11 December 2022

Laura Berger-Thomson
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Treasury

By email: **taxadministrationconsultation@treasury.gov.au**

Cc: Ian Klug, Chair, Tax Practitioners Board
Michael O'Neill, CEO/Secretary, Tax Practitioners Board
Janette Luu, Acting Assistant Secretary, Tax Practitioners Board

Dear Laura,

Implementation of the Government's response to the Review of the Tax Practitioners Board

The external professional association members[1] of the Tax Practitioners Board (**TPB**) **Tax Practitioner Governance and Standards Forum**[2] (**TPGSF**), collectively the Joint Bodies, make this submission in response to **consultation** on the ***Exposure Draft Treasury Laws Amendment (Measures for Consultation) Bill 2022: Tax Practitioners Board Review*** (**the ED**). Additional professional association members[3] from the TPB **Consultative Forum** also support the views presented in this submission.

We thank Treasury for the opportunity to discuss the consultation at the TPB Forum on 6 December. This submission provides further details of the Joint Bodies' response to the changes proposed in the ED.

The complexity and scope of Australia's tax and superannuation system means that almost all Australian businesses and almost two-thirds of individuals use a tax practitioner to help them with their tax affairs. As at 30 June 2022, there were 45,333 tax agents and 17,007 BAS agents[4]. Many of these agents employ others. Collectively, they employ tens of thousands more people, to provide tax advice, as well as prepare and lodge the millions of returns and forms required by the ATO each year.

The size and importance of the tax profession means that changes to the regulatory framework need to be properly considered and carefully implemented. The Joint Bodies support the progression of the recommendations arising from the Review of the Tax Practitioners Board (**the Review**) in 2019. and acknowledge the refinement of proposals since the publication of the **Government response** to the Review recommendations.

We welcome the introduction of the prohibition scheme for disqualified entities but hold concerns about certain aspects especially the notification scheme for practitioners. We reiterate our objections to the Minister having the power to elaborate or supplement the Code of Professional Conduct (**the Code**) as well as our objection to the inclusion of the concept of "tax system integrity" in the Object of the *Tax Agent Services Act 2009* (**TASA**). As the proposed change to the renewal process will still allow the Board to grant renewal terms of longer than one year, we recommend a staged implementation supported by new systems that minimise the disruption and reduce the burden on practitioners. We support the establishment of the TPB Special Account on the condition that there will be no increase in TPB fees.

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[1] The external members are Chartered Accountants Australia and New Zealand, CPA Australia, the Institute of Public Accountants, the Taxation Committee of the Law Council of Australia's Business Law Section, The Tax Institute, Australian Bookkeepers Association, The Institute of Certified Bookkeepers, Financial Planning Association of Australia, SMSF Association and the Corporate Tax Association.

[2] The TPGSF was established pursuant to Recommendation 3.3 of the Final Report of the 2019 **Review of the Tax Practitioners Board** (**the Review**) to ensure that any significant proposals affecting tax practitioners, such as relevant legislation and regulations including the **Code of Professional Conduct** (the Code) in the *Tax Agent Services Act 2009* (TASA), are made with appropriate consultation. See Tax Practitioners Board, **Tax Practitioner Governance and Standards Forum Charter**, 2021

[3] Additional signatories from the Consultative Forum are National Tax Agents' Association Ltd (NTAA Plus), Institute of Financial Professionals Australia, ACCA and ICAEW.

[4] Tax Practitioners Board, About the Tax Practitioners Board, **Annual Report 2021-22**, 2022

Table 1: Summarised responses from the Joint Bodies to the draft provisions in the ED

Recommendation	Joint bodies' view	Summary comments
2.1 – Update and modernise Objects clause	Recommend change.	• Remove reference to "integrity of the tax system".
3.1 – Establish a TPB Special Account	Support.	• Funding, equivalent to that currently received from the ATO, and shared services support should be maintained • Fees should not increase as a result • Cost Recovery Guidelines should not be applied.
4.6 – Not employing or using disqualified entities without Board approval	Support prohibition scheme. Do not support notification scheme for practitioners. Remove draft sections 45-10 and 45-20.	• The prohibition scheme using the Code is supported. • The combination of the prohibition and notification by practitioners scheme, and the retention of section 50-25 is confusing and creates uncertainty for practitioners • The introduction of the Code breach is sufficient and much clearer • The Code breach should be predicated on the practitioner "knowingly" employing or using the services of the disqualified entity • The definition of disqualified entity should be narrowed to target serious behaviours • Consideration should be given to a provision related to a tax practitioner providing services on behalf of a disqualified entity.
4.7 – Converting to annual renewal	Support, conditional on reduced reporting burden. Concerns with implementation.	• Tax practitioners prefer three-year renewal • The Board can continue to issue three-year registrations under the new provision • Renewal is becoming contingent on an increasing number of requirements which have the potential to become even more onerous • No changes should be made until systems and streamlined renewal processes are built • Shouldn't be used as a substitute to deal with Code breaches. • Fees need to be annualised on a pro-rata basis and clearly prescribed in the Regulations
5.1 – Minister has the power to elaborate on or supplement the Code	Do not support. Remove draft section 30-12.	• It is inappropriate for the Minister to be able to "elaborate or supplement any aspect of the Code" • The Code is too fundamental to the legislative scheme to be changed without appropriate Parliamentary scrutiny.

We also note that these are only a selected number of Review recommendations with further recommendations requiring consultation, in particular those related to the sanctions regime. In contemplating the disqualified entities provisions, we observed that other adjustments should be made (including to section 50-25) so that the TASA could operate more coherently and to enable the TPB to be more responsive. Therefore, we recommend that the consultation on sanctions be progressed as a priority.

In addition, the effective implementation of the proposed changes requires the TPB to administer the disqualified entities regime, improve the public register, streamline renewal processes and modify its governance. The Government should ensure that the TPB is properly funded to adopt these changes and to support further investment in its systems. Consultation on improvements to the register should also be progressed.

Further detail is provided in the Attachment.

Should you wish to discuss further, please contact Elinor Kasapidis, TPGSF External Co-chair and Senior Manager Tax Policy at CPA Australia, on 0466 675 194 or **elinor.kasapidis@cpaaustralia.com.au** in the first instance.

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Attachment

Recommendation 2.1 – update and modernise the object clause

- Do not support the inclusion of or reference to the term "integrity….of the tax system"

The Joint Bodies have previously expressed[5] our concerns, and continue to remain concerned about the interpretation and application of wording in relation to the integrity of the tax system. It is our strong view that the TPB's role, and therefore the Object, should focus on community confidence in the tax profession. We are concerned with efforts to legislate amorphous, ill-defined and subjective concepts into the TASA.

We maintain that in upholding the integrity of the tax profession, the TPB maintains community confidence in the integrity of the tax system. The inclusion of a direct reference to tax system integrity instead conflates the respective roles of the TPB and ATO. The concept of the "integrity of the tax system" is not legislated or defined in any tax Acts[6] including the *Taxation Administration Act 1953*.

The proposed wording suggests that tax practitioners have a separate responsibility to enforce the tax laws or act on behalf of the Commissioner in the interests of "tax system integrity". This introduces an obligation that goes far beyond the professional client-agent relationship and may require the TPB to take into consideration whether professional and ethical advice may be against the interests of the tax system. We are concerned that the notion of "integrity of the tax system" creates uncertainty around the meaning of the Code obligation that practitioners must act lawfully in the best interests of their client.

In addition to severe consequences for tax practitioner, this proposed inclusion of tax system integrity in the TASA Object has the potential to blur and skew the independence of the TPB as the regulator of tax practitioners. It introduces an ambiguous notion that may create the incorrect and unintended inference that the TPB has a role as quasi-joint custodian of the tax system. The proposed Object may skew the TPB towards interpreting the Code as containing some form of new, but conflicting, duty owed by tax practitioners to the tax system. It would be an inappropriate outcome that introduces confusion and contradiction, rather than clarity, into the Code and the TASA itself.

In the interests of consumers, taxpayers and citizens, a clear and formal distinction between the role, functions and powers of the TPB and ATO must be maintained. This is critical for the independence of the TPB and is essential for maintaining the trust that the tax practitioner community must rightly place in their regulator's independence from the ATO. It is the ATO alone that is the **principal revenue collection agency** of the Government. That is not the role of the TPB, nor is it the role of tax practitioners.

We recommend the following changes (in red and strikethrough) to the proposed Object clause (1). These will maintain the independence of the TPB from the ATO and remove uncertainty for tax practitioners.

Proposed Object clause (1)	Joint Bodies' recommended changes
The object of this Act is to support public trust and confidence in the integrity of the tax profession and of the tax system by ensuring that tax agent services are provided to the community in accordance with appropriate standards of professional and ethical conduct.	The object of this Act is to support public trust and confidence in ~~the integrity of~~ the tax profession ~~and of the tax system~~ by ensuring that tax agent services are provided to the community in accordance with appropriate standards of professional and ethical conduct.

[5] See for example CPA Australia and CA ANZ **joint submission** to the Review (September 2019) and **joint response** to the Review recommendations (January 2021)
[6] While referenced in the **Explanatory Memorandum** to A New Tax System (Tax Administration) Bill 1999, it is not included in the Act itself.

Recommendation 3.1 – create financial independence for the TPB from the ATO

- Support the establishment of a Special Account
- Cost Recovery Guidelines should not be used to fund the TPB

A structurally separate agency with its own budget and accountable authority will ensure the TPB can operate independently and in line with the TPB's objectives. We believe that this measure will be an important step towards improving the independence of the TPB, when supplemented with the Chair of the TPB being given the power to appoint the TPB's CEO[7].

The ability of the TPB to operate without the influence, real or perceived, of the Commissioner of Taxation (the Commissioner) and to be independent from the pressures of revenue collection is fundamental to its regulatory role of consumer protection.

Whilst our preferred structure is the establishment of a stand-alone statutory role for the CEO, we believe that the combined structural changes will be a substantial improvement, while allowing the TPB to retain the flexibility, agility and cost savings achieved by the current resourcing arrangements.

However, fees to practitioners should not be increased to fund the TPB and any fee increases must remain proportionate to other external business cost increases.

In addition to revenue from fees and specific Budget measures[8], funds currently allocated to the TPB by the ATO should be specifically appropriated and placed in the TPB Special Account on an ongoing basis. Cost efficiencies currently generated through shared services agreements and other means should also be retained.

We therefore give our in-principle support to this recommendation, subject to assurances that:

- Funding remains at or above current levels and that the TPB is not de-funded, or its operations compromised through an alternative budgeting process, and
- The Australian Government **Cost Recovery Guidelines** are not used to fund the TPB.

[7] We understand that the Commissioner has agreed to delegate his power to appoint the TPB's Chief Executive Officer to the TPB Chair. This means that decisions about the day-to-day operations and overall direction of the TPB secretariat will be under the control of the Chair, and the CEO will be direct accountable to the Board, as recommended by the Review.
[8] For example, the Tax Practitioners Board – compliance program to enhance tax system integrity. See p. 20, Budget October 2022-23, **Budget Measures Budget Paper No. 2**, Australian Government, 25 October 2022

Recommendation 4.6 – require tax practitioners to not employ or use disqualified entities in the provision of tax agent services without approval from the TPB

- Support the prohibition requirement
- Support obligations placed on disqualified entities
- Do not support the notification requirement for tax practitioners
- Concerns about the interaction between the Code and civil penalty provisions.

We are supportive of the introduction of a prohibition scheme to restrict the employment or use of disqualified entities that mirrors the **Legal Profession Uniform Law** (**the Law Model**). However, we find that there is too much overlap, room for confusion and choice of remedies in having three different alternative systems in operation as proposed by the new Part 4A – Disqualified entities, in the ED.

It appears that practitioners face offences and penalties under at least three different provisions:

1. a new Code prohibition (proposed section 30-10(15)) resulting in sanctions, including termination, under Part 3
2. a new mandatory notification regime for practitioners, resulting in a civil penalty under Part 4A (proposed sections 45-10 and 45-20), and
3. an existing prohibition under section 50-25 resulting in a civil penalty under Part 5.

This convoluted and conflicting approach results in:

- the exposure of practitioners to a Code breach (and termination sanction) where a disqualified entity either fails to inform the practitioner of its disqualification or otherwise lies to or misleads the practitioner so that the practitioner is genuinely unaware of the disqualification
- the obligation to notify the TPB of the employment or use of disqualified entities under Part 4A, with the consequence of TPB action in response to the breach of the Code, and potentially also section 50-25 due to their own disclosure
- the TPB being able to pursue Code breaches most easily under Part 3 then seek a civil penalty under Parts 4A and 5 with serious and potentially disproportionate impacts on the practitioner
- the existing section 50–25 requiring that the practitioner knows or ought reasonably to know relevant facts about a terminated entity, whereas this protection (i.e., a state of mind or reasonable steps element) is notably absent in the proposed Code item.

We recommend that the notification regime for tax practitioners (proposed sections 45-10 and 45-20) be removed. The provisions should be better aligned with the Law Model, as referenced in paragraph 1.26 of the Explanatory Materials (EM). The Law Model comprises a much simpler 'prohibition without consent' provision and is sanctioned by a civil penalty.

We recommend that the new subsection 30-10(15) (Code item 15) similarly be the mechanism by which tax practitioners engaging disqualified entities are dealt with. In the TASA, a Code breach is preferred to a civil penalty because it is quicker and more cost effective for the TPB to prosecute. It is our view that the inclusion of a notification regime for tax practitioners is incongruous with the design of a prohibition model akin to the Law Model.

The notification requirement offends the principle against self-incrimination as it will inevitably lead the TPB to investigate the practitioner. In notifying the Board, the practitioner is immediately exposed to sanctions under the Code and potentially civil penalties. Even when under investigation, section 60-115 provides some protection to the individual including inadmissibility of evidence in proceedings, which is absent in the ED.

We support the introduction of the notification requirement for disqualified entities in proposed sections 45-15 and 45-25, including the imposition of civil penalties for disqualified entities that fail to notify, like the Law Model. We note however that the ED provides for a maximum of 100 penalty units (individuals) and 500 penalty units (corporations) for contravention of s 45-15 and 45-25 by a disqualified entity. We consider that the penalty should be the same as that applicable

for contravention of all of the other civil penalty provisions in the TASA, i.e. 250 penalty units (individual) and 1250 penalty units (corporation).

We also note that the ED does not include a provision in relation to the converse situation where a tax practitioner provides services on behalf of a disqualified entity.[9] Should the Government still intend for that scenario be covered, we suggest that it be included.

Proposed Code item 15 should be amended to require knowledge of the fact that the person or entity was disqualified, as follows:

> 15) You must ~~ensure that you do~~ not **knowingly** employ, or use the services of, a *disqualified entity to provide *tax agent services on your behalf, without the approval of the Board under section 45-5.

The words "must ensure" impose a zero tolerance to non-compliance (essentially strict liability) and sets an unreasonable and impractical threshold for practitioners. We believe that the strict wording would also preclude the Board from establishing workable guidance that would allow registered agents to reasonably comply with the obligation. The requirement of "knowledge" provides the practitioner with protection against loss of livelihood in situations where they genuinely had no knowledge of the disqualified entity. It also better aligns to the wording of the civil penalty provision in section 50-25. Until appropriate registers maintained by the TPB provide sufficient information of all disqualification events, practitioners will face difficulties in obtaining such information.

The definition of "disqualified entity" in section 45-5 is very broad and we do not support the inclusion of subsections 45-5(g) or (h). Practitioners can have their registrations rejected for a wide range of reasons under section 20-25 (e.g., educational qualifications or work experience insufficient for approval) or be sanctioned for very low risk behaviours under section 60-95 (e.g., written caution or education order) which we consider to be far below the threshold for a disqualified entity. Unlike the Law Model, there is also no definition of "serious offence".

Further, in the absence of a notification by the disqualified entity, the information necessary for a tax practitioner to know whether they have engaged or employed a disqualified entity must be publicly available and easily accessible. The Review made recommendations in relation to the publication of tax practitioner and other details, such as disqualification, on the TPB Register. Future changes should include the publication of details necessary for tax practitioners and consumers to identify disqualified entities.

To better address the significant issues raised above and matters pertaining to the practical implementation of this measure, it may be beneficial to spend more time workshopping the issues and potential solutions before a Bill containing this measure is introduced into Parliament.

[9] The Law Model addresses this under **section123 Contravention by Australian legal practitioner**.

Recommendation 4.7 – convert to an annual registration period

- The replacement of the annual declaration process with an annual renewal process should be used to create a more streamlined and efficient process
- Concern that with increasing conditions attached to registration and renewal, the annual process will be onerous and may create uncertainty
- The reduction in time to make a decision from six to four months may place pressure on the TPB and need to ensure that practitioners aren't affected by delays or capacity constraints
- Many tax practitioners have expressed their preference for three-year renewal periods and are not supportive of a change.

We support simplification and the reduction of the regulatory burden on practitioners. We also highlight the importance of ensuring that the systems changes are feasible and made well in advance of commencement of this measure. This enables new systems and processes to be tested, such that the registrations and renewals of tax practitioners are not put at risk of lapsing.

We note that annual registration fees must be affordable and no more than the equivalent of one third of the three-yearly registration fee on an ongoing basis. The move to an annual fee should not be an opportunity in subsequent years to hike the registration fee to proportionately more than its current level.

Caution must be exercised to ensure that the registration process is not made more onerous or potentially unworkable for practitioners. The goal should be to have no unnecessary blockers to registration and no greater regulatory burden on practitioners after this round of reforms. This should be complemented by enhanced IT systems to further streamline renewals.

We also emphasise that the renewal process should not be considered as, or become an alternative to, the investigative process.

Our members' feedback has been clearly and consistently against the change to annual renewals. The three-year process is considered burdensome and the annual declaration process little better, while the change to annual payment is seen as a mechanism intended to increase fee revenue to the TPB. The key issues raised by members are:

- Time and cost burden of the annual renewal process, noting that the annual declaration process is time-consuming already
- Fee increases as a result of the shift from a triennial to annual payment cycle and the effect of indexing
- The poor experience with the current annual declaration process raises concerns with additional disruption and impost if expanded to the full renewal process annually.

We observe that there are two further Review recommendations that propose new requirements as a condition of registration and renewal. These are:

- Recommendation 4.4, which proposes the introduction of governance requirements for tax practices
- Recommendation 4.5, which proposes amendments to the fit and proper person test and new obligations in relation to spent convictions.

We recommend that the Government consider how the potential passage of such additional, broader eligibility criteria would fit into the annual registration cycle, if at all, and the additional compliance costs that they would potentially cause.

Recommendation 5.1 – enable the Minister to supplement the existing Code of Professional Conduct to ensure that emerging or existing behaviours and practices by tax practitioners are properly addressed.

- Do not support
- The ability for the Minister to "elaborate or supplement any aspect of the Code" is highly concerning
- Current guidance from the TPB and AAT decisions is sufficient
- The Code should only be amended by Parliament.

Our view is that the Code is currently sufficiently flexible to incorporate existing and emerging behaviours and practices. The case to modify the Code or to delegate authority to the Minister has not been sufficiently made. The Code is the most fundamental element of the TASA, and the Minister should not be given the power to change it.

We believe that this proposed change to the existing way and means of amending the Code of Conduct goes too far in favour of allowing regulatory flexibility from the Government's perspective, at the expense of certainty and stability in the Code obligations that tax practitioners are entitled to expect of their governing Code of Conduct.

Because the Code is the centre piece of TASA, and any breach thereof can lead to sanctions including the termination of registration, it is far too important to be capable of being amended by legislative instrument rather than by Act of Parliament.

In our view, the Code should only be able to be changed by amending the legislative Code itself, or as a minimum by way of Regulations and more robust parliamentary scrutiny. Non-compliance with the Code affects fundamental practitioner rights; including the ability to remain registered and earn a livelihood as a tax practitioner in the manner chosen by the individual. These rights to economic self-sufficiency and self-determination should not be able to be adversely affected by a sub-ordinate legislation process that is of a lower order than Regulations.

Given the extraordinary powers being proposed to be given to the Minister, we use the Code of Conduct in the *Australian Public Service Act 1999* (APS Act) as a comparable, if not higher, threshold against which to compare the ED provisions. The APS Act does not allow the Code of Conduct that applies to Australian Public Service employees to be amended by way of a legislative instrument determined by the Minister. Rather, the Code obligations set out in subsections 13-(1) to 13-(13) can only be amended by legislation amending the APS Act itself and can only be supplemented not elaborated on by the Regulations.

There has been no case put by the Government or the Review itself as to why it is justifiable and necessary to make the Code of Conduct for private tax practitioners a "dynamic code", whilst the Code applicable to the Government's own public tax administrators and regulators is a relatively static and certain code of duties and obligations. There ought to a symmetry and consistency in the policy settings around the how changes can be made to the rules governing conduct of individuals who interact with the tax system, whether they are private or public sector participants and stakeholders.

To prevent manipulation of the Code, real or perceived, by administrators, regulators or Ministers, a fully scrutinised legislative pathway is required to maintain the clear separation of roles, responsibilities and influence between the Government, ATO and TPB in relation to taxpayers and their advisors. We therefore consider that the proposed sections 30-12 and 30-10(16) should be removed.