'. Practitioners believe that it is important for the TPB to have the power to investigate; although, there is a real concern over the lack of resourcing of the TPB in carrying out investigations efficiently and effectively, but also the impact on livelihoods, wellbeing, and safety.

Specifically, the majority were supportive of the first Recommendation 6.2(a) for commencing an investigation once a tax practitioner has their registration terminated or where they don't seek reregistration. This finding is also consistent with the submissions of the TPB, professional bodies and the ATO, and was supported by the government in its response. The investigation was viewed as appropriate and in line with what other professional bodies would also do for their members.

The practitioners argue that the review is giving extra power to the TPB not just to educate, but to enforce and police the Code. Consequently, it ought to increase the standard of the profession:

> [I]t seems to be that the Review is kind of nudging it [the TPB] more towards being a bit of an enforcer and a policer rather than just an educator – and, you know, … I'm OK with that because I have seen, and I see all the time, the quality of some of the – some of my colleagues in the tax industry, and let me tell you, they're not all high-quality practitioners and there's some very, very poor behaviours out there – and to the point where it's frustrated me a lot in recent years, some of the clients and the work that I've picked up or been asked to get involved with – and I've just looked at it and just wondered what the person was thinking – and firstly and secondly, how on earth can they do this work with a straight face? Because it's just it's just really to a low standard – and so I think this would help improve standards.

[81] Devos et al, above n 5.

The consequence of breaching the Code must follow the tax practitioners regardless of their registration status. This in turn can help in maintaining the integrity of the tax system and the tax profession and upholding the principles of the Code.

However, concerning the issue of investigating *all* subsequent deregistrations, the findings were more qualified. A strong caveat was raised that the decision to investigate must be justified and necessary given the potential disruption it may cause a tax practitioner's practice and livelihood:

> You can't have an authority or regulator making arbitrary decisions…[I]f they're [the TPB] going to essentially severely impact somebody's livelihood, they better have a damn good reason for doing it. And they better be able to explain it… and that also gives a court or a tribunal, something to scrutinise if their decision's objected to.

Appropriate, transparent, respectful processes are a core element of procedural justice and will differ based on the category of wrongdoing. Some argue that early intervention would be preferable to Recommendation 6.2. While it is very important to stop rogue tax practitioners from bringing the profession into disrepute, the practitioners believe that it will be more beneficial for the TPB to influence the rogue tax practitioners to behave within the principles of the Code instead of 'wasting' government resources (and tax practitioners' time) on investigating these rogue practitioners after being deregistered, arguably described as a re-registration issue. The TPB ought to work with the tax practitioner and help them to improve their practice behaviour. Aligned with this is the need for early engagement rather than chasing tail-end practitioners.

Mixed findings transpired where the tax practitioners were asked about the importance of having valid grounds and reasons for deregistration. While in most cases tax practitioners would provide those grounds/reasons there are always some who choose to manipulate the situation, may destroy evidence, or use the de-registration as a loophole for avoiding consequences. Interviewees were mindful of doing the right thing. For example:

> It's better to be conservative than end up in an ATO audit because I've lived and breathed a few of those and they're not fun. There has to be sufficient evidence and there has to be the ability to have a right of reply, I think. If it's serious and it's a serious complaint that maybe there's a temporary suspension or something like that, I don't know.

Most interviewees indicated that investigating deregistered tax practitioners was valuable and a good use of resources, providing the misconduct was serious and the TPB had done its due diligence on the matter beforehand. However, it is acknowledged that the spectrum of low-level – high-level wrongdoing is something that can be more readily established in hindsight. Issues of early engagement and hindsight highlight the need for proactivity. This will be further examined with respect to penalties and sanctions.

Moreover, while it is important to pursue tax practitioners who breached the Code regardless of their registration status, not only should the TPB first take into consideration the seriousness of the offence but also the overlapping authorities (such as the Australian Federal Police). In some situations, those alternative authorities may

be the more relevant authority to act – and therefore result in criminal penalties applying, for example:

> …[E]ven if the Tax Practitioners Board was potentially aware someone was conducting themselves in a criminal manner, they would typically refer to the federal police anyway, and then they would conduct those surveillance activities. So I don't think it's the role of the Tax Practitioners Board.

The results of this study also indicate strong support with some caveats for Recommendation 6.2(b) of removing the limitation on the TPB formally gathering information prior to commencing and notifying a tax practitioner of an investigation. The element of surprise and flexibility in conducting the investigation was also noted:

> … I am aware that there are certain practitioners out there who if they had became aware that there was going to be an investigation into them, might do certain things they might seek to hide evidence, they might seek to cancel the registration and you know distance themselves and might do any number of things, and that could frustrate an actual investigation – and so, I think it's important that the TPB have powers to at least get to a certain point in their investigation without necessarily having to notify the practitioner if there's a concern that they might interfere.

On the other hand, an important caveat raised was that inadequate resources may hinder the TPB in performing investigations more generally:

> [It's] quite difficult for the TPB. One I don't think they got the resources to do that properly… when they do have a case and go to Court, it's really got to be watertight and I know from what's happened with various chairs over the last few years, they do make sure that the case is solid that they've got all the facts and then, and only then will they take it further – and sometimes they got an inkling of what's happening they that they might have 30% of the facts or 40, but they can't go any further and that becomes a problem too.

This issue may be addressed to some degree with the additional funding the TPB is to receive to carry out their compliance work, as indicated in the October 2022 Federal Budget.[82]

However, it is noted that lengthy delays mean that there are increasing risks of further victims of egregious behaviour. After all, this is about protecting clients (taxpayers) – tax practitioners are meant to be trusted advisers. Where a practitioner is egregious in their behaviour, this can be seen as a mass betrayal: '*[A] mass betrayal from a person that was meant to be a trusted advisor*'.

Here we point to the distinction of tax practitioners being professionals in the first instance – not criminals – thus regulation should reflect this. However, bad actors lead to harm that may be criminal in nature. There is a necessary balance between timely action, procedural fairness, and accountability. This requires strategic resourcing, linking together due process and effective timeframes.

[82] Australian Treasury, *Budget Paper No 2: Budget Measures October 2022-23*, above n 68.

A strong majority was found in favour of tax practitioners having a right to know they were being investigated with the ideal of open and transparent communications between the TPB and tax practitioners. A strong majority were also of the belief that tax practitioners had the right to prepare and defend their case, particularly with regard to protecting evidence. Whilst technological advancements make it harder to tamper with evidence, it is not impossible; there is also the recurring issue of seriousness of the purported offence. Here, the level of seriousness ought to determine whether it is appropriate to lose their right to be notified. In this respect it is the taxpayer's right to protection that outweighs the tax practitioner's right to be notified.

Related to this was evidence of tax practitioner concerns with regard to jeopardising the principles of natural justice and procedural fairness with unknown investigations. The entitlement to the presumption of innocence must be maintained. The practitioners argue that the checks and balances are most likely embedded within the first stage of the investigation, which can be linked to the above issues of resourcing.

However, it is also noted that the findings for Recommendation 6.2(b) contrast with the findings of Devos and co-authors' (2023) study where caveats were raised with regard to criminality and the nature of unknown investigations.[83] The government has also not supported Recommendation 6.2(b), suggesting that further consultation is required with regard to its systemic implications.[84]

Finally, this study found strong support for Recommendation 6.2(c) regarding removal of the six-month time frame to conduct investigations; however there were strong caveats:

> …I think it's appropriate to be removed. Why? Because six months is such a short period of time in the context of what I we do. And remember, we have of course a preparation phase and assessment phase, and then of course in tax land for our small business clients, we have a two-year amendment period and for our larger clients are four-year amendment period, well six months is such a short period of time that the assessments and like wouldn't have even been had.

Practitioners believe that giving a longer timeframe is not necessarily considered to be a 'witch hunt' as the TPB must gather relevant information to make an informed decision. However, it was clear that the time it takes depends on the complexity of the case. Whilst an open time frame may not endanger procedural justice, setting a timeframe was seen to be important to avoid unnecessarily lengthy investigations. Investigations should be dealt with as swiftly as possible and be transparent. In most cases, practitioners believe one year is a sufficient timeframe. The timeframes should take into account the implications resulting from stress, anxiety, and workloads.

Importantly, the TPB needs to be held accountable for the time taken to undertake an investigation. Some qualifications to this general response were also received, including the suggestion of a more flexible approach:

> I think the six-month rule should remain. So, that's six-month rule is not steadfast. It can be extended in circumstances where the practitioners caused delay, unnecessary delay – but I think by having the six-month rule there, it

[83] Australian Treasury, The Review, above n 2.
[84] Ibid.

> really forces the investigation to be carried on expeditiously and I would go one step further and say that this type of time limit should be imposed in respect of tax reviews and tax audits – and you know, if we're talking about complex cases, then you know, a complex tax audit, might, you know, put a 12 month time limit.

Some, however, found six months to be too long. Overall, the majority were strongly in favour of the investigation being both efficient and frequent. As such, the majority recommended that clear timeframes were still warranted for investigations so that those who deliberately delayed and were hiding information would be found out. Tax practitioners should not be able to stonewall investigations.

However, it is noted that the findings for Recommendation 6.2(c) contrast with the findings of Devos and co-authors' (2023) study where strong opposition was found particularly with investigations being efficient and adequate.[85] The government has also not supported Recommendation 6.2(c), suggesting that further consultation is required with regard to its systemic implications.[86]

Table 4 (see Appendix) breaks down the findings based upon the level of agreement or concern with for each element of Recommendation 6.2 and the research questions set.

### 5.3 With respect to penalties and sanctions

We find that whilst there were mixed results and many caveats to the issues raised when it came to the expansion of penalties and sanctions and the flow-on implications, we find a strong majority of interviewees are supportive of the recommendations. A broader toolkit of consequences offers the potential for better standards for the profession.

The practitioner is in a position of trust, both from the perspective of the government and the client (taxpayer). An effective system needs to be able to respond with genuine, timely penalties and sanctions and sufficient enforcement.[87] Without trust within the system, it will be hard for the TPB to control rogue behaviour:

> …[T]here's no reservations. I'll tell you why the whole system is based on trust… the only way you can maintain trust is if there's genuine sanctions. Otherwise, you should just wind the whole system up... Forget about self-assessment…

Without a trusted system, rogue practitioners will continue to harm.

Expanding penalties can create an opportunity for efficiency and ensure tailoring the punishment to the crime, ie, again, coming down to the severity of wrongdoing:

> … 100% in favour of this one … they [the TPB] don't need to, you know, use a sledgehammer to deal with something that maybe doesn't warrant.

This finding is consistent with the TPB submissions received where it was expressed that the TPB be given more flexibility when it came to dealing with a broad range of tax

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[85] Devos et al, above n 5.
[86] Australian Treasury, The Review, above n 2.
[87] The probability of detection was even more important than the penalty which is consistent with extant literature: Roberts, above n 49, 78.

practitioner misconduct. Our findings are also consistent with Devos and co-authors (2023).[88]

The government *noted* Recommendation 6.1, indicating further consultation is warranted. Our findings justify this position given some of caveats that have been raised. One of those caveats is that the focus should be on greater education, not necessarily increased sanctions, which prior evidence supports.[89] Similar to issues around investigations, an ideal is proactivity and early engagement rather than reactive punishment: '*... [the TPB should] encourage and educate tax practitioners to remain in the position*'. Therefore, there is a framing of whether penalties and sanctions are focusing on the symptoms and not the cause; moreover, the overarching lifecycle being explored within this project, from the practitioner building skills and knowledge, servicing the community, to a particular allegation/investigation process, the outcome, aftermath and so on. Key challenges and key relationships throughout this lifecycle will be dynamic. We reflect here on the objective of protecting the community which is not necessarily about punitive action.

It is recognised, however, that those who are egregious will be likely to continue to act in undesirable ways. Many interviewees did not see penalties as being likely to curb undesirable behaviour. Bad actors will continue to be bad actors:

> To be quite honest, if they're really undesirable, I don't think they'd care less. They'll just do it. But if people are kind of on the edge and they're not really that bad but they're just pushing the system; it might bring those people back in the line, but you know, like anyone, if you're a crook, you're a crook. It doesn't matter you know you can put them in jail or out of jail, they go and do it again. And I think really bad ones couldn't care less.

Irrespective of whether the tax practitioner is struck off – loopholes can be found to continue practising. Egregious practitioners will find alternative vehicles to practise. An example is where the egregious practitioner relies on other practitioners to continue to operate, resulting in an environment of problematic culture and pressure:

> …[T]here's been cases where a lot of people have got around this by getting someone else to run their practice and they still manipulate the practice from a distance sort of thing – and that's one thing I'd like to see that if they're disbarred, they shouldn't be involved in practising, you know for that period because I think it's just wherever they're working is probably, then put them [staff] under pressure and I know people that have done it, they've had their staff member take on the registration of the practice and they then sit in the practice and still work the same way and it shouldn't be…

We pause, however, with respect to the causes of undesirable behaviour and whether education or sanctions are likely to influence tax practitioner behaviour. Interviewees reflected on the extent to which undesirable behaviour can stem from intentional and unintentional causes, the latter a matter of deficits in education and experience, or otherwise a lack of reasonable care:

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[88] Devos et al, above n 5.
[89] Devos and Kenny, above n 4.

> … one is where it's just, you know, not taking care, not being sufficiently educated and probably the one I see most is particularly with accountants, is acting in matters and for clients that you're just not experienced or qualified to do – and so some of that is malicious and some isn't… the practitioner is the one in that scenario who should put their hand up and say I'm out of my depth, you need to move on and they don't because they're conflicted. They're, in my opinion, they're in complete breach already.

Moreover, the conflict of interest raises issues here.[90] Particularly for smaller practitioners, they may be particularly reliant on particular clients – 'golden geese' – over time, leading to a problematic reliance and therefore conflict:

> There's a lot of smaller practitioners, especially, out there who might have a one or two clients who are just their golden goose and they get a lot of revenue out of these clients, and they might have started with them when they were small and the clients just grown and grown and grown, and now they'd be much more suited to a bigger firm perhaps, or a firm with more skills. But for whatever reason that you know loyalty or the fact that the client is simply unaware, they've hung in there, I see this all the time… and the practitioner is the one in that scenario who should put their hand up and say I'm out of my depth. You need to move on, and they don't because they're conflicted.

Despite this, interviewees did not see questions of effectiveness as stopping reform. The TPB needs to be more creative and have sufficient capabilities to investigate. Inherently, this links to a persistent theme across the perspectives: funding.

Thus, a conundrum – or perhaps a spectrum – arises. The perceptions largely presented indicate: (i) those egregious tax practitioners are unlikely to be swayed by increasing sanctions or penalties; (ii) those that ought to benefit from early intervention and education to drive improving standards of practice, and (iii) those somewhere in between that may trend towards responding to either/or sanctions and educational approaches.[91] The objective of reform is about the community, it is not punitive but protective. Practitioners serve the community. This in itself creates a conflict between the client and the community.[92]

It ultimately depends on how the reform is implemented.

Some strong opposition to Recommendation 6.1 was identified, which suggested an alternative to the increased sanctions was by way of a court order and making the order an enforceable undertaking. Concern was also raised regarding the impact of interim suspensions to livelihoods and the risk to ruining the practitioner's business.

We can similarly reflect on past reforms that interviewees considered positive and offer lessons to future reform:

> I think it's a very good idea and I think this change is similar to a change that we saw a couple of years ago in the superannuation industry in that the tax

[90] As identified in Cooper, above n 33 and Walpole, above n 32.
[91] The literature supports the notion that tax practitioners are no different here to taxpayers in that they will improve compliance with a combination of education and penalty: Devos and Kenny, above n 4, 629.
[92] See for example Cooper, above n 33, 16.

> office was very unlikely to make a super[annuation] fund non-compliant and that was one of the very few things that they could do to a fund. They couldn't have a penalty, that there weren't a lot of minor penalties or options to give and that appears to be a similar situation that the Tax Practitioners Board has at the moment with tax practitioners. So, I think it would be very good to have a larger range of options available to the Tax Practitioners Board.

Proper process and procedural fairness are found to be an important aspect, including access to support and guidance, the right of appeal. However, this is not necessarily absent from the existing system, and some questions arose as to whether the overall system should change:

> I would hope that the due process still takes place, just because you have a series of different sanctions and for different levels of court culpability, and hopefully that would not mean that they bypass due process.

The majority of interviewees indicated that increased sanctions would not jeopardise the power and independence of the TPB; however perceptions of independence were reiterated, with respect to supplementing the Code. The implications of the interconnectedness between the TPB and ATO, extending considerations presented earlier, create hesitation by practitioners:

> [A] lot of the staff have moved across and they go backwards, and forwards and it happens in public service everywhere that people go across… but … people say, well, are they different from the tax office?

Similarly, perceived conflicts of interest arose again over the reach of power and revenue collection:

> I think so long as there was some ability for that decision to be reviewed by a genuine third party, and if that is the AAT, then I guess that's up to the AAT because you know, you wouldn't want them …overstepping their power in [respect of] … revenue collection.

A strong majority were supportive of Recommendation 6.3, regarding publishing more detailed reasons for tax practitioner sanctions and terminations in a publicly available TPB register. Overall, the findings suggest that there is a role for 'naming and shaming' although there was also acknowledgment of what reputational damage could occur as a result.[93] This relies on members of the public being aware of the register.

Here we reflect on the notions of rehabilitation and spent convictions, borrowing from criminal law:

> I would like it to be there for a long period of time, and even if an agent, remains and is of good standing. I would like to know, as a user of that service that I have the ability to access those details and understand what my tax agent has done in the past … it's not to say the person cannot become a better advisor or better tax agent they can – but I think it's in the public interest to have that information out there...

[93] See also Braithwaite and Drahos, above n 25; Sakurai and Braithwaite, above n 57, 375.

Such an approach provides transparency as well as enabling informed decisions to be made by the community, thus improving public trust. Moreover, it goes together with education – for all stakeholders.

> So, for me and I think anyone in the profession having a bit more detail around why the decision was made and what decision gave rise to the different level of sanction that would assist the tax practitioner in understanding what others are doing wrong – and because sometimes you know, I hope that in my advice I've never breached those lines and I'm confident that I'm not, but it's still useful knowing.

However, it is important to recognise the need to balance privacy and consumer rights. For example, the appropriateness of disclosing certain information may be challenged. A point that was also raised, was in relation to publication, that information should not be published until all avenues of appeal had been exhausted:

> … [I]f there are criminal charges against the tax practitioner it would not be appropriate to disclose those or provide more disclosure in relation to those on a register when they wouldn't be open to the general public. I think that would be quite unfair to that tax practitioner, yes, but some limited information on the TPP register, such as cancelled registration, suspended registration until a particular date or something like that, I think would be good as it would allow the consumers to make a more informed decision.

Caution is also raised with respect to the potential damage the disclosures could do. There is equally a balance between recognising harm and having 'done the time'. The idea of 'naming and shaming' is seen to be a significant risk to the livelihoods of practitioners:[94]

> …[Y]ou might be suspended for six months, you might get a caution and it's dealt with… you don't want to have a black mark on someone when they've done the time. So that's the balance…

There is also a need to consider the contemporaneous narratives permanently available following publication. Whilst the TPB can publish official reasons, whether permanently or temporarily, there is a contrasting and less controllable narrative that will live on through the court of public opinion. The ability for parties to undertake 'Google reviews' can skew reasoning and impact named practitioners. This may not, however, be seen as too problematic – a fact of a digitalised economy – an information economy:

> …[I]t's like a Google review, OK? Someone going to review a restaurant and give it two stars? And if you're thinking of going to that restaurant, you might want to go – hang on – why did you give it two stars? I'll make up my own mind – and then you look at the reason and you might actually not have a problem with whatever the issue was – and you go, you know what? I'm OK with that. I'm a very strong believer in transparency. I think government decisions and executive decisions need to be made as clear as possible with as much reasonable information communicated as possible so that the public can make better decisions and be better informed – and I think simply saying, oh,

[94] See also Braithwaite and Drahos, above n 25.

> someone got banned – I mean that just gives you nothing. Then you're going – and I've done this myself – then you're going to Google to try and find something in the media as to why this particular person got sanctioned or struck off, and you would rather have the official reason for that than the court of public opinion.

There is a delicate balance given the personal reach of 'naming and shaming' in this context (in contrast to 'naming and shaming' a company or business). A more personal impact therefore results.

Whilst there may be decisions or rulings for behaviour that progressed through the courts – where the tax practitioner challenges decisions of the TPB – clients may not have the capacity or willingness to locate, peruse and understand complex reasonings. Some mixed perspectives were put forward on whether the public should be expected to 'dig' through court decisions and the role of the courts in publishing decisions (in contrast with the distinct role of the TPB register). However, this implies the taxpayer is searching the register to begin with. Since 2010 a body of case law has begun to develop in the area.[95]

Reputation also extends more inwardly, with registers being flagged as a tool for assessing possible future employees:[96]

> …[W]e would probably check the register to make sure that there are no, you know black marks against him at the end of the day, it becomes reputational for a firm, if you take on somebody that he is on that list and it becomes public knowledge, then it's potentially quite damaging to a brand, so, yeah…

The issue was raised again with respect to the level of misconduct guiding the disclosures, for example comparing the multi-million dollar frauds, with not lodging a tax return on time. We again reflect on issues of intention vs ignorance and the need for a nuanced approach. However, just like the problem of '*a doctor not knowing how to treat a cold*', practitioners must have adequate knowledge of the law.

Embedded within these issues are the permanent-temporary perspectives of published information, education and previously flagged notions of rehabilitation and spent convictions. Interviewees suggested time limits to having practitioner information disclosed on the registers. There is an expectation that practitioners should be able to learn from their mistakes:

> I think that I'm a believer in, you know, we all make mistakes and we all should be able to learn from our mistakes and move on in life. I'm a strong believer in that and – so I don't believe that they should be up there forever – but less than forever, maybe just for the period of time that there's a suspension exists. Seems reasonable off the top of my head.

The caveat, however, is that interviewees felt that given the digital world we operate in, the impact will follow practitioners for life, irrespective of the period of publication.

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[95] See section 3 of this article.

[96] As flagged in section 2.4 of this article, draft legislation on new disqualified entity rules have been released. This will be further discussed in section 6 of this article.

This somewhat qualified support differs slightly to the TPB submissions received, where it was expressed that the greater transparency was required for both prospective employers and clients in warning them against unscrupulous tax agents; although the TPB Review conceded that the register needed to be supplemented with accurate information identifying these agents. The study's results are also not as strong as the findings by Devos and co-authors (2023) regarding penalties, although reputational damage was earmarked as a concern.[97] On the other hand, it could also be viewed as an effective deterrent as indicated in the literature.[98] Similarly, the government noted Recommendation 6.3 and believes further consultation is warranted.

Finally, this study produced mixed results with regard to Recommendation 6.4 and the introduction of an administrative penalty regime which imposed penalties on tax practitioners who demonstrate an intentional disregard of the tax laws. Approximately half of the practitioners were in support of an administrative penalty regime to particularly address the egregious tax agent. In essence, there was strong support to hold egregious practitioners to account; again, forming part of the TPB's toolkit.

However, clear challenges were considered around establishing sufficient evidence to prove intentional disregard and similarly raising the question as to whether the tax practitioners should be terminated instead if proven. Whilst the challenge of establishing sufficient evidence and proof relates to the complexity of the law, it was equally noted that there is a good body of law from which to draw upon to develop appropriate frameworks:

> … [I]t's a tough one, but there is a lot of case law in the tax sphere around penalties and penalty remissions for, you know, reasonable care and intentional disregard, all those sorts of things that could be drawn upon to come up with a framework when you would find this or when you would find that. So, look, I think it's OK. I think it should be a tool that the TPB has in their toolkit. Yes, I think it can be challenging to figure out what is intentional disregard versus something else, but that's why we have so many cases on it is because it is hard to for people, to people, have different opinions on it. So, you got to go to court to figure it out.

Inherently connected to issues of independence and overlapping regulatory frameworks, one suggestion offered was for the TPB to be the body to deal with reviewing tax promoters, thereby removing 'unnecessary' duplication (ATO and TPB) over the affairs of tax agents:

> …[T]he exercise of administrative discretion, you know, is usually at the AAT now think probably requires a change in the law to, you know, allow a review of administrative discretion… why don't we get the TPB to be the body that deals with the, you know, review of tax promoters? Because tax promoters usually are tax agents anyway. You wouldn't expect a mum and dad to be a tax promoter, so why don't we get civil penalty applications that are made to the federal court? They have penalties imposed upon tax promoters for the marketing of tax exploitation schemes would within the purview of the TPB and make it the sole body rather than having two separate bodies, you know,

[97] Devos et al, above n 5.
[98] Braithwaite and Drahos, above n 25.

> involved in the regulation of tax agent activity… [T]his idea that you've got the tax office and the TPB both reviewing the affairs of tax agents, I think is just, you know an unnecessary duplication. Yeah, so, the two side issues are the tax promoter penalty provisions and the disqualification of directors and the comparison of how that regime works with regard to the possibility of applying the same principles to the disqualification of tax practitioners.

More broadly, the question is whether the role and function of the TPB should broaden and become more independent from the ATO.

Overall, this somewhat qualified support is consistent with the TPB submissions received where it was acknowledged that there was sensitivity surrounding this issue. The study's results are also consistent with the findings of Devos and co-authors (2023) with regard to the caveats around the clarification and proof of intentional disregard and the procedures and independence of the regime.[99] The government has also noted Recommendation 6.4 and believes further consultation is warranted.

Table 5 (see Appendix) breaks down the findings based upon the level of agreement or concern with for each element of Recommendations 6.1, 6.3 and 6.4, and the research questions set.

### 5.4 With respect to safe harbour

There was strong support in principle shown for Recommendation 6.5 for extending safe harbour protections to instances where the tax agent had demonstrated recklessness or intentional disregard with respect to the law. There is a need for appropriate protection for clients relying on – ie, trusting – tax practitioners. The Code must always prevail and be robust:

> So, I think that a Safe Harbour mechanism is critical to ensure that you know if a tax agent has made an error, or failed, or overlooked the lodgement of something, or done something erroneously, it shouldn't be the taxpayer that is penalised for that situation…

If the tax practitioner has done the wrong thing, then safe harbour ensures no one suffers – the aggrieved party can take steps to protect themselves. In some cases, it will be fairly straightforward – however not always:

> [The] Commissioner, let's say, gives the taxpayer free pass because they're the aggrieved party and he often does that and says, well, you know, you trusted this tax agent and he let you down or he or she let you down. Then nobody suffered – nobody. There's no consequence to anyone because there's no regime at the moment to penalise the agent – and I think we are missing that – and I think we should have it. I wouldn't want to be necessarily the one making the call as to who's going to pay what penalty. It's a tough one, but I can tell you from experience, it's going to be easy in some cases. In other cases, it can be very, very hard.

The more challenging cases reflect challenges in respect to discretion and judgment, as law is complex by volume and also practically complex. Interviewees suggest that more

[99] Devos et al, above n 5.

guidance is needed in this space for safe harbour to be effective. It is difficult to apply in practice. Part of the issue is the prescriptive nature of safe harbour leading to a 'tick box exercise'. This can create an unintended consequence of protecting parties without stopping the misconduct. Safe harbour protections are therefore a consequence of a flawed system, where the system cannot be trusted to weed out all bad actors. They represent another form of reactive checks and balances. The stronger the system, the less likely the need for safe harbours:

> …Safe Harbour is fine. It has to be written properly. It has to be done in a way that people still get assurance and comfort – but you know, if it's been artificially or contrived that you don't actually get the – you know, protection so that you know says it has.

The critical issue with the Recommendation is identifying where the taxpayer is at fault in addition to the tax practitioner. If clients are truly innocent, where the intentional disregard or recklessness can be clearly attributed to the tax practitioner, safe harbour is considered appropriate. However, concern arises where clients give tacit approval to the actions of the practitioner:

> … [T]hey often are well aware of what's going on and give tacit approval – but if the client is truly innocent of the recklessness or intentional disregard, and that can be clearly attributed to the agent, then I'm OK with the client having a Safe Harbour...

In establishing fault, the Recommendation recognised the potential to apportion penalties. We find mixed results with respect to this element. The appropriateness and practicality to do so where the taxpayer is not fault-free is a complex matter. Many caveats were raised by the interviewees, including the resulting legal action ensuing between the client and the practitioner to recover monies lost. This would create a blame game between parties:

> I think if we started to go down a level of apportionment, we could, you know, be around for another five years trying to argue about percentages. So, I don't think apportionment really works. It would just be too messy – and practically if there was some apportionment to be done, the tax agent would then get legal advice and attempt to recover some…

The conflict of interest is also noted in that the Recommendation goes against normal principles of law between the client and practitioner acting on their behalf and potentially jeopardises their very relationship:

> …[Without Safe Harbour] then taxpayers are effectively liable for what the things that the tax agent does, but having said that pretty much in most cases, principal is generally liable for actions of their agent in most areas of law – and this is an issue, and if there's an issue with the agent acting contrary to the interests of the principal, then the principal has to take action against the agent.

There was also some strong opposition to the Recommendation which noted that this course of action was highly unusual amongst tax administrations worldwide – and a 'game changer':

> …[T]hat would be a game changer. I don't think there are any tax jurisdictions around the world that sort of apportion penalties. Penalties are ordinarily imposed upon taxpayers.

As already flagged, the broader regulatory framework, including the role of the courts is relevant and raises opportunities for efficiency from a client perspective. Taxpayers are able to take legal action to cover costs, sue for negligence, or make a claim on the tax agent's insurance, although it was noted that this action is very costly for taxpayers.[100] Court action was considered to be less likely. It was suggested that most action is settled outside of court:

> It's difficult to sue a professional. I mean, a lot of taxpayers won't have the financial capability to commence legal action against their tax advisors or agents. I mean, you look at your average person who you know and the cost of starting a court action is enormous as time.

Lastly, timeliness for client outcomes and wellbeing were also identified as important considerations. Safe harbour can be perceived as a facility to circumvent stress. A client having suffered harm by the practitioner is likely to be incredibly stressed and the court processes can be lengthy and expensive.

Overall, this qualified support for Recommendation 6.5 is consistent with the TPB submissions received where it was acknowledged that there was some opposition surrounding this issue. The study's results are also consistent with the findings of Devos and co-authors (2023) with regard to the caveats around the necessity of safe harbours and how they would work in practice.[101] The government has also noted Recommendation 6.5 and has not endorsed it in the absence of a new administrative penalty regime.

Table 6 (see Appendix) breaks down the findings based upon the level of agreement or concern with for each element of Recommendation 6.5 and the research questions set.

## 6. SUMMARY AND CONCLUSION

This study gathered the views and insights of 20 Australian tax practitioners, as to their level of (dis)agreement with the selected recommendations in respect to the Code, investigations, penalties and sanctions, and safe harbour provisions. Table 7 summarises the majority positions identified in this research. However, as detailed in section 5, there are strong, complex narratives at play. Across all recommendations, whilst there may be majority perspectives of the interviewed cohort, these perspectives are complicated by nuances of a contemporary Australian context. Table 7 cannot be considered without appreciating the in-depth and valuable insights detailed in section 5.

[100] Note that there is no right of appeal for safe harbour. It is an administrative decision by the Commissioner with the only redress being to challenge the Commissioner's administrative action in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). This is generally seen as an expensive exercise and beyond the financial resources of most clients, as reflected upon by interviewees.
[101] Devos et al, above n 5.

**Table 7: Summary of Majority Positions by Practitioners**

| Research Question | Majority Position |
|---|---|
| **With Respect to Supplementing the Code** | |
| ***RQ*$_{1.1}$** Overarching agreement (dis-agreement) with Recommendation 5.1 | Agree-Partial Agree |
| ***RQ*$_{1.2}$** Concern about the level of government control and independence | Concerned |
| ***RQ*$_{1.3}$** Concern about the Ministers' lack of expertise | Concerned |
| ***RQ*$_{1.4}$** Concern about the Ministers being subject to political pressure or ATO influence leading to biased decisions | Concerned |
| **With Respect to Investigations** | |
| ***RQ*$_{2.1}$** Overarching agreement (dis-agreement) with Recommendation 6.2 | Agree |
| ***RQ*$_{2.2}$** Investigating de-registered tax practitioners is a valuable / good use of resources (re Recommendation 6.2 (a)) | Agree-Partial Agree |
| ***RQ*$_{2.3}$** Concern investigating de-registered tax practitioners will impact on principles of natural justice / procedural fairness (re Recommendation 6.2 (a)) | Concerned |
| ***RQ*$_{2.4}$** Tax practitioners have a right to know they are being investigated (re Recommendation 6.2 (b)) | Mixed |
| ***RQ*$_{2.5}$** Concern that removing the six-month timeframe will impact the effectiveness and efficiency of investigations (re Recommendation 6.2 (c)) | Concerned |
| **With Respect to Penalties and Sanctions** | |
| ***RQ*$_{3.1}$** Overarching agreement (dis-agreement) with Recommendation 6.1, 6.3 and 6.4 | Agree |
| ***RQ*$_{3.2}$** Sufficient penalties are needed to curb undesirable behaviour | Disagree |
| ***RQ*$_{3.3}$** The proposed sanctions offer balance between regulation and procedural fairness (re Recommendation 6.1) | Agree |
| ***RQ*$_{3.4}$** Concern increasing sanctions will impact power and independence of the TPB (re Recommendation 6.1) | Not Concerned |
| ***RQ*$_{3.5}$** Proposed publication of further detail in the TPB register will improve transparency and public trust (re Recommendation 6.3) | Not Concerned |
| ***RQ*$_{3.6}$** Proposed administrative penalty regime will be effective in dealing with high-level of misconduct (re Recommendation 6.4) | Agree |
| ***RQ*$_{3.7}$** Appropriate avenues of appeal are required regarding the proposed administrative penalty regime (re Recommendation 6.4) | Agree |
| **With Respect to Safe Harbour** | |
| ***RQ*$_{4.1}$** Overarching agreement (dis-agreement) with Recommendation 6.5 | Agree |
| ***RQ*$_{4.2}$** It is important to identify whether the taxpayer is at fault in addition to the tax practitioner | Agree-Partial Agree |
| ***RQ*$_{4.3}$** The imposition and apportionment of penalty between the taxpayer and tax practitioner is appropriate | Mixed-Partial Agree |
| ***RQ*$_{4.4}$** The proposed safe harbour regime is relevant given legal action can be taken to recover costs | Agree |

Overall, there are complex and intertwining factors influencing practitioners' perceptions regarding Recommendation 5.1. Like the study by Devos and co-authors

(2023),[102] it is considered important that the Minister's powers be used judiciously and not in a knee-jerk fashion. Similarly, the inclusion of safeguards – proper process – has been revealed in this project, particularly around notions of open communication. Here, we expanded perspectives on the issues surrounding consultation and the role of lobbying and how these connect to issues of power, independence, and balance.

Interviewees explored issues surrounding the expertise and bias of Ministers identified by Devos and co-authors (2023)[103] and the way in which open dialogue can improve or add to these concerns. Overall, these interact with issues of perceived independence. Whilst Devos and co-authors (2023)[104] did not reveal concern of the principles-based Code becoming too prescriptive as was identified in the Review, in-depth examination of the perceptions in this study confirmed this aspect of concern.

Overall, the Review already:

- reinforced the critical need for collaborating with key stakeholders;
- referred to safeguards and parliamentary oversight.

The government has already:

- established the TPGSF to enable appropriate collaboration and consultation;
- announced an increase in funding allocation in the October 2022 Federal Budget;[105]
- published legislation on several of the Review's recommendations, including Recommendations 5.1, 6.2(c) and 6.3.[106]

On the latter point, the release of the legislation occurred following the completion of interviews. As noted in section 2.2 of this article, the initial proposal to provide the Minister with this power would include the need for the Minister to consult with the TPGSF before making any changes – thus checks and balances. This process has not been included in the legislation. Thus, the question arises as to whether the profession would feel more at ease if the proper processes surrounding collaborations and safeguards were to be embedded in law. However, what constitutes proper process itself needs to be founded in collaboration. Here, the TPGSF is the appropriate starting point. The TPGSF ought to consider whether Ministers should be required to undertake a minimum level of public consultation before decisions can be made.

Concern over the scope and limits of ministerial power can be somewhat resolved through the legislative amendments. The profession can reinforce their perspectives through this process, including concerns over complexity and overlapping roles and functions across regulatory frameworks. The amendments do not limit powers in terms

[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Federal Treasury, *Budget Paper No 2: Budget Measures October 2022-23*, above n 68.
[106] See Treasury Laws Amendment (Measures for Consultation) Bill 2022: Tax Practitioners Board Review, above n 9. See also at the time of writing *Treasury Laws Amendment (2023 Measures No 1) Act 2023* (Cth) and Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023.

of temporary or permanent outcomes, nor are they proposed to be reserved as emergency powers.

Given the perspectives presented, we conclude that the TPGSF should consider the alternative or additional approach of a *TPB-guidance focus* or the TPB having the power to supplement the Code. The amendments will add additional layers of complexity, and the profession is clear on to the notion of 'fixing what we have'. One example proffered was to have the guidance documents put down as legislative instruments. This offers a meaningful connection between the profession, TPB and Minister with respect to the necessary expertise and understandings underpinning future legislation. TPB guidance is seen as a critical piece of the puzzle and can resolve many of the issues presented by practitioners, including clarity over the various roles and functions across regulators (including with respect to professional bodies as well as regulators and the courts[107]).

We also reflect on the need for decision-making processes to be formalised and transparent. Our findings suggest that decisions made (or considered) by the relevant Minister, including their basis, ought to be reported and monitored. The TPGSF will have a continuing role here, ensuring the Code does not become unwieldy or untenable, but to also help ensure the Code retains its principles-based approach. No prior evidence or argument had been put forward within TPB submissions opposing Recommendation 6.2 from the professional bodies. In turn, the government indicated support in part, with an intention to amend the law to enact Recommendation 6.2 (a), whereas the government indicated it would consult further on Recommendations 6.2 (b) and (c). Devos and co-authors (2023) similarly found contrasting perspectives.[108]

Fundamental to investigations is the issue of funding, education/awareness and wellbeing. The TPB needs to ensure appropriate resources are maintained to complete the investigations it starts. As previously noted with respect to supplementing the Code, the Federal Budget has increased funding allocations in this space which ought to begin to address the concerns raised.

More generally, we find that clarity on the extent to which the level of investigations can occur without the knowledge of the practitioner is needed. In this regard, practitioners expect appropriate, transparent, and respectful processes that are appropriately resourced; however they understand that what this translates into can differ between cases. We reiterate the broad powers of the TPB to investigate and the significant implications, including limits to defence and penalties therein, as outlined in section 2.4 of this article. This is of particular concern given the contrasting positions of interviewees depending on whether the problem is a result of inexperience/lack of knowledge compared with more egregious actors. As noted previously, at the time of writing the government had also published exposure draft legislation[109] with regard to

[107] It is also pertinent to note that since the completion of interviews, the Federal government announced plans to abolish the AAT and replace it with a new appeal body: 'A New Federal Administrative Review Body' *Administrative Appeals Tribunal* (Online), https://www.aat.gov.au/about-the-aat/a-new-federal-administrative-review-body. Thus, whilst tax agents that are struck off by the TPB can appeal to the AAT, there will be a functional change to this process in due course.

[108] Devos et al, above n 5.

[109] Treasury Laws Amendment (Measures for Consultation) Bill 2023: Tax Practitioners Board, Exposure Draft Legislation, Sch 1, Pt 2. See also the Exposure Draft Explanatory Materials, Treasury Laws Amendment (Taxation and Other Measures No 1) Bill 2023, ch 1 'Government Response to the Review of the Tax Practitioners Board – Tranche 2'.

investigations where the period of consultation appeared to be quite short. Further discussion of the proposed legislation is outside the scope of this article, but it should definitely be the subject of further research.

When it comes to penalties and sanctions, as identified, the Review considered there to be a problematic gap in the severity of sanctions. Recommendations 6.1, 6.3 and 6.4 were largely agreed with, although there were general perceptions that those egregious tax practitioners will not be swayed by increasing consequences. Instead, early engagement programs for low-level misconduct to catch tax practitioners before they become problematic were viewed favourably. Similarly, recurring themes with respect to benefits of guidance enabling practical resources to educate stakeholders are seen throughout this project. The TPB cannot underestimate the value of disseminating practical insights and lessons learned from real life occurrences. This includes with respect to providing a framework and clear guidance that breaks down the characterisation of intentional disregard and recklessness. An overarching issue is the self-assessment system itself. Inadequate funding for tax audits and resources for the TPB will exacerbate the problem. This was somewhat addressed by the October 2022 Federal Budget allocation.[110]

Whilst contrasting perspectives were offered with respect to the public register, the majority position was positive. These findings on naming and shaming will be further tested by the proposed legislation that imposes new legal obligations on registered tax agents and BAS agents, as outlined in section 2.4 of this article, particularly where interviewees indicated the various uses of register information, in addition to the loopholes flagged in getting around deregistration. It is therefore critical to fully appreciate the scope for which registers can be utilised. With the public scrutiny over PwC and a former partner,[111] which occurred following the completion of interviews for this project, our findings around conflict of interest as well as ethical culture are particularly noteworthy.

The proposed introduction of the disqualified entity provisions may require tax and BAS agents to undertake police checks on both new and existing staff. It can be seen that the wide and complex definition of a disqualified entity[112] will introduce new legal complexities and obligations both in managing existing staff and recruiting new staff. Given the findings presented, we see further need to explore the TPB register, including details of length of time and level of misconduct. At the time of writing, further exposure draft legislation had also been released with regard to information on the register.[113]

Finally, to date, it does not appear we have strong policy recommendations capturing issues with respect to implicit conflicts of interest. This issue warrants further attention,

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[110] See Treasury Laws Amendment (Measures for Consultation) Bill 2022: Tax Practitioners Board Review, above n 9.
[111] See n 58, above.
[112] An entity is a disqualified entity if, among other things, the entity is subject to sanctions under TASA 2009 or has been convicted of certain offences – see Recommendation 4.6.
[113] Treasury Laws Amendment (Measures for Consultation) Bill 2023: Tax Practitioners Board, above n 110, Sch 1, Pt 1. See also the Exposure Draft Explanatory Materials, Treasury Laws Amendment (Taxation and Other Measures No 1) Bill 2023, above n 110, ch 1, 'Government Response to the Review of the Tax Practitioners Board – Tranche 2'. See Recommendation 8.1. Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023.

again an item that could be encompassed within the newly formed TPGSF. This study highlights inherently the benefits of the TPGSF.

With respect to Recommendation 6.5 on safe harbour, there was overarching support, but a strong caveat with how to operationalise it. Critically, the government merely noted this recommendation. Without a new administrative penalty regime, it would not endorse it.[114] This study indicates further work is needed to understand comprehensively the issues with respect to safe harbour, including with respect to guidance, identifying and evidencing fault, principle/prescription approaches and so forth, the problem being that the Review's scope did not extend to consider taxpayer conduct, which was a key element of the issues found in Devos and co-authors' (2023) study.[115] Contemplating fault and apportionment between tax practitioners and their clients require a broader scope of consideration.

Finally, we pause on the need to consider issues of wellbeing and harm across the various stakeholders within the profession. Harm can take on many forms and can arise from actions and inactions. Reform should seek to balance a multitude of conflicting factors within a self-assessment system.

This study offers timely evidence of Australian tax practitioners' perspectives as to the merits of the selected TPB recommendations and how they will impact upon their businesses and livelihoods. What we have observed are strong themes around continuing to develop a holistic system and toolkit for the TPB and the tax practitioner community. What cannot be diminished is consideration of the various interconnected stakeholders, their livelihoods and wellbeing. Moreover, a strong consultative approach, and proactivity are key factors.

These findings offer critical insights relevant to the tax policy debate, including the work of the newly-established TPGSF, as well as the PSC and government more generally. Even though the interview sample size of 20 tax practitioners is limiting in being able to extrapolate the results to the wider tax practitioner population, this study indicates that there is fertile ground for further empirical research into tax practitioner attitudes and behaviours concerning the remaining TPB recommendations. As this study focused on six Recommendations, of which ttwo appear in draft legislation and one has already become law to date, there is scope for further work to inform policy and improve revenue and compliance outcomes. In this regard it is imperative that further academic research be supported and continued in order to generate a more comprehensive picture of the tax practitioner landscape.

[114] See also Devos et al, above n 5.
[115] Ibid.

## APPENDIX

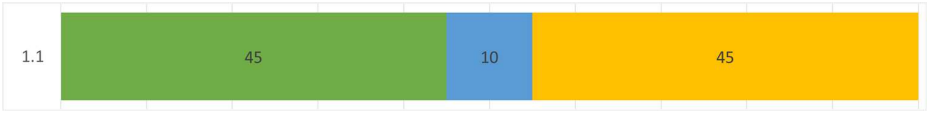
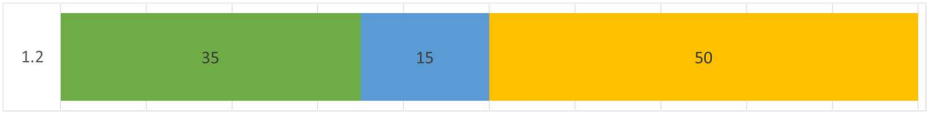
**Table 1: TPB Recommendations and Government Response**

| | Recommendation – October 2019 | Government Response – November 2020 |
|---|---|---|
| 5.1 | The Review recommends that the relevant Minister be given a legislative instrument power to be able to supplement the Code of Professional Conduct to address emerging or existing behaviours and practices. The legislative instrument process would also ensure appropriate consultation with key stakeholders and parliamentary oversight. | The government supports the recommendation.<br>There are clear benefits in having processes in place to ensure the Code of Professional Conduct remains contemporary.<br>Any proposed changes to the Code will be considered first by the Tax Practitioner Governance and Standards Forum proposed as part of Recommendation 3.3. |
| 6.1 | The Review recommends that the Board's sanctions powers need to be increased, including introducing the following sanctions into the *Tax Agent Services Act 2009*, which could be applied to registered and unregistered practitioners:<br>a. Infringement notices<br>b. enforceable undertakings<br>c. quality assurance audits<br>d. interim suspensions<br>e. permanent disbarment<br>f. external intervention. | The government notes the recommendation.<br>While there are a number of sanctions already available to the TPB, the review identified a gap between existing low-level sanctions and higher-level sanctions.<br>Treasury will consult with stakeholders on the appropriateness of providing new sanction powers to the TPB. |
| 6.2 | The Review recommends that:<br>a. Investigations are able to commence and/or continue once a registered tax practitioner either has their registration terminated, chooses not to re-register, or is seeking to surrender their registration.<br>b. The limitation on the TPB formally gathering information prior to commencing and notifying a tax practitioner of an investigation be removed.<br>c. The six-month timeframe to conduct an investigation be removed. | The government supports the recommendation in part.<br>The government agrees with (a) and will amend the law to enact this change.<br>The government will consult further on (b) and (c) to investigate the systemic implications of changing the current limitation on TPB formal information gathering and investigation time limits. |

| | | |
|---|---|---|
| 6.3 | The Review recommends that the *Tax Agent Services Regulations 2009* be amended to enable the TPB to publish more detailed reasons for tax practitioner sanctions, including terminations, on the TPB Register (which is publicly available). See also Recommendation 8.1. | The government notes the recommendation.<br>The government notes that there should be transparency for the community to make informed decisions regarding their use of tax services and will consult on the scope of information to be included on the TPB register and how long the information should remain on the TPB register. |
| 6.4 | The Review recommends that an administrative penalty regime, administered by the ATO, be introduced to impose penalties on tax practitioners who demonstrate an intentional disregard of the taxation laws in making, or being involved in making, a statement to the Commissioner of Taxation. | The government notes the recommendation.<br>Any additional powers provided to the TPB (as per Recommendation 6.1) should be given time to be considered in operation before considering the need to introduce ATO administered administrative penalties for tax practitioners. |
| 6.5 | The Review recommends the safe harbour protection as it applies both to false or misleading statement penalties and failure to lodge penalties, be extended to cover instances where the tax agent or BAS agent has demonstrated recklessness or intentional disregard with respect to a taxation law. | The government notes the recommendation.<br>In the absence of a new administrative penalty regime administered by the ATO (recommendation 6.4), a response to this recommendation is not required. |

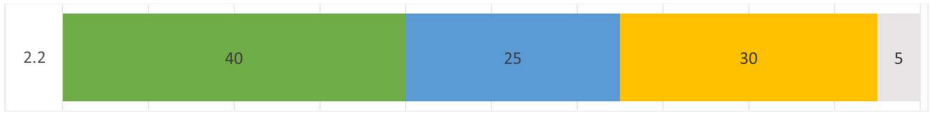
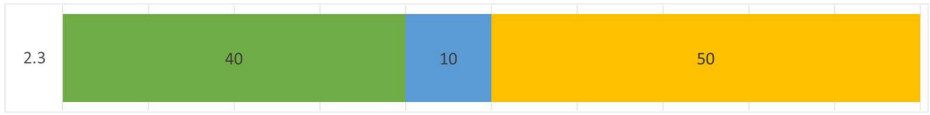
Source: Australian Treasury, The Review, above n 2, 12-13; Australian Treasury, Government Response, above n 8, 16-19.

**Table 3: With Respect to Supplementing the Code with Ministerial Powers**

| Research Question Set | Interviewee Spread (Percentages) | Key Themes |
|---|---|---|
| ***RQ1.1*** Overarching agreement (dis-agreement) with Recommendation 5.1 |   | Judiciary process, legislative process, decision-making process, bad behaviour, natural justice, technological advancement, stakeholders |
| ***RQ1.2*** Concern about the level of government control and independence |   | Decision-making process, judicial process, stakeholders, natural justice, procedural fairness bad behaviour |
| ***RQ1.3*** Concern about the Ministers' lack of expertise |   | Level of independence/political interference, decision-making process, judicial process |
| ***RQ1.4*** Concern about the Ministers being subject to political pressure or ATO influence leading to biased decisions |   | Legislative process, level of independence/political interference |

Percentage Agreement / No Concern | Percentage Partial Agreement / Partial Concern | Percentage Dis-agreement / Concern | No Clear Position Provided

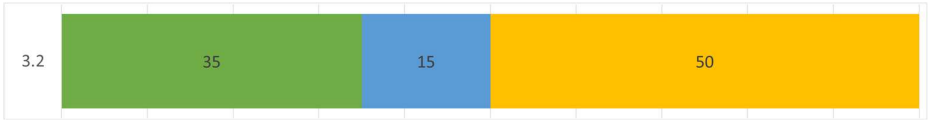
**Table 4: With Respect to Investigations**

| Research Question Set | Interviewee Spread (Percentages) | Key Themes |
|---|---|---|
| ***RQ*$_{2.1}$** Overarching agreement (dis-agreement) with Recommendation 6.2 |   | TPB power, Decision-making process, code principles, judicial process, natural justice, procedural fairness, investigation power, stakeholders, grounds for investigation, sanctions, registration status |
| ***RQ*$_{2.2}$** Investigating de-registered tax practitioners is a valuable / good use of resources (re Recommendation 6.2 (a)) |   | TPB power, Decision-making process, code principles, judicial process, natural justice, procedural fairness, investigation power, regulation process |
| ***RQ*$_{2.3}$** Concern investigating de-registered tax practitioners will impact on principles of natural justice / procedural fairness (re Recommendation 6.2 (a)) |   | Code principles, judicial process, procedural fairness, investigation process, stakeholders, cost-benefit approach, sanctions |

| | | |
|---|---|---|
| ***RQ2.4*** Tax practitioners have a right to know they are being investigated (re Recommendation 6.2 (b)) |  | Code principles, judicial process, investigation power, tampering with evidence, tax system, technological advancement, investigation process, stakeholders, sanctions |
| ***RQ2.5*** Concern that removing the six-month timeframe will impact the effectiveness and efficiency of investigations (re Recommendation 6.2 (c)) |  | Investigation process, procedural fairness, natural justice, taxation law, the complexity of the issue, the severity of the offence, timeframe |

Percentage Agreement / No Concern | Percentage Partial Agreement / Partial Concern | Percentage Dis-agreement / Concern | No Clear Position Provided

**Table 5: With Respect to Penalties and Sanctions**

| Research Question Set | Interviewee Spread (Percentages) | Key Themes |
|---|---|---|
| ***RQ*$_{3.1}$** Overarching agreement (dis-agreement) with Recommendation 6.1, 6.3 and 6.4 |  | Trust, system, the principles of the Code, sanctions, professional bodies, procedural fairness, uncertainty |
| ***RQ*$_{3.2}$** Sufficient penalties are needed to curb undesirable behaviour |  | Judicial process, sanctions, registration status, rogue behaviour, severity of the penalty, procedural fairness, fraud technique, the principals of the Code, parliamentary process, tax practitioners' profession, safe harbour, consequences, carless |
| ***RQ*$_{3.3}$** The proposed sanctions offer balance between regulation and procedural fairness (re Recommendation 6.1) |  | Sanctions, procedural fairness |
| ***RQ*$_{3.4}$** Concern increasing sanctions will impact power and independence of the TPB (re Recommendation 6.1) |  | Independence issues, power |

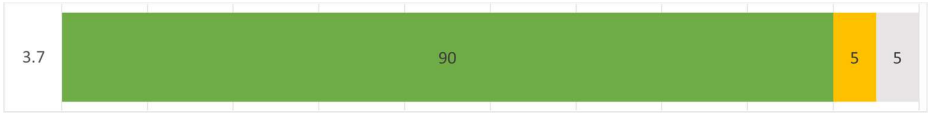
***RQ*$_{3.5}$**
Proposed publication of further detail in the TPB register will improve transparency and public trust (re Recommendation 6.3)


Registration status, the severity of the penalty, procedural fairness, judicial process, the principles of the Code, the nuance of the register, protective approach, consumer protection, balance, length of time, the content of the register

***RQ*$_{3.6}$**
Proposed administrative penalty regime will be effective in dealing with high-level of misconduct (re Recommendation 6.4)


Duty of care, information gathering process, proportionate the penalty, the principles of the Code, confidentiality, the onus of proof, affected party, judicial process

***RQ*$_{3.7}$**
Appropriate avenues of appeal are required regarding the proposed administrative penalty regime (re Recommendation 6.4)




Appeal process, judicial process

**Table 6: With Respect to Safe Harbour**

| Research Question Set | Interviewee Spread (Percentages) | Key Themes |
|---|---|---|
| ***RQ$_{4.1}$*** Overarching agreement (dis-agreement) with Recommendation 6.5 |   | Duty of care, penalty, protection, innocence, legal process |
| ***RQ$_{4.2}$*** It is important to identify whether the taxpayer is at fault in addition to the tax practitioner |   | Onus of proof, tough situation |
| ***RQ$_{4.3}$*** The imposition and apportionment of penalty between the taxpayer and tax practitioner is appropriate |   | Apportionment of penalty, the complexity of the system, duty of care, level of expertise, judicial process, innocence, penalty regime |
| ***RQ$_{4.4}$*** The proposed safe harbour regime is relevant given legal action can be taken to recover costs |   | Legal path |

Percentage Agreement | Percentage Partial Agreement | Percentage Dis-agreement | No Clear Position Provided