

4 October 2023

Director  
Tax Agent Regulation Unit  
Personal and Indirect Tax and Charities Division  
Treasury  
Langton Cres  
Parkes ACT 2600

Law Division  
Treasury  
Langton Cres  
Parkes ACT 2600

By email: [PwCResponse@treasury.gov.au](mailto:PwCResponse@treasury.gov.au)

Dear Sir/Madam

## **Submission on Response to PwC – information sharing, whistleblower protections, reform of promoter penalty laws and Tax Practitioners Board Reforms**

CPA Australia and the Institute of Public Accountants (IPA) make this submission in response to the four Exposure Drafts (EDs) released as part of the response to the PwC matter. We are committed to maintaining the integrity of the tax and superannuation systems and do not tolerate adviser misconduct.

We are supportive of the Government's response to the PwC matter as expressed in the [Factsheet](#) and the manner in which key issues have been delineated into a series of reviews over the next two years. We believe this approach allows proper consideration of the critical issues to identify the most effective and efficient interventions to enhance the current regulatory environment. We look forward to participating in the consultation process.

However, we respectfully query the assertion that, "Fraud is often perpetrated by, or with the assistance of, rogue tax practitioners, intermediaries, as well as other third parties"<sup>1</sup>. To date, we have not been provided with empirical evidence to substantiate these claims and research published by the ATO, such as the tax gap, has not demonstrated a causative relationship. The number of criminal prosecutions associated with these behaviours is comparatively low and we understand that the most recent significant fraud event, [Operation Protego](#), was perpetrated primarily by unadvised individuals.

Our members perform a critical role in safeguarding the system and we are committed to working with the Government, ATO, Tax Practitioners Board (TPB) and other regulatory agencies to protect against fraud. Reforms should be placed in this context and recognise that the vast majority of the tax profession are committed to conforming with the various legislation and Codes that govern their conduct and advice. Changes must be reasonable, proportionate and properly targeted to enable the ATO and TPB to perform their duties without introducing commercial threats or legislative uncertainty that will reduce the ability of Australians to obtain qualified and regulated tax advice.

The changes proposed in these EDs will improve the ability of Government and professional bodies to detect and respond to breaches of professional and ethical misconduct. The enhanced register will also assist consumers and other professionals to obtain information about their tax practitioner. We make the following comments on each ED.

---

<sup>1</sup> P.7, Tackling fraud against the ATO and the tax and superannuation systems – Treasury review Government response to PwC tax leaks scandal, The Treasury, 2023

## Information sharing

We support the [proposed changes](#) and agree that the ATO and TPB staff should be enabled to share necessary protected information with regulators, the Treasury, relevant Ministers and professional disciplinary bodies such as CPA Australia and IPA. The proposed measures provide clarity and protection to public servants seeking to communicate critical information outside their normal boundaries and should enable coordinated responses thereby fully using available powers and reducing timeframes to address potential misconduct.

### *Prescribed disciplinary bodies*

We welcome the ability to receive protected information from the ATO and TPB about potential breaches of our standards by members. CPA Australia has a [Memorandum of Understanding](#) with the TPB to facilitate communication, however current legal constraints limit the timeliness, detail and effectiveness of information exchange.

Our member conduct and discipline processes are underpinned by the relevant Constitution, By-Laws, the [Code of Ethics](#) and applicable regulations. However, as professional bodies, we do not have statutory powers and are therefore limited in our ability to obtain evidence or compel responses. Due to privacy laws and our governing documents, we are also unable to disclose information about our members to statutory authorities without a formal request (i.e., information gathering notices issued under the *Taxation Administration Act 1953 (TAA)* or *Tax Agent Services Act 2009 (TASA)*).

The [factsheet](#) on the disclosure of information to prescribed disciplinary bodies signals that regulations will be developed following the passage of the Bill and that the application process will be managed by Treasury. The list of expected application information includes a “commitment to providing relevant information to the ATO or the TPB in relation to circumstances where relevant practitioners may have been involved in significant breaches of Commonwealth laws or other ethics standards”.

As noted above, we are not currently able to lawfully disclose member information to the ATO or TPB in the manner expected in the factsheet. Professional bodies do not have the necessary relationship with our members to be protected as a tax whistleblower under existing rules. This means we are not afforded the same protections and may be subject to litigation or other claims from members.

Further consultation is required to enable applying associations to be able to satisfy the application criteria without contravening other laws and regulations. This may require extending tax and corporate whistleblower protections to prescribed disciplinary bodies or changes to association constitutions and By-laws, which may require a member vote.

In relation to the protected information to be received, further consultation is required on the content and detail that would be required by a prescribed disciplinary body in order for it to take action. We note that the Australian Securities & Investments Commission (ASIC) has an existing provision<sup>2</sup> that enables disclosure to prescribed professional disciplinary bodies<sup>3</sup>, however to our knowledge this is not being used.

Given the sophistication of the TPB and ATO’s intelligence, analytics and enforcement capabilities, we anticipate a higher likelihood of receiving information on a regular basis and therefore request the opportunity to discuss detailed operational aspects with the TPB and ATO concurrent to the development of the regulations.

## Whistleblower protections

We agree with the [proposed changes](#).

As mentioned under information gathering, prescribed disciplinary bodies – or professional associations more generally – are neither eligible recipients or protected whistleblowers in relation to information about their members. The statutory review of tax and corporate whistleblower laws scheduled for late 2024 provides an opportunity to consider this issue, noting that the ability to satisfy the application criteria for a prescribed disciplinary body may be dependent on such a legislative change.

<sup>2</sup> Section 127(4)(d) of the *Australian Securities and Investments Commission Act 2001*

<sup>3</sup> CPA Australia and IPA are prescribed professional disciplinary bodies under section 8AA of the *Australian Securities and Investments Commission Regulations 2001*

## Reform of promoter penalty laws

The [proposed changes](#) seek to address identified limitations in the existing promoter penalty laws. Providing the Commissioner of Taxation with additional time to commence proceedings, calibrating penalties with the *Corporations Act 2001* and removing the ability to misrepresent conformance with ATO rulings are reasonable provisions.

We acknowledge the need to expand the definition of a promoter beyond the receipt of consideration. However, as articulated in paragraphs 1.36 and 1.37 of the [Explanatory Memorandum](#), there is the potential for uninhibited interpretation of the concept of a benefit as "anything that is consideration" will be included. This could create significant uncertainty for tax advisers, and it is unclear how the Commissioner of Taxation would approach the application of the tests, especially where the alleged benefit is unquantifiable or not directly attributable to the scheme. The expanded definition may now potentially encompass persons who have not received any specific consideration in relation to the promotion or encouragement of a scheme.

The proposed promoter penalties appear disproportionately large. The penalties in the *Corporations Act 2001* and the *Competition and Consumer Act 2010* are focused on anti-competitive and restrictive trade practices such as cartels, and protections from harm associated with financial products, financial services and consumer credit. These significant penalties combined with the expanded scope of the promoter penalty laws creates the potential for the imposition of penalties intended to be reserved for very serious market misconduct to any scheme with any benefit (including intangible and unquantifiable benefits) suggested by a tax adviser of any size. The risk is compounded by the joint and several liability of all partners for a contravention by a partner, and for the trustee or all trustees of a trust of these civil penalties, irrespective of whether the partner or trustee had knowledge of the relevant contravention of the promoter penalty provisions.

## Tax Practitioner Board reforms

We agree with the [proposed changes](#).

The TPB Register is an important source of valuable information. The level of detail to be contained on the Register is appropriate and the five year publication period is reasonable. Publishing the details of the individuals comprising the sufficient number of registered individuals in a registered practice will be beneficial for consumers, regulators and other stakeholders to understand the relationship between practitioners and firms.

We support the increase in the TPB investigation timeframe to two years. The more reasonable two year period recognises the need to allow for more complex investigations however we would anticipate that many cases would be completed in a shorter timeframe. The investigation process is highly stressful and disruptive to tax practitioners, particularly where their livelihood is in question, therefore timely resolution of investigations should become a TPB performance measure and data on investigation timeframes should be included in their Annual Report.

Should you wish to discuss our submission, please contact Elinor Kasapidis, Head of Policy and Advocacy at CPA Australia at [elinor.kasapidis@cpaaustralia.com.au](mailto:elinor.kasapidis@cpaaustralia.com.au), in the first instance.

Yours sincerely,



Elinor Kasapidis  
Head of Policy and Advocacy  
CPA Australia



Tony Greco  
General Manager Technical Policy  
IPA