2 October 2024

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

By email: PWCresponse@treasury.gov,au

Dear Ms Beach,

Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024

CPA Australia, Chartered Accountants Australia and New Zealand, Australian Bookkeepers Association, the Financial Advice Association of Australia, the Institute of Public Accountants, the Institute of Certified Bookkeepers, the National Tax & Accountants' Association, the Institute of Financial Professionals Australia, the SMSF Association, Stockbrokers and Investment Advisers Association and The Tax Institute (together, the **Joint Bodies**) welcome the opportunity to comment upon the proposed amendments to the Code of Professional Conduct (the **Code**) contained in the *Tax Agent Services Act 2009* (**TASA**). The exposure draft amendments are contained in the Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024 (the **ED amendments**) and Explanatory Statement (the **ES**). The ED amendments make changes to the Tax Agent Services (Code of Professional Conduct) Determination 2024 (the **Determination**) which amends the Code.

Our comments below relate to the ED amendments as well as other provisions of the Determination.

It is the view of the Joint Bodies that:

- The ED amendments greatly improve sections 45 (keeping clients informed) and 20 (activities undertaken for government) by making them more targeted and closely aligned to the policy intent of those provisions. The Joint Bodies welcome these amendments and appreciate the government listening to and actioning our concerns in relation to these provisions.
- In section 25 (maintaining confidentiality in dealings with government confidential information), a distinction needs to be drawn between activities undertaken "for" government and broader activities undertaken by tax practitioners. Replacing "working with the agency" with "working for the agency" will align it with section 20 and appropriately limit its operation.
- The proposed amendments to section 15 (false or misleading statements) are an improvement to the original section 15 of the Determination, however it does not meet what was agreed in the negotiated agreement of 10 September 2024. Additional requirements have been added that were not agreed to, which dilutes the meaning of substantial harm and further amendments are required to meet what was agreed.

Originally, section 15 required tax/BAS agents to report to the Australian Taxation Office (**ATO**) statements which the agent reasonably believed were false, incorrect or misleading in a material particular, or omitted some matter or thing without which the statement is misleading in a material respect, where the maker did not correct the statement within a reasonable time.

Whilst the members of the Joint Bodies would prefer the removal of the "dob-in" provisions, the government has been steadfast that removal is not an option. An improvement was negotiated to raise the threshold at which the dob-in provisions become operative, using concepts from the non-compliance with laws and regulations (**NOCLAR**) requirements of the Accounting Professional and Ethical Standards (**APES**), with which many tax practitioners are familiar.

Now, the threshold before reporting becomes mandatory is that after a reasonable period of time, you are not satisfied that the false or misleading statement was corrected and:

- it was made due to recklessness as to the operation of a taxation law or intentional disregard of a taxation law; and
- the client's actions have caused, are causing, or may still cause, substantial harm to the interests of others.

Changes are needed to the definition of the term "substantial harm" in note 4 of section 15 and the ES so that the definition is consistent with APES 100. APES 100, R260 and R360 state that, as a pre-condition for reporting to a regulatory authority, it is serious adverse financial and non-financial harm to the ***client's investors, creditors, employees or the general public*** that is to be considered. The current references to a tax practitioners' obligations in paragraph (b) of note 4 to section 15, and the addition of other criteria in the explanatory statement (such as client's customers, competitors, Parliamentary intent, and public confidence and trust) impose a significantly different test than that which is contemplated by the APES 110 360.5 A3. These references should be removed so it is consistent with the negotiated scope of the provision.

Further refinements around the explanation of 'material' are also needed to ensure that the intent to align the concepts with the NOCLAR provisions of the APES is met.

Even with the currently proposed amendments, sections 10 (upholding and promoting the ethical standards of the tax profession) and 15 (false and misleading statements) remain of concern, particularly for small and medium practitioners, as these provisions fundamentally change the relationship between tax/BAS agents and their clients and impose additional compliance burdens on those least able to bear them. We have highlighted below our concerns and recommendations regarding section 15, and we have provided our feedback regarding section 10 in Appendix A to this letter.

Section 15

Section 15 is about **taxpayer integrity,** not tax agent integrity, and the requirement for tax agents to 'dob-in' taxpayers to the ATO is being consulted upon publicly for the first time now.

Whilst the bar for reporting is set high, it is unlikely that the average taxpayer will hear that message. Based on feedback from our members, what taxpayers will hear is that a tax/BAS agent is no longer a trusted advisor acting in their best interest but is now effectively an outsourced ATO officer. There are strongly held concerns within our membership bases that any required reporting of clients to the ATO will undermine the trusted relationship and impact public confidence in the integrity of the tax system.

Taxpayers, especially small and medium business clients, rely heavily on tax/BAS agents to ensure that they comply with the tax laws. Requiring tax/BAS agents to dob-in clients, albeit with a higher threshold, may deter clients from having full and frank discussions with their tax/BAS agent, leaving them with inadequate advice and potentially exposed to greater penalties.

It may drive taxpayers who need guidance to navigate a complex tax system away from registered tax/BAS agents altogether. Section 15 may encourage the use of non-registered practitioners or independent self-assessment by taxpayers and place a much high compliance assurance burden on the ATO to ensure that Australia's revenue base is not eroded. This outcome would be detrimental to the system as a whole.

The final report of the 2019 Review of the Tax Practitioners Board (the **James Review**) considered the issue of to whom the tax practitioner owes a duty, and stated at paragraph 2.4:

> ***"Tax practitioners do not have a duty to the ATO. The core object is the appropriate standards of professional and ethical conduct. Tax practitioners must be free to provide professional and ethical advice to their clients, so that taxpayers can fulfil their obligations to the ATO. It is this tripartite relationship that contributes to the integrity of the tax system."***[1]

Excessive regulation and red tape

These amendments are part of a broader package of measures directed to increasing the integrity of the tax profession. The sheer volume of changes, and in some cases the severity of the response, have caused concern among the profession. This is particularly evident in relation to small and medium sized practitioners who are disproportionately affected by rapidly changing and overly complex regulations. This is particularly concerning when, in some cases, a breach of those rules can result in termination of registration.

Multiple overlapping and in some cases, inconsistent, rules create confusion. The avalanche of red tape is being compared to what financial advisers have experienced which resulted in the loss of over 12,000[2] financial advisors. The Australian Law Reform Commission (**ALRC**) report on the financial services industry regulatory reforms in 2023 (ALRC Report 141) warns that complexity costs consumers not only in the expenses that are passed on by financial services providers, but by failing to protect them from misconduct.

Cautionary lessons should be learnt from those experiences. Our members are concerned that the substantial increase in their regulatory burden will necessitate price increases, due to legal costs and increased insurance premiums, among other things. This will adversely impact taxpayers who are most in need of their advice. It is also resulting in some practitioners reconsidering their careers in the tax profession and bringing forward their retirement date, with increasingly fewer new practitioners in the pipeline to replace them.

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[1] https://treasury.gov.au/review/review-tax-practitioners-board-final-report

[2] https://www.afr.com/companies/financial-services/the-wealth-adviser-exodus-has-bottomed-out-for-now-20230414-p5d0fj#:~:text=More%20than%2012%2C000%20financial%20advisers,workforce%20in%20just%20five%20years.

Recommendations

We recommend the following actions:

- Clarifying the definition of 'material' in sections 15(2)(c) and 15(2)(d), as detailed in Appendix A.
- Deleting paragraph (c) of Item 2 in 15(2)(d). This requires a tax agent to tell a client that they may be required to 'dob-in' the client to the ATO if they do not correct a statement and may cause personal safety concerns for the tax/BAS agent. Alternatively, there should be a carve out for advising a client of this requirement if personal safety is an issue.
- Amending paragraph (b) of Note 4 to section 15(2) and the explanatory statement. Substantial harm considers the impact of an action or inaction of a client. As currently drafted, the Determination and explanatory statement require considerations broader than that of the client's action or inaction to be taken into account.
- Section 25 – change 'with the agency' to 'for the agency' in the same manner as done for section 20.
- Withdrawing or amending section 10 as detailed in Appendix A.

If you would like to discuss this submission or to arrange a meeting with the Joint Bodies, please contact Matthew Addison, Executive Director of the Institute of Certified Bookkeepers on 0421 553 613.

Yours faithfully,

The undersigned.

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Director
Australian Bookkeepers Association

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Scott Treatt
Chief Executive Officer
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Managing Director/Chief Executive Officer
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Appendix A - detailed submission

Section 10 Upholding and promoting the ethical standards of the tax profession

The Joint Bodies are concerned with the requirement in subsection 10(b)(ii) of the Determination to not "undermine public trust and confidence in the integrity of the tax system". The exposure draft ES to the ED amendments states:

> *the overarching ethical responsibility to act, when it is needed and where it is appropriate, in the public interest, can be of a higher importance relative to a tax practitioner's duties to [**their**] client, although these duties are also of great import.*

This appears to be in direct conflict with subsection 30-10(4) of the TASA which requires a tax practitioner to *act lawfully in the best interests of your client*.

Under subsections 30-10(1) and 30-10(10) of the TASA, a tax practitioner must *act honestly and with integrity* and *take reasonable care to ensure that taxation laws are applied correctly*. These obligations must be carried out in the context of the obligation to the client at subsection 30-10(4). Anything less risks undermining the integrity of the agent-client relationship, severely hindering the tax practitioner's ability to adhere to subsection 30-10(4).

This is supported by findings in the James Review, which states at paragraph 2.4 (page 20):

> *Tax practitioners do not have a duty to the ATO. The core object is the appropriate standards of professional and ethical conduct**. Tax practitioners must be free to provide professional and ethical advice to their clients**, so that taxpayers can fulfil their obligations to the ATO. It is this tripartite relationship that contributes to the integrity of the tax system (emphasis added).*

Section 10 of the Determination goes beyond what was envisaged in the James Review and, by undermining the extant, largely well-functioning tripartite relationship, it may itself undermine the integrity of the tax system.

We would therefore submit that section 10 of the Determination should be repealed.

If the provision is not repealed, the relativity of the duties should be clarified, and it should be amended so that it is clear that the duty to act in the best interest of the client is paramount unless the substantial harm provisions (amended as recommended in this submission) of section 15 apply.

Section 15 False or misleading statements

The Joint Bodies have the following concerns with section 15:

- 'Substantial harm' is not consistent with the APES 110 360.5 A3 meaning.
- 'Material' is used in multiple contexts and has different meanings which need clarification.

We note that there have been some indications by the government that section 15 is consistent with APES[3]. However, this is not accurate as currently drafted. We also note that the APES provisions **permit**, they do **not require**, disengagement or reporting of a client.

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3 https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/28063/&sid=0000

"Substantial harm" – breadth and uncertainty

Substantial harm is meant to take its meaning from APES 110, 360.5 A3 which states:

> *"For the purposes of this section, an act that causes substantial harm is one that results in serious adverse consequences to any of these parties in financial or non-financial terms. Examples include the perpetration of a fraud resulting in significant financial losses to investors, and breaches of environmental laws and regulations endangering the health or safety of employees or the public."*

The reference to 'these parties' is to the client's investors, creditors, employees and the general public.

Substantial harm in APES 110 looks at the actions of the client in respect of others and the likelihood of substantial impact on others. The current wording of factors to consider in the ED amendments and the ES expand that to include requirements about tax agent actions, public trust and confidence in the tax system, and Parliamentary views, customers and competitors. These need to be amended to reflect the intent of APES 110 to only consider the impact of the actions (or inaction) of the client upon specific people and the public at large.

APES 110 at paragraph 360.29 A1 states

> *"The Member in Public Practice is expected to apply knowledge and expertise, and exercise professional judgement. However, the Member is not expected to have a level of understanding of laws and regulations beyond that which is required for the Professional Service for which the Member was engaged."*

A tax/BAS agent should not be expected to consider competition and consumer laws which are beyond the scope of their professional services.

These concepts should be removed from the ED amendments and the ES as they significantly depart from the APES 100 meaning of substantial harm.

Material

The term "material" is used in both section 15(2)(c) and 15(2)(d). In section 15(2)(c) it is used in the context of 'material particular' and 'material respect' and in section 15(2)(d) in "materially false or misleading".

The ES correctly discusses materiality with reference to the case of *Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 34 FCR 348. That case interpreted "material" to be "of moment or of significance, not merely trivial or inconsequential". The ES further explains that a material error must be "of substantial import, effect or consequence to the outcome for which it was given".

This is a significant threshold to be attained before a statement is materially false or misleading, or false or misleading in a material particular or respect. However, feedback from our members indicates that there is confusion regarding what level of materiality is to be applied. This is particularly the case as the Tax Practitioner Board (TPB) exposure draft guidance on this issue, TPB(I)D54/2024, states that "a material particular is something that is likely to be relevant to an entity's obligations or entitlements under the TASA or taxation law more generally". However, something that is relevant is not necessarily of substantial import and these concepts should not be conflated

Further work in relation to the explanation of the meaning of material in each statutory context is needed in the explanatory statement. Examples would be helpful to illustrate how they will apply in practice.

Section 25 Maintaining confidentiality in dealings with government

Use of the word "with" in the section 25 can cause confusion as to which type of tax-related service or engagement to which this provision applies. A distinction needs to be drawn between activities undertaken "for" government as envisaged in section 20 and broader activities undertaken by tax practitioners. The current wording in section 25 casts doubt on the ability of the tax practitioner to share information received from a regulator about their client where the information is obtained while acting on the client's behalf.

We acknowledge the example included in subsection 25(1) being:

> *Where a tax agent or BAS agent receives information from an Australia* government agency, when engaging with that agency for and on behalf of a client, it would be reasonable to conclude that the information received from the agency was authorised for disclose* to the client.*
>
> * *Australian/disclosure*

We further acknowledge that subsection 15AD(b) of the *Acts Interpretation Act 1901* states that an "*example may extend the operation of the provision"*. We are concerned that the use of the word "may" does not provide enough certainty that the example does in fact extend the operation of the provision.

If the government (including Treasury and the ATO) is concerned about ensuring that the scenario is covered where they give a small number of trusted tax agent individuals an embargoed copy or exposure draft copy of a document (e.g., exposure draft legislation, a proposed draft ruling, or other ATO administrative guidance or policy) and require the document and contents to be kept confidential, then we consider that the appropriate approach to be taken is for the relevant government agency to expressly request that the tax/BAS agent to do something for the government – i.e. to consider and revert with any comments, for the benefit of the government.

If, then section 25 is amended to replace "with the agency" with "for the agency", the scenario of confidential government discussions will be appropriately included, and there would also be an appropriate carving out of situations where the tax practitioner is acting "for" their client but working "with" the government.

We also recommend that Treasury consider developing another safe harbour example in the Determination to confirm that tacitly acquired general knowledge, insights or market intelligence is not something to which section 25 would apply, because tacit general knowledge, insights or experience are not in the nature of information that can be confidential information. Rather they are the perceptions that tax/BAS agents gain through their subject matter expertise.

A structural problem exists in the drafting of paragraphs (a) and (b) in both subsections (1) and (2). The test in paragraph (a) is one of a "reasonable to conclude" implied authority, whilst the test in (b) seems to suggest that there would need to be an express authority given by the agency, as well as compliance with any conditions of such express authority.

An amendment is required to both paragraph 25(1)(b) and 25(2)(b) to confirm that the test is one of a "reasonable to conclude" implied authority which would make it consistent with both 25(1)(a) and 25(2)(a).

Section 45 Keeping clients informed

The last paragraph starting at the bottom of page 8 of the ES:

> *"Disclosure to prospective and current clients should go beyond any non-compliance of the individual tax practitioner and extend to matters relating to any company or partnership they are associated with, if the matter could significantly influence the decision to engage or continue to engage a tax practitioner within the company or partnership. This provision will further increase the transparency of the tax profession, which is critical to ensuring the integrity of the tax system as a whole."*

This paragraph needs to be updated to reflect the complete re-drafting of section 45 and the changed approach to limit it to prescribed events and matters that are required to be disclosed, rather than all relevant matters that could significantly influence a current or prospective client's decision to engage an agent.

Our concerns are that:

- references to "if the matter could significantly influence the decision to engage or continue to engage" are tied back to language that no longer exists in the Determination and should be removed; and
- section 45 is focussed on "current and prospective clients". These are the current and prospective clients of the agent that engages clients. That will typically be the tax agent firm, and not the individual tax agents, other than those who are individual agents who act as supervisory agents for the tax agent firm.