23 January 2024

TPB Code Feedback
Law Division
Treasury
Langton Crescent
Parkes ACT 2600

By email: TPBCode@treasury.gov.au

Dear Director,

Tax Agent Services (Code of Professional Conduct) Determination 2023

The Australian Bookkeepers Association, Chartered Accountants Australia and New Zealand, CPA Australia, Financial Advice Association of Australia, the Institute of Public Accountants, the Institute of Certified Bookkeepers, National Tax & Accountants' Association, the SMSF Association, and The Tax Institute (together, the **Joint Bodies**) write to you as the peak professional accounting and tax practitioner bodies in Australia representing the tax profession, the superannuation sector, and financial advisers. The Joint Bodies welcome the opportunity to make this submission to the Treasury in relation to the exposure draft of the Tax Agent Services (Code of Professional Conduct) Determination 2023 (**draft Instrument**) and accompanying explanatory materials (**draft ES**).

In the development of this submission, we have consulted with members of the Joint Bodies to form a whole of industry view that represents the tax profession.

The Joint Bodies acknowledge the Government's efforts in designing the draft Instrument to ensure that the tax profession is held to the highest ethical standard, standards which the vast majority of the profession strives to achieve. We support all measures that intend to maintain or improve the integrity of our taxation and superannuation system and those who operate within it.

The Code of Professional Conduct (the **Code**) contained in the *Tax Agent Services Act 2009* (Cth) (**TASA**) is one of the key mechanisms through which confidence in the operation and administration of our taxation and superannuation system is maintained. Noting the importance of the Code to the community and the tax profession, the Joint Bodies are of the view that it is important to ensure that any amendments effectively address identified shortcomings in the existing regulatory environment. Amendments to the Code also need to be effective at improving and strengthening the integrity of the taxation and superannuation system.

To achieve this, changes to the Code need to conform with the same, effective principle-based drafting approach as the existing Code and ensure the policy intent is clearly conveyed through detailed explanation in the draft ES. This will better allow tax practitioners to understand and ensure they meet their obligations, while providing the Tax Practitioners Board (**TPB**) with a clear, robust and unambiguous framework from which it can develop practical guidance. Our submission intends to assist the Government achieve this through suggested amendments to the draft Instrument and draft ES.

Keeping the Code of Conduct concise, clear and capable of practical application

The Code plays an integral role in the tax profession and for the broader taxpayer community. The Code is a central set of obligations that sets the standard expected from registered tax agents and BAS agents (**tax practitioners**).

At their core, the obligations contained in the Code:

- promote honesty and integrity;
- put the client first, subject to the law;
- manage any conflicts of interest;
- ensure that tax agent services are provided competently;
- ensure that the taxation legislation is correctly applied;
- require tax practitioners to undertake their dealings with the TPB and the Australian Taxation Office (**ATO**) in a timely and efficient manner; and
- holistically promote confidence in the tax profession and administration of Australia's taxation legislation.

Effective regulatory regimes

The two aspects of an effective regulatory regime have been identified as:

- the legal structure (the rules), which must be easily understandable; and
- the implementation of the rules (the regulation), which must be done in a predictable and consistent manner.[1]

The Joint Bodies consider that, without the needed clarification, the draft Instrument may diminish and weaken the current TASA regulatory regime on both counts. We have set out below areas where we consider there are opportunities for improvement of what has been proposed.

First, the rules in the draft Instrument are not easily understandable. They are mostly either prescriptive (like standards) and/or vague (unfamiliar concepts), which makes them a poor framework for a code of conduct that was designed as a model of principles and ethics for tax practitioners to embody and implement in their practices, to regulate their conduct and how they operate and interact with clients and the tax system more broadly.

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[1] M Mann, 'What Constitutes a Successful Securities Regulatory Regime?' (1993) 3(2) Australian Journal of Corporate Law 178.

Second, in terms of implementation, the move away from a principle-based Code to a partly prescriptive Code represents a risk to the breadth and generality of the existing Code. There is a degree of duplication and overlap between the existing Code obligations and the proposed Code items even though section 5 of the draft Instrument states that the proposed Code items are intended to be 'additional'. In our view, all the proposed Code items can be categorised as falling within one of the themes of the existing Code items, being 'Honesty and integrity', 'Independence', 'Confidentiality', 'Competency', and 'Other responsibilities'.

From a statutory interpretation perspective, the introduction of new, explicit, obligations may create difficulties in their application. This is particularly problematic where existing Code items contain implicit obligations that reflect what is intended by the proposed Code items. This raises the potential question of whether there is inconsistency. We note that, to the extent that the Minister's proposed Code items conflict with the Code they are of no effect.[2] For this reason, we consider that the new prescriptive approach creates uncertainty and makes the future interpretation of aspects of the existing Code items less predictable and at greater risk of being interpreted contrary to their originally intended broad scope. This is an undesirable outcome for tax practitioners and the system as a whole as it would result in the changes not being sufficiently effective to strengthen the Code.

Clear, broad, flexible, and actionable principles are required

The obligations contained in the existing Code:

- are generally underpinned by clear, broad, flexible, and actionable principles, and are supported by a framework that imposes sanctions on tax practitioners who do not meet their obligations; and
- have been developed after extensive consideration through consultation with stakeholders (for the most part) during the Parliamentary process, with follow-up consultation with the TPB, and have been thoroughly tested in courts and tribunals.

The Joint Bodies are of the view that any modifications or additions to the Code should reflect best practice regulation, embody clear, broad, flexible and actionable principles, and should be supported by detailed guidance in the draft ES. We consider that the draft Instrument should be amended to ensure that it meets this standard.

Coherence of the Code is impaired

In the Joint Bodies' review of the draft Instrument, we have identified some concerns in the drafting and interaction between the new and existing Code items that have the potential to substantially impair the coherency of the Code overall. These concerns include that there are duplications, incongruency and a level of prescription that ostensibly alters the Code from being one of broad principles (how to conduct yourself) to a detailed rule book of activities that must/must not be undertaken (what actions to take and by when, or what actions not to take). We also observe that the existing Code comprises primarily positive duties, whereas the new Code items are predominantly negative duties (prohibitions).

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[2] TASA, section 30-12.

There appears to be no discernible policy reason for altering the legislative scheme in these significant ways for a part of the Code. The Code's core purpose seems to be dislocated and undermined by this approach. This results in an impairment of the coherence of the Code, which makes it very difficult to read and reconcile as a whole.

Government's regulatory reform agenda

The amendments should also meet the objectives of the Government's regulatory reform agenda to 'boost Australia's productivity and lower the cost of living by ensuring a fit for purpose regulatory environment.'[3]

The Government states that its goal to boost productivity across the economy can be achieved 'through reducing unnecessary or duplicative regulatory costs', and 'identifying opportunities to improve the quality of regulation'[4]. The Joint Bodies consider that the draft Instrument, as currently proposed, is unlikely to advance or achieve these objectives.

As the tax profession predominantly consists of small and micro businesses, they are sensitive to the burdens of highly prescriptive rather than flexible regulation, especially where those prescriptive requirements are tied to very serious consequences flowing from breaches of the Code, which can include termination of registration. We also note that the Government's regulatory reform agenda concerns 'building trust in government and its institutions' and 'putting business and community at the centre of policy and services.'[5] We consider that amendments to the draft Instrument should be made to enable efficiencies and better balance the impact on tax practitioners to promote productivity.

Amendments to the draft Instrument

We consider that some of the proposed obligations in the draft Instrument need clarification, particularly in respect of obligations that propose to:

- collectively promote confidence in the tax profession;
- promote the Code;
- keep proper client records;
- ensure tax practitioners' staff maintain their skills and knowledge relevant to the tax agent services they are providing; and
- ensure there are internal quality assurance processes relating to the Code.

Duplication of obligations

The draft Instrument proposes to effectively duplicate the obligation for tax practitioners to not make false or misleading statements to the TPB or ATO. The taxation legislation already contains a robust and extensive framework for tax practitioners who make false or misleading statements. The proposed additional obligation may result in tax practitioners being liable for multiple categories of sanctions in respect of the same act, potentially resulting in a duplication of punishments.

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3 Albanese Government (2024) Progressing Australia's Regulatory Reform Agenda, Purpose.

4 Albanese Government (2024) Progressing Australia's Regulatory Reform Agenda, Overview.

5 Albanese Government (2024) Progressing Australia's Regulatory Reform Agenda, Overview.

A similar concern exists for the breach reporting ('dob-in') provisions and the proposed additional obligation for tax practitioners to hold each other accountable. We consider that these proposed obligations are not needed given the existing framework.

Notifications to clients

We also consider that the proposed obligation contained in subsection 45(a) — relating to tax practitioners notifying clients of matters that would impact their decision to engage that practitioner for tax agent services — requires amendment. The wording in the draft Instrument appears to extend the requirement to provide notice to a wider range of matters than factors relating to the fitness and propriety of the practitioner to provide tax agent services, as described in the draft ES. Its application to 'prospective clients' is also overly broad, particularly as this may lead to premature disclosures.

Further, this proposed obligation will apply retrospectively if the draft Instrument is registered as drafted. We consider that the reporting obligations should commence after the date of registration for the instrument and apply to matters occurring on or after that date. Consideration should be given to whether a brief delay in start time would be appropriate to allow tax practitioners time to better understand this obligation.

Our detailed response is contained in **Appendix A**.

If you would like to discuss any of the above, or to arrange a meeting with the Joint Bodies, please contact The Tax Institute's Senior Counsel – Tax & Legal, Julie Abdalla, on (02) 8223 0058.

Yours faithfully,

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APPENDIX A

We have set out below our detailed comments and observations for your consideration. All legislative references are to the draft Instrument unless otherwise indicated.

Upholding and promoting the ethical standards of the tax profession

Promoting the Code of Professional Conduct and public confidence

Subsections 10(a) and 10(b) propose to introduce obligations requiring tax practitioners to 'uphold and promote the Code' and 'protect public trust and confidence in the integrity of the tax profession and tax system'. The draft ES states that these apply to both tax practitioners 'on their own, and in cooperation with other tax practitioners.'

We consider that these proposed obligations do not meaningfully add to tax practitioners' existing obligations under the Code. Although the underlying objectives of the Code include the promotion of the Code and public trust and confidence in the tax profession as broader outcomes, on their own they are nebulous concepts that cannot be readily applied or readily enforced as actionable obligations.

The Joint Bodies are of the view that obligations in the Code should be clearly defined and actionable principles that encourage and enforce behaviour that promotes the Code and public confidence in the tax profession. As a result, we consider that subsections 10(a) and 10(b) should be inserted into the draft Instrument or TASA in the form of an objects clause or contained only in the draft ES to explain the context for the other changes in the draft Instrument.

Holding each other accountable

Subsection 10(c) broadly proposes to require tax practitioners to work with each other and take reasonable steps to hold themselves and each other accountable. For reasons similar to those stated directly above regarding subsections 10(a) and (b), this is a difficult obligation to understand, apply and enforce. Further, the existing principle of honesty and integrity in subsection 30-10(1) of the TASA can be applied to achieve the same regulatory result. Additionally, the breach reporting provisions contained in Part 5 of Schedule 3 to the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023* (Cth) provide an actionable obligation on tax practitioners to give effect to the underlying intent, making subsection 10(c) unnecessary to the effective operation of the Code and result in potential confusion.

In practice, the proposed wording in subsection 10(c) likely introduces a positive obligation on tax practitioners to hold each other to account for their actions. This is a difficult standard for tax practitioners to meet as it may unreasonably imply that they are required to actively monitor the actions of other tax practitioners. As noted in the Independent Review of the Tax Practitioners Board (2019) (**James Review**), it is not appropriate for tax practitioners to have an obligation to be responsible for upholding the integrity of the tax system.

Paragraph 2.4 of the James Review further explains the rationale for this view and states that:

> 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.

Accordingly, we consider that subsection 10(c) should be removed from the draft Instrument. Alternatively, the draft ES should provide detailed guidance about how the proposed obligation is intended to differ in operation from the breach reporting provisions.

False or misleading statements

Subsection 15(1) proposes to require that tax practitioners cannot make materially false, incorrect or misleading statements (or statements they ought reasonably to have known were false or misleading) in any manner to the TPB or ATO, either in their professional or personal capacity. Further, subsection 15(2) proposes to require tax practitioners to correct a false or misleading statement. We consider that these obligations should be removed from the draft Instrument as there is an existing framework to appropriately manage the consequences for tax practitioners who make false or misleading statements to the TPB or the ATO.

Currently, tax practitioners who make false or misleading statements may be subject to civil penalties under section 50-20 of the TASA. Further, tax practitioners who recklessly make false or misleading statements may commit a criminal offence under sections 8N and 8K of the *Taxation Administration Act 1953* (Cth), and may be thereby subject to the consequences of breaching the *Criminal Code Act 1995* (Cth).

The Joint Bodies are also of the view that the Code would be hindered by the inclusion of subsections 15(1) and (2) as the existing framework has been designed by Parliament with appropriate consideration given to the:

- factors that constitute a false or misleading statement;
- appropriate punishment for making a false or misleading statement; and
- relevant safeguards that ensure due process is followed for any punishment.

The generality and breadth of the existing Code item regarding honesty and integrity covers false or misleading statements made to the TPB or the ATO in any event, without the need for a somewhat duplicated but inconsistent provision creating confusion around the existing legislative framework.

The requirements in subsections 15(3) and 15(4) to not make statements that are false, incorrect or misleading to other Australian Government agencies are typically already addressed in the legislation that relates to the relevant agency, such as the Australian Securities & Investments Commission.[6] It may therefore be unnecessary to include these in the Code.

[6] See sections 12GYG, 64, 169 and 199 of the *Australian Securities and Investments Commission Act 2001* (Cth).

Keeping of proper client records

Section 30 broadly proposes to require tax practitioners to keep detailed records of tax agent services provided to each of their clients and former clients. Subsection 30(2) details specific record-keeping requirements that tax practitioners must meet. We consider that, as currently drafted, the proposed obligation creates uncertainty regarding its scope and may unreasonably increase the compliance burden on tax practitioners.

Subsection 30(1) requires that tax practitioners must keep 'complete and accurate records', with paragraph 30(2)(c) requiring the level of detail to be 'adequate'. The proposed thresholds are new and untested concepts that are not supported with sufficient guidance about how these thresholds are defined or can be satisfied. This is likely to result in uncertainty for tax practitioners as to how they may satisfactorily meet these obligations.

Many tax practitioners may respond to such legal uncertainty by significantly increasing the records they develop and retain in a client engagement, records that are otherwise unnecessary to the engagement, in an attempt to comply with the proposed obligation.

We consider that proposed section 30 should be replaced with a clear and general principle that has sufficient flexibility to adapt to a wider range of circumstances. For example, tax practitioners could be required to:

> … keep records of tax agent services provided (either by the tax practitioner or on their behalf) to clients (and former clients) showing the nature, scope, outcome of the tax agent service. The records should include all the relevant information considered when providing the tax agent service and should be kept for at least 5 years after the tax agent service was provided.

Alternatively, we consider that detailed guidance is required on how tax practitioners can meet the proposed thresholds, and the process, if all the types of records listed were not relevant in their circumstances. Such guidance is particularly important from a practical perspective given the extensive reliance practitioners now place on digital service providers (**DSPs**) such as Xero and MYOB for tax compliance, and the cloud-based storage of relevant electronic records which DSPs provide. The Joint Bodies note that 'ownership' of such information and records is currently a matter of on-going concern in discussions in various ATO stewardship groups between the ATO, professional associations and other stakeholders, and DSPs.

Ensuring knowledge of others is maintained

Subsection 35(1) proposes to require tax practitioners to ensure that other persons providing tax agent services on their behalf maintain the skills and knowledge relevant to the tax agent services provided. We consider that the draft ES should provide detailed, practical guidance on how tax practitioners can meet this obligation. Without such guidance, tax practitioners may struggle to understand the scope of this obligation as the concept of adequate training has a subjective element. These difficulties are compounded when there are multiple layers of advisers, or offshore service providers, involved in a client engagement.

We consider that the guidance should also outline how a tax practitioner's obligations can be met with regard to unregistered employees or contractors who are not members of relevant professional associations. Although this category of staff may require more training development, a tax practitioner's obligations need to be proportionate to the skills of the employee or contractor, with an option for implementing a wider approach that covers a broader group of staff members. The guidance should also outline how a tax practitioner's obligations can be met with regard to staff or contractors located outside Australia (e.g. working in offshore process centres).

Our view is that the guidance should provide reasonable safe harbours for certain categories of staff. For example, the majority of those working in 'technical' roles in the tax profession who provide tax agent services on behalf of tax practitioners are members of at least one professional association that has minimum regular continual professional development (**CPD**) requirements as a condition of their membership. Professional associations' CPD requirements are generally consistent with the requirements of the TPB or go beyond those requirements. These memberships require members to maintain their skills and knowledge and demonstrate they have met this requirement in the event of a CPD audit by the relevant professional association. In our view, if those staff who are members of professional associations continue to meet their CPD obligations, it should be sufficient to meet this proposed obligation.

Quality assurance and other internal controls

Section 40 proposes to require that tax practitioners maintain 'adequate internal control procedures' to ensure their compliance with the Code. We consider this threshold to be unclear and may be difficult to apply in practice. The draft ES explains that this obligation can include, but is not limited to:

- regularly training staff regarding their obligations under the Code;
- ensuring there are information barriers when dealing with conflicts of interest;
- ensuring there are adequate review processes for tax agent services provided to clients;
- ensuring there are internal procedures that check for conflicts of interest; and
- documenting internal reporting lines and responsibilities.

From a practical perspective, many of the examples provided in the draft ES are likely to be implicitly required by existing obligations. We consider it important for additional obligations that codify existing implicit obligations to be worded in a principled manner that ensures consistency with the design of the Code. Without this, tax practitioners may not understand what is required from them. Accordingly, we consider that the wording in section 40 should be amended so that it more clearly explains the intended objective in a principled manner.

Further, we consider that section 40 should not use the term 'quality assurance'. The term 'quality assurance' has specific application in auditing and assurance standards issued by the Australian Auditing & Assurance Standards Board (**AUASB**). Tax practitioners who are also auditors may misunderstand the extent of the proposed obligations, conflating it with the requirements of AUASB. The term 'quality assurance' could be replaced with 'quality management' as used by the Accounting Professional & Ethical Standards Board in APES 320 *Quality Management for Firms that provide Non-Assurance Services*.

Suitability of obligations for categories of tax practitioners

Section 30, subsection 35(2) and section 40 propose to introduce a varying range of obligations for tax practitioners. The steps required for tax practitioners to satisfy these obligations are likely to vary depending on a number of factors including, but not limited to, the size of the tax practitioner's practice and the complexity of the arrangement. The draft ES notes this in relation to the obligations in sections 30 and 40.

We consider that, subject to the other comments in our submission, the sections should specifically note that the appropriate record keeping, supervision and internal quality management mechanisms will depend on the size and complexity of the tax practitioner's practice.

Keeping clients informed of all relevant matters

Subsection 45(a) proposes to require tax agents to inform clients and prospective clients of 'any matter that could be reasonably relevant and material to a decision by a client to engage' the tax practitioner to provide tax agent services.

The draft ES provides guidance on the types of information envisaged and includes, but is not limited to:

- a prior material breach of the TASA;
- a current or former investigation by the TPB;
- any sanctions imposed by the TPB;
- any conditions applying to registration; or
- any potential use of disqualified entities in relation to that client or a potential client.

The examples in the draft ES appear to primarily focus on matters related to the fitness of the adviser to be a tax practitioner.

However, the drafting of subsection 45(a) has the potential to encompass a much broader range of matters, such as relevant experience, conflicts of interest, the provision of advice on similar commercial matters, or even personal matters, that may factor into a client's decision to engage a tax practitioner. Such a wide scope creates uncertainty.

We are of the view that subsection 45(a) requires re-consideration. If the intention of this proposed obligation is to focus on matters relating to the fitness of the person as a tax practitioner, the subsection should be re-drafted to better reflect this intention. The Joint Bodies consider that it is appropriate to limit the scope of subsection 45(a) to matters concerning a tax practitioner's adherence to the Code, or their fitness to be a tax practitioner.

Extending the obligation to all 'prospective clients' is also very broad. While subsections 45(b) and (c) are constrained by the words 'upon engaging/re-engaging', subsection 45(a) is not so constrained. We query how a tax practitioner may comply with subsection 45(a) in terms of informing all persons who could fall within that concept. In theory, it could include any entity that is not a current client. The term is not defined. As drafted, we consider that the introductory words combined with subsection 45(a) are unreasonably broad. Therefore, in our view, this aspect also requires re-consideration and re-drafting.

Further, we consider that guidance should be included in the draft ES detailing:

- what constitutes a 'material breach', enabling tax practitioners to clearly understand and action their obligations; and
- the timeframe within which tax practitioners are required to notify their clients of the relevant matters. Subsection 45 implies that this should happen contemporaneously, however, the ES states that it needs to happen when engaging or re-engaging a client.

We also consider that these disclosures should be limited to material matters, and with respect to historical issues, should be limited to a defined timeframe, for example, a maximum of five years. In our view, a mistake made as a junior practitioner, should not remain subject to disclosure to clients for the rest of their career.

The underlying information referred to in the draft ES should be made publicly available on a register maintained by the TPB. This centralised approach is consistent with the regulation of other professions, would ensure greater transparency over the tax system, and allow tax practitioners to satisfy this obligation by referring their clients to the register.

The Joint Bodies are of the view that serious consideration should be given to any obligation that requires tax practitioners to disclose current investigations. An investigation is merely that: an investigation (not yet a finding). The investigation may have been initiated in response to information which later proves to be incorrect, inaccurate, or otherwise unsubstantiated. For such details to be made known to clients, in addition to potential reputational damage for the tax practitioner, it is possible that this information being placed in the public domain could prejudice future disciplinary proceedings to be taken by the TPB. Premature disclosure of this information could be a denial of procedural fairness to tax practitioners and is not in the public interest.

This proposed obligation may result in a client not engaging the tax practitioner (impacting income earning potential) and/or reputational damage which could be of lasting effect. There would be clear detrimental outcomes for the tax practitioner if the investigation ultimately finds no breach of the Code. It would be more equitable to require disclosure only after the TPB has made a final decision.

Transitional provisions

Proposed section 151 states that:

> Despite section 100, section 45 applies in relation to matters that have arisen on or after 1 July 2022. However, clients should be advised of a matter that arose on or before the day this instrument commenced within 90 days from that day.

In effect, this means that the proposed obligations in section 45 have retrospective application as tax practitioners are required to implement changes to notify clients of historical events. The Joint Bodies are of the view that, as a general principle, obligations should not be applied retrospectively, which would be the outcome if this provision is registered as drafted.

Tax practitioners have not been provided with sufficient notice that they need to implement changes to their record-keeping and engagement processes to meet any additional obligations on a retrospective basis. This may lead to circumstances where some tax practitioners are not able to meet the 90-day time limit, especially if obligations in subsection 45(a) include a broader range of matters than those related solely to the tax practitioner's fitness to provide tax agent services.

If the penalty applies retrospectively, then it is especially problematic. This is because tax practitioners will have been deprived of the ability to know prior to the relevant matter or event occurring that the matter was subject to a form of publicity penalty. From a natural justice perspective, the notification obligation should only apply to matters and events that tax practitioners have the opportunity to influence while they are aware of the existence of this obligation, so that they can modify their conduct in light of that knowledge. For this reason, the provision should only apply to matters and events arising prospectively.

As noted above, the sheer breadth of the relevant and material matters that could be caught by section 45 is unclear and uncertain. Given the broad and uncertain scope, it is unfair and inequitable for it to apply retrospectively. We consider that the proposed obligations in section 45 should commence only once the draft Instrument is registered and apply only to matters that arise after the date of its registration.

It is also our view that the transitional rule contained in proposed section 151 is confusing and inconsistent with the draft ES, in that the draft ES requires clients to be advised of relevant matters on engagement or reengagement, as opposed to within 90 days. This should be clarified and consistent as between the draft Instrument and the draft ES.