The Tax Institute

21 November 2024

Ms Nadja Harris
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Tax Practitioners Board
GPO Box 1620
Sydney NSW 2001

By email: tpbsubmissions@tpb.gov.au

Dear Ms Harris,

**TPB consultation on draft Code Determination guidance**

The Tax Institute welcomes the opportunity to make a submission to the Tax Practitioners Board (**TPB**) in respect of its consultation on the following draft guidance materials (collectively, **the draft guidance**) relating to the additional Code of Professional Conduct (**Code**) obligations under the Tax Agent Services (Code of Professional Conduct) Determination 2024 (**Determination**).

The Determination introduces eight additional obligations to supplement the existing Code in section 30-10 of the *Tax Agent Services Act 2009* (Cth) (**TASA**).

The draft guidance products to assist registered tax practitioners (**practitioners**) are:

- TPB(I) D56/2024 — Upholding and promoting the ethical standards of the tax profession (**D56**);
- TPB(I) D57/2024 — False or misleading statements (**D57**);
- TPB(I) D58/2024 — Managing conflicts of interest when undertaking activities for government and maintaining confidentiality in dealings with government (**D58**);
- TPB(I) D59/2024 — Obligation to keep proper client records of tax agent services provided (**D59**);
- TPB(I) D60/2024 — Supervision, competency and quality management under the Tax Agent Services Act 2009 (**D60**); and
- TPB(I) D61/2024 — Keeping your clients informed (**D61**).

The Tax Institute is pleased to see the release of draft guidance to set out, explain and clarify the obligations outlined in the Code. We have proposed some improvements to enhance the draft guidance further.

Our detailed response and recommendations to further improve the draft guidance are contained in **Appendix A**.

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The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact our Senior Counsel – Tax & Legal, Julie Abdalla, on (02) 8223 0058.

Yours faithfully,

**Scott Treatt**

Chief Executive Officer

**Todd Want**

President

**APPENDIX A**

We have set out below our detailed comments and observations in relation to the draft guidance for your consideration.

## Interaction of obligations under TASA, NOCLAR and APES

The TPB guidance should explain how the obligations under TASA relate to other ethical standards that apply to some practitioners, such as the Non-compliance with Laws and Regulations (**NOCLAR**) and Accounting Professional and Ethics Standards (**APES**). It should also clearly set out the expectations for these practitioners in meeting their obligations under TASA in instances where the Code or the TPB's guidance does not clearly align with other ethical standards to which they may be subject. In particular, the guidance should address and reconcile these different forms of guidance and standards so practitioners understand when they are able, or are required, to disclose client information without the client's consent (whether to another practitioner or to a regulator).

## Upholding and promoting the ethical standards of the tax profession (D56)

### Not engaging in conduct that undermines the tax profession and tax system

Paragraph 23 of D56 states that considered professional feedback or submissions, including criticism regarding public consultation documents, do not constitute a breach of paragraph 10(b) of the Determination.

In this regard and to provide comfort to practitioners, D56 should also clarify that complaints, objections, appeals, applications for private rulings and reviews challenging the Commissioner's decision, as permitted by tax law, will similarly not be deemed a breach of section 10 of the Determination.

## False or misleading statements (D57)

### Order of guidance in dealing with required elements and required actions

Table 1 in paragraph 11 of D57 outlines the necessary actions to be taken by practitioners, while Table 2 in paragraph 38 details the elements that must be met before taking further action regarding false or misleading statements. We consider that the elements should be prioritised and discussed in the draft guidance before the actions.

Ordering the discussion in this manner would be more logical for practitioners who need to first establish whether they have satisfied the four elements to invoke an action under section 15 before they consider the required action.

## Withdrawing from an engagement

Item 3 in Table 1 of paragraph 11 states that if a practitioner has prepared (or allowed or directed another to prepare) a statement for a client, and after a reasonable time, the practitioner is not convinced the client has rectified or clarified the statement, they must withdraw from the engagement and terminate the professional relationship if the false or misleading nature of the statement is due to recklessness or intentional disregard of the tax law, with some exceptions. Further, as outlined in paragraphs 64 and 56, practitioners must not only cease providing tax agent services, including BAS services, to the client but must also withdraw any other professional relationships with the client, such as those involving business advisory, accounting, audit, or financial services. However, if a practitioner is required to withdraw from an engagement under subsection 15(2) of the Determination, this obligation does not extend to related entities of the client with whom the practitioner has a professional relationship; the withdrawal obligation is confined to the client who has failed to correct the false or misleading statement or adequately explain its basis.

In certain practical situations, a client may serve as a parent entity or be part of a consolidated entity framework, leading to the withdrawal of a relationship with the client affecting the tax advisory or other advisory services offered to related entities. The TPB should take these practical scenarios into consideration and work with practitioners to develop appropriate guidance that addresses such circumstances. This could include examples involving a client group comprising multiple related entities, as well as multiple services being offered by other practitioners within the firm to the same client.

Further, it is common for a single engagement letter to cover several, if not all, entities in a related group. The question of 'who is the client' may arise in a situation where multiple entities in a group are covered by the same engagement letter and the behaviour of one entity in the group results in a practitioner needing to withdraw from the relationship with the 'client'. It is not clear whether the 'client' would be the individual entity or could be the whole group.

For the purposes of paragraph 65 of D57, when a practitioner needs to withdraw from an engagement and professional relationship with a client, it would be useful if the guidance could explain whether related entities covered by the same engagement letter are considered to be:

- individual entities that can be separately considered such that there is no requirement to also withdraw from them; or
- a single client (given there is only one engagement letter) which would mean the practitioner is required to withdraw from all entities within that group.

It may also be possible that the outcome may turn on the terms of the engagement letter. It would be useful to indicate where certain terms may indicate that the requirement to withdraw would extend to the entire group.

## Meaning of 'material'

Paragraph 32 explains the meaning of the term 'material particular' or 'material respect' with regard to the principles established in migration cases. The draft guidance would be enhanced by additional reference to the principles provided in Australian Accounting Standards Board Practice Statement 2 (**AASB Practice Statement 2**) and the ATO's Practice Statement Law Administration PS LA 2012/5: *Administration of the false or misleading statement penalty – where there is a shortfall amount* (**PS LA 2012/5**). The concepts considered in this other guidance will be more familiar to practitioners given the inherent connection between tax and accounting.

AASB Practice Statement 2 offers guidance on making informed materiality judgments by setting out the criteria and considerations for determining what constitutes material information for financial reporting purposes. PSLA 2012/5 explains the ATO's view on the administration of penalties for false or misleading statements under the tax law.

Given the importance of understanding the term 'false or misleading statement' in section 15 of the Determination and the potential implications for practitioners, we are of the view that it would be beneficial to incorporate references to AASB Practice Statement 2 and PS LA 2012/5 in the draft guidance.

Further, paragraph 7J of PS LA 2012/5 sets out the Commissioner's view that most of the information included in a label on a tax return or activity statement constitutes a material particular, as it is essential for determining tax-related liabilities. The TPB's guidance should clarify whether this is also the TPB's position. We are of the view that labels that do not form part of calculating an entity's taxable income or BAS liability should not be regarded as 'material particulars' for the purposes of section 15 of the Determination.

## Notification to the TPB or ATO

Paragraph 67 of D57 explains that a practitioner is not required to correct the statement or explain to the TPB or the ATO why they believe the statement to be false or misleading or what the practitioner otherwise believes the statement should have said.

The draft guidance would be enhanced if it also articulated:

- that the practitioner is not required to explain why they:
    - are not reasonably satisfied that their client has corrected the statement or otherwise adequately explained the basis for the statement;
    - have reasonable grounds to believe that the false or misleading nature of the statement resulted from recklessness or intentional disregard of a taxation law; and
    - have reasonable grounds to believe the client's actions have caused, are causing, or may still cause, substantial harm to the interests of others; and
- the evidence that practitioners are expected to provide if requested by the TPB or ATO to demonstrate that they have met their obligations under section 15 of the Determination.

We also note that paragraph 69 of D57 explains that 'the method and process to notify the TPB and ATO will be published on the website of each agency'. It is vital that practitioners understand the essential information required for the notification process. This may include the client's name, a demonstration of reasonable grounds for believing a correction is needed, and a statement regarding the client's lack of adherence to professional advice provided by the practitioner. The inclusion of the client's name is particularly important for identifying the relevant individual or entity, although it is noteworthy that detailed transaction information may not always be required, potentially simplifying the notification process for practitioners.

These aspects are crucial, as they underscore the importance of professional responsibility and accountability. They highlight that practitioners cannot be held liable for outcomes that arise from clients not adhering to the advice provided. By clearly explaining these additional aspects, practitioners can do everything necessary to meet their obligations under TASA. Setting out in the guidance what particulars practitioners are not required to notify the regulators will also provide comfort to clients and greater transparency to the community about the limited circumstances in which practitioners are obligated to notify the regulators and what information they are required to disclose.

### Other considerations

D57 would benefit from the TPB setting out its expectations of practitioners taking the various actions in subsection 15(2) of the Determination where:

- a false or misleading statement can no longer be corrected due to the passage of time (i.e. the date of the assessment is outside its period of review); and
- the ATO identifies a false or misleading statement before the practitioner does.

The draft guidance is silent on these aspects and the obligations or steps practitioners must follow, including any potential consequences under the TASA for failing to self-report under the breach reporting rules.

## Managing conflicts of interest when undertaking activities for government and maintaining confidentiality in dealings with government (D58)

### Legal professional privilege

We understand that sections 20 and 25 of the Determination apply to practitioners engaging in confidential consultations with the government. Paragraph 97 of D58 addresses the implications of legal professional privilege (**LPP**). Its relevance in the context of guidance for section 20 and section 25 of the Determination is unclear. This inclusion appears misplaced and raises confusion regarding the circumstances in which the TPB anticipates LPP will be relevant in these scenarios. We suggest either paragraph 97 should be removed or the TPB should clarify when LPP would be relevant in these circumstances.

# Keeping your clients informed (D61)

## Explanation of prescribed events

A brief explanation of each prescribed event mentioned in paragraph 29 of D61 would be beneficial for practitioners to have a clearer understanding of the meaning of each item listed. For example, subparagraph 45(1)(d)(iv) of the Determination requires the disclosure of any convictions related to fraud or dishonesty. However, D61 does not clarify whether the obligation to disclose such a conviction arises upon the initial conviction or if the disclosure is required upon the exhaustion of all rights of appeal.

## Disclosure requirement

Paragraph 13 of D61 states that for practitioners operating through a partnership or company (**the entity**) that is a registered tax agent, the disclosure obligations under section 45 of the Determination are confined to the relationship between the client and the practitioner. It goes on to explicitly state that the disclosure obligation imposed on the practitioner does not extend to the other practitioners that form part of the 'sufficient number' requirement for the entity providing these services.

Paragraph 38 explains the TPB's expectation that the disclosure to potential and current clients should go beyond the events relating directly to the individual tax practitioner and extend to matters relating to any associated company or partnership (**associated entity**) providing tax agent services.

A reading of these two paragraphs together suggests that while the entity is included in the disclosure requirements, other individual agents who form part of the 'sufficient number' are not taken into account for this purpose.

It would be beneficial to clarify that the 'sufficient number' of agents referenced in paragraph 13 does not fall within the disclosure obligations outlined in paragraph 38, and to explain how matters relating to any associated entity can be determined without having regard to the other practitioners who form part of the 'sufficient number'.

Further, the TPB should clarify in paragraph 44 what specific information should be disclosed on the firm's website and/or in the engagement letter. This clarification should address whether the disclosure pertains to the firm's details, including any breaches involving all practitioners of the firm, or only to the information of the individual practitioner with whom the client has a relationship.

## Five-year look back period

D61 would benefit from a clear statement that the five-year look-back period referenced in paragraph 45(1)(d) of the Determination is constrained by the transitional rule in subsection 151(1) of the Determination. The transitional rule precludes from the operation of section 45 matters arising before 1 July 2022. Consequently, the earliest date on which a full five-year period can apply is 1 July 2027. Paragraphs 35 and 36 refer to the date of 1 July 2022 but do not reference the interaction with the five-year period in paragraph 45(1)(d). This clarification could be inserted somewhere under the heading 'Information about prescribed events' on page 8.

## Case studies

### D56

In Case Study 1 in D56, the facts note that Sam deleted the email and did not document the possible conflict of interest. The TPB's guidance should clarify that Code item 5 and section 10 of the Determination do not require practitioners to avoid a conflict of interest altogether; rather, they are required to 'manage' the conflict. The case study would be enhanced if it articulates the reasons for the TPB's conclusion that Sam breached section 10; that is, because he failed to keep records and deleted the emails, relating to the potential conflict of interest, not because of the existence of the potential conflict of interest.

### D57

The case studies presented in D57 provide useful practical guidance on a range of issues for practitioners. However, of the six case studies, only one deals with a situation where the client's actions may cause substantial harm to others.

Given that notifying the TPB or ATO under section 15 of the Determination is the most serious action a practitioner can take regarding their client's conduct, the draft guidance would benefit from some additional examples that specifically illustrate substantial harm, including explaining the circumstances in which the impact of the client's actions on the collection of public revenue (see paragraph 113 of D57) constitutes 'substantial harm.' This would enhance practitioners' understanding and compliance with their TASA obligations and provide some comfort around when they are required to notify the TPB or ATO.

### D61

We make the following observations in relation to the case studies in D61.

- Case Study 1 should clarify that, under section 30-25 of the TASA, a practitioner is prohibited from practising during a suspension or following a termination of registration, and they have an implicit duty to inform their clients of their suspension or termination. Failing to notify prospective and current clients of their suspension or notification, which will give rise to a breach of section 45 of the Determination, will also result in other breaches of TASA and therefore is not the sole issue in this case study. It is important to recognise and set out other potential breaches of the TASA to enhance the practical relevance of the case study.
- There is value in Case Study 2 in D56 being repurposed into a new case study in D61 through the perspective of applying section 45 of the Determination.
- For clarity, there is value in an additional case study being included in D61 explaining:
    - that individual agents who form part of the 'sufficient number' requirement for a partnership or company they are associated with (**associated entity**) do not fall under the section 45 disclosure requirements;
    - disclosure under section 45 extends to matters relating to any associated entity; and
    - how a practitioner's obligations to meet the disclosure requirement practically extend to issues concerning any associated entity without having regard to those individual agents who form part of the 'sufficient number' requirement.

## Minor comments

**D57**

- The text on page 1 of D57 under 'Disclaimer' states that it provides information regarding the TPB's position on the application of the **proposed** updates to section 15 of the Determination. However, since the changes to section 15 have now been legislated and are no longer in the proposal stage, the language should be revised to reflect this.
- We recommend inserting a paragraph following paragraph 20 to clarify that the obligations outlined in subsections 15(1) and (2) pertain exclusively to statements made to the TPB or the ATO, while the obligations in subsection 15(3) are relevant solely to statements made to other Australian government agencies. These provisions can easily be conflated and may result in confusion among practitioners.

**D58**

- The reference to TPB(I) D54/2024 false or misleading statements in paragraph 26 of D58 should be corrected to TPB(I) D57/2024 false or misleading statements.

**D59**

- Paragraphs 19 and 45 of D59 are repetitive as both address the obligations outlined in section 30 of the Determination.

**D60**

- In Paragraph 4 of D60, the web version lacks a space following 'to' in the paragraph references concerning Code obligations related to competence (paragraphs 64 to 69).

**D61**

- The word 'enquires' in paragraph 18 of D61 should be corrected to 'enquiries'.
- The TPB has included in Appendix 1 of D61 a fact sheet that sets out standard information that practitioners can easily pass on to their clients to fulfil their obligations under paragraphs 45(1)(a) and 45(1)(b) of the Determination (and as explained in paragraphs 20 and 21 of D61). It would be beneficial if the TPB enhanced this fact sheet to also include a full list of the 17 Code obligations in plain language. This would assist practitioners in meeting their obligations under paragraph 45(1)(c) (as explained in paragraph 25 of D61) and allow them to easily share the information with their clients.
- In paragraph 44 of D61, it would be helpful if either 'and' or 'or' is inserted in the bulleted list to improve clarity.
- It would be helpful if footnote 37 of D61 clarified that it is unnecessary to inform clients about prescribed events in section 45 that occurred before 1 July 2022.