

Thursday, 22 February 2024

Tax Practitioners Board
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Dear Sir / Madam

Submission on Draft guidance on new Code items – Disqualified entities

Chartered Accountants Australia and New Zealand and CPA Australia (the Joint Bodies) welcome the opportunity to provide feedback on behalf of our members on the Draft guidance issued by the Tax Practitioners Board (TPB) in relation to new items 15 and 16 of the Code of Professional Conduct (the Code)¹:

1. [TPB\(I\) D51/2023: Code of Professional Conduct – Employing or using a disqualified entity in the provision of tax agent services without approval](#)
2. [TPB\(I\) D52/2023: Code of Professional Conduct – Prohibition on providing tax agent services in connection with an arrangement with a disqualified entity](#)

New Code items 15 and 16 prohibit tax practitioners from:

- employing or using a 'disqualified entity' without approval by the TPB; or
- entering into certain arrangements with a 'disqualified entity'.

The purpose of new Code items 15 and 16 is to improve internal governance practices that lead to tax practitioners employing or using people who are considered unsuitable to provide tax services.

The two new Code items apply to all registered tax practitioners. They commenced on 1 January 2024, subject to certain transitional rules that apply until 31 December 2024.

Structure of the Draft guidance

Each of the Draft guidance Information Sheets on Code item 15 (D51/2023) and Code item 16 (D52/2023) is broadly divided into the following components:

¹ *Treasury Laws Amendment (2023 Measures No. 1) Act 2023* introduced the two new Code items 15 and 16, by amending section 30-10 of the *Tax Agent Services Act 2009* (TASA).

1. What is Code item 15 and Code item 16, what are the employment / engagements, and arrangements that are covered, and what is prohibited?
2. What is a 'disqualified entity'? – which sets out each of the disqualifying events (Table 1).
3. What does it mean to 'know or ought reasonably to know'? – which sets out the 'reasonable steps' process that a tax practitioner should follow to confirm whether an entity is a disqualified entity (Table 2). These are minimum requirements.
4. How to comply (Table 3) - which provides four general scenarios with a snapshot on how to comply in those circumstance. It also includes 'Other considerations', and 'Seeking approval from the TPB'.
5. Notification by disqualified entities
6. Transitional rules (Table 4) – which sets out various detailed scenarios and how the transitional provisions apply.
7. Consequences of breach
8. Case studies – which provides three examples (Code item 15), and four examples (Code item 16)

Our Submission

Overall, we commend the TPB on the structure, clarity and practicality of the Draft guidance. We consider that tax practitioners will be able to use each of the Information Sheets as a tool to help them understand and implement the required steps and procedures in their tax practices to comply with the law.

In particular, we welcome the TPB developing practical online forms and processes to facilitate and streamline compliance with the new Code obligations for tax practitioners, such as:

- a [Disqualifying events declaration and consent form](#) for tax practitioners to request all new staff to complete during the recruitment and on-boarding process during their employment/engagement; and
- a simple approval form for tax practitioners to seek TPB approval by logging into [My Profile](#) from 1 January 2024.

Our comments in this submission are focused on providing feedback on components 3, 4, 6 and 8 above, only.

We have no specific comments on the remaining components, and broadly support the TPB's approach to the guidance in those remaining parts of the guidance.

One of our key concerns is the guidance on the information to be published on the Register, and the need to give tax practitioners greater transparency on the information that is anticipated to be published on the Register (once the proposed changes are implemented) to help them to comply with the Disqualified entities regime.

In addition, regarding the Transitional rules, this component attracts most of our feedback in terms of errors that we have identified and issues with the accuracy and consistency of the Draft guidance. In the Draft guidance on Code items 15 and 16, at paragraphs 36 and 32 respectively, the TPB states that the Transitional rules “allow registered tax practitioners a reasonable amount of time to ensure compliance with the requirements of [the Code items].”

However, there are some concerns about how the transitional rules will apply in practice given the interplay in timing between the disqualified entities notification obligation and the tax practitioner’s obligation to make reasonable enquiries. This impacts the assumptions made in the scenarios in Table 4 regarding the timing of notification by the disqualified entity early in the transitional period, whereas it is more likely this notification will fall outside of the transitional period.

Our Comments

What does it mean to ‘know or ought reasonably to know’? (Table 2)

The Register

The Draft guidance states that it is necessary to conduct a search of the TPB Public Register using the name and/or ABN of the entity to verify whether the entity has been sanctioned and/or terminated by the TPB. The guidance then notes that:

“the TPB has limited powers to publish information on the TPB register. These limitations include:

- details of an entity that had its registration terminated by the TPB must only be kept on the TPB Public Register for 12 months from the date of termination -
- details of a sanction imposed on an entity (other than a written caution or termination) must only be kept on the TPB Public Register for the longer of 12 months from the date of the sanction, or the duration of the sanction
- written cautions to an entity are sanctions that cannot be published on the TPB Public Register, and
- the TPB cannot publish details of an investigation under section 60-95 of the TASA which did not result in a sanction or termination of an entity.”

These limitations are accurate currently. However, given how significant the proposed changes to the Register will be in terms of expanding the scope and duration of the information that the TPB can and must place on the Register, we consider that it is important for the Draft guidance to set out more clearly the information that would be on the Register if the proposed changes are passed. All the above limitations will change, except for the limitation that written cautions cannot be published, which will remain the case. Such an additional explanation in the Draft guidance from the outset will enhance the currency and clarity of the guidance in relation to the information that is proposed and expected to be published on the Register to support compliance with the Disqualified entities regime.

At this stage, there is a lack of transparency and details for tax practitioners about what information is anticipated will be published on the Register to help them identify whether proposed new staff have had disqualifying events in the past 5 years.

At present, the Draft guidance only includes a footnote (footnote 29), which mentions that the relevant amending Bill “proposes amendments to the TASA which would require additional information to be published on the TPB Public Register. If passed, these amendments will commence no earlier than 1 July 2024. This Information Sheet will be updated to reflect any amendments to the TASA that come into effect.”

We believe that it is important for tax practitioners, who are being asked to put in place arrangements to comply with the new Code obligations now based on the Draft guidance that has been published, to understand exactly what information it is proposed will be published on the Register if the amending law is enacted as anticipated. This is especially so as we anticipate the passage of the amending law has been delayed due to the Senate Economics Legislation Committee Inquiry until around mid-April at the earliest.

It is also especially important as Code obligations apply to tax practitioners now and throughout the rest of the transitional period in respect of newly recruited employees, contractors etc (and any renewals), such that they need to know, plan for and implement in their tax practices where to source the relevant information both prior to, and after passage of the Amending Bill. For example, after the Bill is passed, tax practitioners will presumably immediately need to ensure that their procedures include a search of the Register to check for all disqualifying events that are published on the Register, e.g. orders made by the TPB (as sanctions for breach of the Code), or findings that an entity is not a Fit and Proper Person. This is because a failure to make these checks on the Register when such information is published would likely mean that the tax practitioner has not taken all reasonable steps to become aware they are employing or using a disqualified entity.

We also recommend that the Draft guidance make it expressly clear which of the disqualifying events are not going to be published on the Register even if the proposed changes are passed, and therefore, which events tax practitioners should pay special attention to ensuring are covered by a declaration in writing from prospective employees, contractors and other staff. For example, a written caution from the TPB in the past 5 years will not be published in the expanded information on the Register. This is despite it being an event that makes a tax practitioner a ‘disqualified entity’. We believe that such information in the Draft guidance would assist tax practitioners to understand as soon as possible during this 12-month ‘implementation period’ that they are now in, which information they should be able to check and verify on the Register, and which information they will need to ascertain by requesting and relying on a declaration from the entity.

Disqualified Entities Register

Whilst it may not be feasible immediately, within a reasonable time, we recommend that the TPB explore the possibility of collating all relevant information that is published on the TPB website which constitutes a ‘disqualifying event’ and consolidating that information into a single searchable webpage called a ‘Disqualified entities register’.

That page would publish the names of the entities, ABN, any previous registration number, and the ‘disqualifying events’ relating to those entities.

The register would also need to publish a warning that there are other 'disqualifying events' which are not reported on that Disqualified entities register which could mean that the entity is nevertheless a disqualified entity. It could then provide guidance on which further disqualifying events there are, and provide a statement on the method for ascertaining that information, consistent with the Draft guidance.

No mention of time frame to comply

The Draft guidance does not give any indication to tax practitioners what the TPB considers to be a reasonable time frame for actions to be taken to comply. The TPB should clarify this aspect. Does the TPB have a general timeframe within which they expect practitioners to either have severed the relationship or contacted the TPB for approval? Is there a safe harbour period within which the TPB will regard as generally acceptable, and if so, could this be included in the guidance? We note that Table 4 uses the words "cease...immediately". This is discussed in more detail below under the Transitional rules.

Disqualifying events declaration and consent form

We recommend that the TPB include a link to its 'Disqualifying events declaration and consent form' in the Draft guidance documents. As the guidance is online, any changes to the link or updates can be made online to keep the guidance current. Table 2, rather than just the footnote, should name the form and contain the link.

Record-keeping

We query where the 5-year requirement for record-keeping comes from in Table 2 (last line and column)? There does not appear to be any legislative requirement for this in the TASA, and the 5-year record-keeping requirement in the Draft Code Determination is not yet law, and in any event it only applies to the records that relate to the tax agent services provided to clients. By contrast, these Part 4A records would be internal human resource-related records. If there is a legislative 5-year record keeping requirement, we request that a footnote be included to provide a reference for the source of the requirement.

In addition, we are uncertain about the meaning of the two bullet points when read together. We are concerned that the wording used in this part of Table 2 reads as if there may be a requirement for documentation and records to be kept at the end of employment, confirming at all times whether they had a disqualifying event in the last 5 years.

We suggest that this should be amended so it is clear that the documentation and record required to be kept is when the entity (employed or used to provide tax agent services on behalf of the tax practitioner) notified the tax practitioner that they had a disqualifying event, or completed a 'Disqualified entity declaration and consent form' prior to being employed or used.

How to comply (Table 3), Other considerations, and Seeking approval from the TPB

Overall, in our view, Table 3 How to comply is well set out and clearly points tax practitioners to the relevant paragraphs that apply to the general Situations listed.

Requirements in the Fair Work Act and employment contracts

As the Draft guidance contemplates, tax practitioners will need to review and update their employment and engagement contracts to enable them to take necessary steps to comply with the Code of Professional Conduct where they discover they have unknowingly employed or used an existing disqualified entity.

There could be significant legal and financial consequences to tax practitioners in terminating disqualified entities to comply with this new obligation under Professional Conduct.

Despite the existence of the transitional period, it may not be sufficient or applicable at the appropriate time to allow tax practitioners to take the necessary steps to comply in a timely manner. We therefore submit that the TPB should have the discretion to allow tax practitioners to apply for additional time to comply with the new disqualified entity requirements, so that they have time to seek, obtain and implement necessary legal advice.

We note that the transitional period of 1 January 2024 to 31 December 2024 that applies to protect tax practitioners from breach of the new Code items in the first year will lapse before the time when existing employees / contractors who are 'disqualified entities' are required to notify the tax practitioner that they are disqualified. Under section 45-20, existing employees/contractors are not required to notify until 30 January 2025. By this stage, there is no transitional protection, and the obligations to either sever the relationship or seek approval are in operation.

This leaves the tax practitioners exposed to breach of the Code at that time they are notified, when it will likely be the first knowledge that they have of the disqualified status of their employees, and the first opportunity they have for taking action (through employment lawyers) to sever the relationship.

Whilst the TPB expects that tax practitioners will use the 12-month transitional period to become aware of any disqualified entities on their staff, realistically, there is nothing to compel disqualified entities to notify (as assumed in the Table 4 scenarios), and for the time being, the information available on the Register is mostly deficient for the purpose of informing them of disqualifying events.

Below we discuss a potential solution for the TPB to consider integrating into its policy, procedure and guidance.

Finite or temporary (non-ongoing) approval

In terms of seeking approval from the TPB, we can envisage there being situations in which a tax practitioner wishes to contact the TPB to inform the TPB that they have been made aware they are employing a disqualified entity, but are seeking approval from the TPB to retain the disqualified entity for a finite period only, whilst going through the due process of terminating their employment and maintaining resourcing capacity. Therefore, a finite or temporary (non-ongoing) approval is required.

We believe that it would be constructive for the TPB to consider implementing a policy and process around this scenario to encourage tax practitioners to inform the TPB so that they can be covered during an agreed interim period while the practitioner undertakes what is expected to be a slightly extended process of severing the employment relationship.

As highlighted above, the scenario of a tax practitioner who has to obtain employment law advice and has to comply with a lawful process of severing the employment relationship may be one scenario and valid reason for which a relatively longer, but finite, approval period is required.

Issues of this nature would also be particularly relevant to small and micro practices for example in regional locations, where they often have difficulty in resourcing clients' tax obligations and meeting lodgement deadlines should they lose a staff member due an extremely limited or competitive market for recruiting tax talent. For these circumstances, tax practitioners would require a procedure that enables an agreed, limited period of time to allow a relationship with a disqualified entity to be severed lawfully and the entity replaced,

We believe that the addition of this aspect to the Draft guidance would promote the objectives of the new Code items. We also consider that the natural language of the drafting of the TPB's power to grant approval is sufficiently broad to cover this scenario (a finite or temporary approval). Specifically, subsection 45-5(1), together with ss (4)(b), should in our view enable the TPB to provide an appropriate approval or administrative concession to facilitate a compliance process that is smooth and workable for both the regulator and the tax profession.

The Transitional rules (Table 4)

We consider that the Transitional rules component of the Draft guidance needs to be outlined more clearly and more accurately, as discussed below.

The rules and legislative references

The transitional provisions relating to the obligation of disqualified entities to notify tax practitioners are incorporated into new Part 4A of the TASA. This means that these transitional rules are more accessible for tax practitioners to look up, read and interpret. These transitional rules are set out in paragraphs 34 and 35 (of the Draft guidance on Code item 15), and paragraphs 30 and 31 (of the Draft guidance on Code item 15). We recommend that the legislative reference for these transitional rules be cited in these paragraphs. The legislative references are s 45-20(1) and (2) of the TASA.

By contrast, the transitional provisions relating to the obligations of tax practitioners under Code item 15 and Code item 16 are contained in the amending legislation that introduced the Disqualified entities measure. This means that these transitional rules are a lot harder for tax practitioners to locate and access, and therefore they are less likely to be able to look up, read and interpret the legislative provision itself. For this reason, the Draft guidance needs to be accurate and very clear on these rules.

The references cited in the Draft guidance on Code item 15 and Code item 16, at footnote 41 and footnote 39 respectively, being 'Subsection 8(3) of the TASA' and 'Subsection 8(2) of the TASA', are incorrect. The correct reference to be cited in each of these footnotes is 'Subitem 9(3) in Schedule 3 of *Treasury Laws Amendment (2023 Measures No. 1) Act 2023*'.

We consider that the Explanatory Memorandum, at paragraphs [3.64] – [3.74], does a good job of explaining the transitional rules, and as such, the Draft guidance could incorporate more of these explanations in the paragraphs immediately prior to Table 4.

Currently, we believe that the paragraphs 37 and 38 of the Draft guidance on Code item 15 are an incorrect or inaccurate statement of the transitional rules.

By contrast, paragraphs 33, 34 and 35 of the Draft guidance on Code item 16 are correct or accurate and a much clearer statement of the transitional rules that apply for both Code item 15 and 16.

Table 4 scenarios and dates

Table 4 contains various scenarios with dates that events have occurred in those scenarios.

Once the transitional rules are stated more simply and accurately immediately prior to the Table, the Table should then contain scenarios that follow and illustrate those rules.

As currently drafted, we envisage that tax practitioners could possibly be confused by reading those dates of the events in the scenarios and could take them to be relevant dates in the transitional rules. For this reason, we would prefer if the Table could be initially divided into the generic dates relevant to the transitional rules – ‘Pre-1 January 2024’ and ‘1 January 2024 and later’, when the contract was first entered into, i.e. whether the disqualified entity was existing staff on-board at the commencement date of 1 January 2024. This is the main distinction that the transitional rules turn on, other than whether the contract was renewed during the transitional period (even if was entered into pre-1 January 2024). We believe that the operation of the rules could therefore be made clearer, and the Table made simpler, if it were divided into this more streamlined structure.

Furthermore, we note that all scenarios in the Table assume that the tax practitioner will be immediately notified by the disqualified entity during the transitional period. There are two points to make here:

1. There is a transitional period of 12 months and 30 days that applies to the disqualified entity in Scenario 1 (under s 45-20 of the TASA), so it is unlikely Stuart would notify Sarah immediately. More realistically, Stuart would notify Sarah around 30 January 2025; and
2. As such, it is unlikely that Sarah would know immediately, and in any event, as there is a 12-month transitional period that applies to tax practitioners in this scenario, Sarah does not need to have taken any reasonable steps to become aware or obtain approval, until 1 January 2025. However, from 1 January 2024 to 31 December 2024, Sarah should be implementing the appropriate procedures into her tax practice’s staff recruitment and retention process to identify and prevent any new disqualified entities from being employed or used from 1 January 2024, and to obtain TPB approval to employ, use or retain any disqualified entities from that date.²

Given the above, we recommend that the TPB consider whether a scenario should be included where an existing disqualified entity (employed pre-1 January 2024) does not notify the tax practitioner until 30 January 2025.

² In the Draft guidance on Code item 16, the names in the scenarios are Sam, the tax practitioner, and Sophie, the disqualified entity, however the scenarios have exactly the same dates/events. These points apply equally to both Draft guidance documents.

Scenarios and conclusions

We have reviewed all scenarios set out in Table 4, and all conclusions on the operation of the transitional rules seem to be a correct application of the rules. However, in our view, Scenarios 2 and 4 should acknowledge that the tax practitioner should seek independent legal advice. Merely because the contract was renewed in January 2024, it does not mean that it will have the appropriate clauses in it, nor that legal advice may not be required to lawfully remove an employee or contractor. The Draft guidance is still being prepared and tax practitioners should not be tacitly expected or assumed, by these examples in Scenarios 2 and 4, to have already incorporated legal clauses in their contracts in January 2024.

As noted above, there is no mention of timing required for a tax practitioner to comply by either ceasing the contract or applying to the TPB for approval. However, in Table 4, Scenarios 2 and 4 state for the first time in the Draft guidance that the tax practitioner “will need to consider her options to cease employing the disqualified entity to provide tax agent services on her behalf immediately on 1 February 2024, having regard to her obligations under employment law and contract law.”

If this time frame - “cease employing...immediately...having regard to obligations under employment law and contract law” - is the intended time frame within which the TPB expects tax practitioners to act when the transitional rules do not apply, then we recommend that this be stated earlier in the Draft guidance as we have noted it is silent on this point. Furthermore, as requested, the TPB should consider whether it can stipulate in the Draft guidance a safe harbour or indicative period within which it expects this process to generally be completed, in order to provide more certainty.

Case Studies

Three examples are provided in the Draft guidance on Code item 15, and four examples are provided in the Draft guidance on Code item 16.

For each of the examples, we do not have any particular concerns about the conclusions reached regarding the application of the Code, Disqualified entities regime provisions and the civil penalties provisions, based on the facts outlined.

Draft guidance on Code item 15 provides a range of relevant, illustrative scenarios:

1. an example of a tax practitioner *not meeting* their Code obligations where they have employed a disqualified entity, as they ought to have known about the disqualifying event had they taken reasonable steps to become aware. They did not take the minimum steps outlined by the TPB guidance;
2. an example of a tax practitioner *meeting* their Code obligations where they have unknowingly contracted with a disqualified entity, despite taking reasonable steps in the TPB guidance. They took the minimum steps outlined by the TPB guidance; and
3. an example of a tax practitioner *meeting* their Code item 15 obligations where they have employed a disqualified entity, but only after first obtaining approval from the TPB.

Draft guidance on Code item 16, similarly, provides a range of relevant illustrative scenarios:

1. an example of a tax practitioner *not meeting* their Code item 16 obligations where they have entered into an arrangement with a disqualified entity, as they did not make reasonable inquiries to become aware of that fact. They did not take the minimum steps outlined by the TPB guidance;
2. an example of a tax practitioner *meeting* their Code obligations where they have unknowingly entered into an arrangement with a disqualified entity, but undertook reasonable inquiries and met the TPB's minimum requirements in the guidance;
3. an example of a tax practitioner *meeting* their Code item 16 obligation as they entered into an arrangement with a person who had been de-registered within the past 5 years, but who was a registered tax practitioner once again when they contracted with them, so was not a disqualified entity; and
4. an example of a tax practitioner *not meeting* their Code obligations as they entered into an arrangement with a person to provide tax agent services to them, despite knowing that their registration had been terminated two years ago, which meant they were a disqualified entity.

We have a few suggestions, however, to improve the examples and/or to make them consistent across the two Draft guidance documents:

Code item 15 guidance - Example 1

For completeness, we suggest that in addition this example should mention that Brendan is also in contravention of s 50-25 civil penalty provision which prohibits 'Employing or using the services of deregistered entities' within 12 months of termination of their registration.

We also recommend that example 1 mention that Chelsea will also be in breach of section 45-10(1) for failing to notify Brendan that she is a disqualified entity. By contrast, we note that this is included in Example 1 in Code item 16 Draft guidance.

Code item 15 guidance - Example 2

We recommend that this example include a statement that Winnie is in breach of section 45-10(2) for failing to notify Trent that she is a disqualified entity. By contrast, we note that this is included in Example 2 in Code item 16 Draft guidance.

Code item 16 guidance - Example 3

We suggest that the name of the tax practitioner in Example 3 be changed from James to another name, as James is already used in Example 2 of this Draft guidance.

Other issues

Circumvention of the Code obligations

Despite the introduction of the two Code of Professional Conduct obligations, we highlight that they are unlikely to stop unregistered or deregistered preparers from the existing practice of adding themselves as authorised contacts of their clients in Online Services for Business, and continuing to provide their taxation services incognito, which we reported to the TPB previously. Neither Code Item 15 nor 16 in their present forms will prevent the above situation from happening as the disqualified entity operates alone without the need to be employed, used or in connection with an arrangement with another tax practitioner.

We trust that our feedback and suggestions assist you in finalising the Draft guidance documents. If you would like to discuss any aspect of this submission further, please feel free to contact Donna Bagnall, Senior Tax Advocate, Chartered Accountants Australia and New Zealand, on (02) 9290 5761.

Yours faithfully



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