



21 November 2024

Tax Practitioners Board
GPO Box 1620
Sydney NSW 2001

By email: tpbsubmissions@tpb.gov.au

Dear Tax Practitioners Board,

The National Tax & Accountants' Association ('NTAA') is a national member-based organisation that represents the interests of approximately 10,000 member firms, including tax accountants and superannuation professionals.

The NTAA is focused on representing the interests of our members which are predominantly small and medium sized accounting practices.

We are grateful for the opportunity to provide feedback on the following Draft TPB Information sheets:

- TPB(I) D57/2024 False or misleading statements
- TPB(I) D60/2024 Supervision, competency and quality management under the *Tax Agent Services Act 2009*.
- TPB(I) D61/2024 Keeping your clients informed.

In particular, we provide the following comments in relation to some of the specific questions raised in the draft information sheets.

TPB(I) D57/2024 False or misleading statements

Question 1 – Are there additional types of statements routinely made or prepared by registered tax practitioners (or under the direction of registered tax practitioners), that should be specifically addressed by the guidance (including case studies)?

An issue that has been commonly raised since section 15 was legislated is in relation to a client's superannuation guarantee obligations. On occasion the registered practitioner will become aware that the client has not kept up to date in relation to their superannuation guarantee obligations for employees. This may include where the employer has not paid anything into super for employees, or they may have underpaid for some reason.

Clearer guidance on a registered practitioner's obligations under section 15 is requested when they become aware that a client has not met their superannuation guarantee obligations. It has been suggested that this will be captured by section 15 and in some cases (after working through the relevant steps in section 15) the registered practitioner will need to notify the Commissioner. This is because the act of not paying the required superannuation obligation for each employee would be considered to have caused, is causing or may still cause substantial harm to the interests of those employees (subject to the carve-out for personal safety risks).

The first issue to resolve in this case is whether or not the client has made a false or misleading statement to the Commissioner in relation to the underpayment of superannuation by the client. If the specific labels on the client's tax return have been completed correctly, disclosing that no superannuation has been paid (or there has been an underpayment), then arguably there has been **no** false or misleading statement made to the Commissioner, despite the fact the superannuation has not been paid.

When a client has underpaid their quarterly superannuation liability in respect of one or more of their employees, they are required to lodge a superannuation guarantee charge statement ('SGC statement') to the Commissioner disclosing the underpayment and paying the relevant amount and penalties. If an SGC statement is submitted to the Commissioner with incorrect or incomplete information, then this will undoubtedly amount to a false or misleading statement being made to the Commissioner. However, if the client chooses not to lodge the SGC statement, then no statement has been made to the Commissioner, so arguably section 15 has no application.

Case study 6 provides an example of when section 15 could apply in respect of a client's superannuation guarantee obligations, but it does not provide detail on how the false or misleading statement was 'made' to the Commissioner in the first place. If the company in the case study made the false or misleading statement to the Commissioner by incorrectly reporting their deductible superannuation expense in an income tax return, are the registered practitioner's obligations under section 15 (in items 2, 3 and/or 4 of the table in subsection 15(2)) limited to the correction of the tax return?

If the TPB's view is that clients 'make' a false or misleading statement when they fail to lodge an SGC statement when required, then the registered practitioner in Case study 6 would arguably have obligations under section 15 with regard to the SGC statement that **should have** been lodged. Is this how the TPB intends to apply section 15, and if so, would this line of thinking also apply when a client has not lodged their income tax return? It would be beneficial for the TPB to specifically address this circumstance to provide some clarity on this issue, as it will be a circumstance that many registered practitioners will encounter in their practice.

Question 2 – Are there additional examples of further action in the public interest that tax practitioners should take in certain circumstances (paragraph 73)?

As stated in the TPB information sheet, the answer to this question will be determined by the facts of each case. In most circumstances, the extent of any further action in the public interest will likely be limited to providing the ATO and/or the TPB (as the case may be) with additional information in relation to the matter when requested by that Government agency.

Following on from the superannuation guarantee issue discussed above, the TPB should confirm that a registered practitioner's obligations under further action in the public interest, do not extend to notifying all impacted employees. Requiring the practitioner to do so would create an unreasonable administrative burden on the practitioner as practitioners are unlikely to have the required information at their disposal.

Question 3 – Are there additional examples of risks to the personal safety of registered tax practitioners, their family members or at risk staff members that should be listed at paragraph 123?

Paragraph 123 lists the following examples of risks that may be posed to a registered tax practitioner, their family or an at-risk staff member. These include (but are not limited to) any:

- risk of physical injury or harm to the registered tax practitioner, a member of their family, or an at risk staff member; or
- risk of emotional distress or psychological harm caused by harassment to the registered tax practitioner, a member of their family, or an at-risk staff member.

These risks focus on the personal risk to the practitioner, the family member or the at-risk staff member. However, the threat may instead be to the practitioner's property, such as the office, home, car or other personal possessions. It is appropriate for the TPB to comment whether these types of threats are included as a reason for the registered practitioner to **not** notify to the Commissioner or the TPB.

In the very least, the threat of damage to assets associated with the practitioner, their family or an at-risk staff member would certainly add to the emotional distress or psychological harm of the individual, as alluded to in the second dot point above. On that basis, this should be covered in the final guidance material.

Question 4 – Are there additional case study scenarios that would assist registered tax practitioners in understanding how the obligations apply practically? If so, what types of scenarios should be addressed?

As discussed in Question 1, a client's non-payment of their employee superannuation guarantee obligations is a scenario that is regularly being raised by practitioners as something they will need to consider in light of section 15. It would be beneficial for practitioners to have this dealt with as a case study.

Another scenario raised has been the practitioner's obligations under section 15 where they take on a new client and the new practitioner has discovered something that has been incorrectly dealt with in a previous income tax return. This might be the way the previous tax agent has applied the Division 7A rules on a loan from a company to a shareholder.

Here the new practitioner has not made or prepared any statement to the Commissioner in relation to those previous returns, so section 15 does not apply to them (although the breach reporting requirements may apply in certain circumstances). It would be beneficial for the guidance material to apply these facts to demonstrate that a registered practitioner does **not** have obligations under section 15 in relation to statements made or prepared by other practitioners.

Question 5 – Are there additional practical considerations for registered tax practitioners relevant to the obligations in section 15 of the Determination that should be addressed in the guidance?

Paragraph 40 advises that innocent or genuine errors are not intended to be captured in the section 15 obligations. Although this paragraph refers to the administrative penalty regime for guidance, it would be prudent to include some practical everyday examples of circumstances (perhaps in dot point form) that are innocent and genuine errors, to give practitioners comfort that these types of scenarios will not be of concern.

Paragraph 40 also ignores the fact that action will be required under section 15 in relation to a false or misleading statement that resulted from "a failure to take reasonable care in connection with the preparation or making of the statement". It is quite possible for an innocent or genuine error to be made due to a failure to take reasonable care in relation to a false or misleading statement prepared for a client, which would generally require the practitioner to withdraw from the client engagement if the client refuses to correct the statement.

If the intention of **paragraphs 37 to 43** is to explain when the TPB or ATO need to be **notified** in respect of false or misleading statements, these paragraphs should be reworded to make that clear. For example, **paragraph 39** states that action outlined in Table 1 is required when **all** the elements in Table 2 have been satisfied. However, when a false or misleading statement was made by a registered tax practitioner for themselves (refer to item 2 in Table 2), they must have the statement corrected regardless of the cause of the error (i.e., item 4 in Table 2 is not applicable).

Many practitioners are concerned where the 'line in the sand' is for this requirement, particularly in the case of there being a "failure to take reasonable care". Case study 5 is one example detailing an innocent mistake where the registered agent provided an inaccurate business industry code on the client's income tax return, which does not affect the tax payable. The TPB guidance should include more circumstances to give clarity, such as where an innocent mistake results in less tax to be paid by the client.

Paragraphs 109 to 115 discuss the meaning of the phrase '*believe on reasonable grounds that the client's actions have caused, are causing, or may still cause, substantial harm to the interests of others*'. This is a very important phrase because if the registered practitioner believes the client's actions are problematic, they may need to notify the Commissioner or the TPB about the client. This is also the requirement that has caused the most angst for practitioners since the original Minister's Determination was released. On that basis, significantly more detail needs to be provided on the key terms so that practitioners know where the parameters are.

Paragraphs 112 to 114 focus on the term '**substantial harm**'. Given this is the final requirement (apart from the carve-outs) to establish whether the registered practitioner needs to notify the Commissioner or the TPB about the client, there needs to be far more detail on what '**substantial harm**' means. The draft guidance provides some dot points of things to consider but each dot point itself needs to be expanded with examples so that practitioners are much clearer on their obligations.

For example, **paragraph 113** provides additional matters that might assist a registered practitioner in forming a belief on reasonable grounds that a client's actions have caused, are causing, or may still cause, substantial harm to the interests of others. The 5th dot point considers whether the action of the client creates a loss of revenue to the community. This will arguably be the case where the client has underpaid income tax by \$100, although this was never intended to be captured.

Other General comments

Paragraph 30 of TPB(I) D54/2024 False or misleading statements to the TPB or Commissioner (now withdrawn) states that '**For the purposes of these obligations, the 'maker' of a statement refers to the person who made or is making the statement in question, whether they make the statement themselves or permit or direct another person to make it on their behalf.**'

Although a small statement, it is an important one because it sets out clearly who the maker of the statement is for section 15. However, this paragraph seems to be missing in the updated draft information sheet. Given its importance, it needs to be included in the final guidance.

TPB(I) D60/2024 Supervision, competency and quality management under the Tax Agent Services Act 2009

Question 3 – Do you consider the suggested internal controls outlined at paragraphs 79 and 80 of this draft TPB(I), in relation to quality management systems for large firms and individual tax practitioners respectively, to be adequate and appropriate? If no, please provide further detail including any additional suggestions of internal controls that should be included.

The internal controls outlined in paragraphs 79 and 80, whilst not exhaustive seem adequate and appropriate. Paragraph 79 covers off requirements for large firms and paragraph 80 for individual practitioners (i.e., sole traders). However, most registered practitioners would have a practice size greater than one but less than 30 technical staff. On that basis, it would be prudent to include the expectations on specific internal controls for this market segment.

Question 4 – Are there additional case study scenarios that would assist registered tax practitioners in understanding how the obligations under sections 35 and 40 of the Determination apply practically? If so, what types of scenarios should be addressed?

Within this guidance material are 6 examples setting out where the TPB would not be satisfied that the registered practitioner has complied with their requirements under either section 35 or 40 of the Determination. Although these are welcome, their worth would be greatly enhanced if the examples could further explain what changes the registered practitioner could make in each of these circumstances to provide the TPB with comfort that they are complying with their obligations. This provides practitioners with an idea of the changes to their practice that would be required to comply with sections 35 and 40.

TPB(I) D61/2024 Keeping your clients informed

Question 3 - Are there additional case study scenarios that would assist registered tax practitioners in understanding how the obligations under section 45 of the Determination apply practically? If so, what types of scenarios should be addressed?

One of the main issues for practitioners in complying with section 45 will be around the timing of when they need to disclose the required information to clients or prospective clients. As we know an enquiry to provide tax agent services can come in many different ways and can be a drawn-out process depending on the needs of the client and the complexity of the required services. So registered practitioners need to be fully aware of the actual point in time to advise the section 45 information to the client.

An individual client wanting their tax return prepared may call up for a price and book over the phone, or via the internet. The question is would the registered practitioner be required to disclose this information at the time of booking or when the client comes in for the tax consultation. Alternatively, where the prospective client's tax affairs are complicated requiring many meetings before the engagement is confirmed, is it at the first meeting that this information should be disclosed, or some later time.

Alternatively, could a registered practitioner satisfy their obligations by only including the required information in their engagement letter, which they will discuss with the client at the relevant time. Further explanation of these issues will provide comfort to practitioners that they are complying with their obligations.

Question 4 – Do you have any general comments regarding the TPB's factsheet titled 'Information for clients'?

These are our observations in relation to the TPB's factsheet.

1. Under the heading '**Overview**', the second dot point should read 'practitioner' rather than 'practitioners'.
2. Under the heading '**Your tax practitioner's obligations include**', the third dot point needs to change. Rather than read 'Act lawfully in your best interests', it should read 'Act in your best interests unless legally obligated to act otherwise'. This is to cater for the notification requirement in section 15 of the Determination.
3. Under the same heading, the 11th and last dot points seem to be about the same issue. If there is a point of difference, it is not clear.
4. Under the heading, '**If your tax practitioner does not meet their obligations to you or under the law**', the second last dot point does not read clearly in the context of the heading.

5. The last paragraph under heading 4 on page 2 states **'Tax practitioners need to be transparent with clients about certain misconduct (prescribed events) that may have occurred in the past 5 years. This disclosure obligation extends to prospective clients – for example, a taxpayer seeking a quote for tax agent services)'**. There is a bracket at the end of the sentence, but no starting bracket.

It also uses the example of taxpayers seeking a quote for tax agent services which seems at odds with **TPB(I) D61/2024 Keeping your clients informed. Paragraph 18 states 'Prospective clients do not include individuals or entities making general enquires about a registered tax practitioner, including in relation to information available on the registered tax practitioner's website. For example, general enquires may include those relating to pricing'**.

This suggests asking for a price will not trigger a disclosure obligation, but asking for a quote will. Most consumers would not know any difference between asking for a quote and asking for a price to have their tax affairs prepared by a registered agent. So, the guidance needs to differentiate this better.

Yours Faithfully

A handwritten signature in black ink, appearing to read "Geoff Boxer". The signature is written in a cursive, flowing style with a horizontal line at the end.

Geoff Boxer
Chief Executive Officer