



21st November 2024

Tax Practitioners Board
GPO Box 1620
Sydney NSW 2001

Email: tpbsubmissions@tpb.gov.au

Dear Sir/Madam

SMSF ASSOCIATION SUBMISSION: TPB(I) D58/2024 MANAGING CONFLICTS OF INTEREST WHEN UNDERTAKING ACTIVITIES FOR GOVERNMENT AND MAINTAINING CONFIDENTIALITY IN DEALINGS WITH GOVERNMENT

The SMSF Association welcomes the opportunity to provide this submission in response to exposure draft TPB Information sheet TPB(I) D58/2024 *Managing conflicts of interest when undertaking activities for government and maintaining confidentiality in dealings with government* (D58/2024 ED).

The SMSF Association is generally supportive of the guidance on the obligations under section 20 and section 25 of the *Tax Agent Services (Code of Professional Conduct) Determination 2024* (Determination).

Importantly, section 20 creates a positive obligation on tax practitioners to not only disclose the details of a conflict they may have to a government agency, but to also disclose to the same agency another person's or entity's conflict of interest in undertaking the same or a different activity for that agency. However, the proposed guidance does not provide any further commentary or case studies on how this obligation may apply in practice beyond what is stated in the Explanatory Statement to the Determination.

The SMSF Association recommends the guidance is amended to include reasonable steps a tax practitioner could take to comply with this obligation and specific case studies that demonstrate how this obligation may apply in practice, including where the other person or entity is not an associate of the tax practitioner. This should include exploring the risks that the tax practitioner should consider before making such a disclosure and what protections may apply should they make the disclosure to the government agency.



Our detailed responses to the consultation paper are contained in the Attachment.

If you have any questions about our submission, please do not hesitate to contact Keddie Waller, Policy Manager via email keddiewaller@smsfassociation.com

Yours sincerely,

Tracey Scotchbrook
Head of Policy and Advocacy

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing the self-managed superannuation fund (SMSF) sector which is comprised of over 1.1 million SMSF members and a diverse range of financial professionals. The SMSF Association continues to build integrity through professional and education standards for practitioners who service the SMSF sector. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial advisers, tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them with access to independent education materials to assist them in the running of their SMSF.

TPB Information sheet TPB(I) D58/2024

Do you have any general comments regarding the guidance on the obligation under section 20 of the Determination?

The SMSF Association generally supports the guidance on obligations under section 20 of the Determination.

However, we make the following specific observations and recommendations:

Paragraph 20 and 21

- Given it is common for tax practitioners to be part of working groups with government agencies such as the ATO and TPB, we recommend explicitly including such roles as a relevant example.

‘What is a conflict of interest’?

- This section focuses on what is a conflict of interest for the purposes of section 20 of the Determination, rather than what is a conflict of interest. We therefore recommend amending this section to ‘What is a conflict of interest in dealings with Government’?

Paragraph 34

- The footnote to this paragraph states that registered tax practitioners should consider whether the existence of a material conflict of interest gives rise to any obligations they may have under the new breach reporting requirements. It is unclear what circumstances may arise where a material conflict may trigger a tax practitioner to act under the breach reporting obligations. We recommend an example is included for clarity.
- The footnote also notes that tax practitioners should consider any obligations they may have under non-compliance with laws and regulations framework (NOCLAR). We recommend the guidance is amended to make it clear that NOCLAR only applies to tax practitioners who are required to comply with APES 110 *Code of Ethics for Professional Accountants*.

Paragraph 36

- Paragraph 17 states that section 20 would include activities ‘in other skilled or expert capacity where the relevant activities falls outside of the definition of a tax agent service or BAS service’. Given this, we believe that it is not just the ‘size of the tax practitioner entity’ that would be a relevant factor to considering any material conflict of interest, but rather the nature of the work and client base of all relevant employing entity or entities of the tax practitioner.
- We question the relevance of whether the tax practitioner has provided training to staff on identifying, disclosing and documenting conflicts of interest, as a relevant factor in determining whether the tax practitioner themselves has taken reasonable steps to identify and document any material conflict of interest. Rather, the relevant factor may be whether the tax practitioner themselves has undertaken training on identifying, managing and disclosing conflicts of interest.

- While the factors listed in this paragraph can be considered collectively to assess compliance with the obligation, we believe the order should be revised to ensure factors such as establishing procedures for identifying and documenting conflicts of interest are listed and therefore considered before disclosure, record keeping and training.

Paragraph 39

- This paragraph restates the commentary from the Explanatory Statement to the Determination but provides no further commentary or practical guidance to support a tax practitioner navigate what will be a challenging situation, noting such actions could result in negative consequences for the tax practitioner.
- We recommend the guidance is amended to include practical steps a tax practitioner should consider to comply with this obligation, including where the conflict may be real or apparent.

What details need to be disclosed to the agency

- The information that may need to be disclosed will depend on the tax practitioner and relevant circumstances. We therefore recommend the heading for this section is amended to 'What details may need to be disclosed to the agency'.
- It is also possible that a government agency may have its own policy or procedure for declaring and managing conflict of interests. Therefore, we believe the guidance should be amended to acknowledge the information that will need to be provided may also be determined by the government agency.

Paragraphs 78 and 79 - Comparison with the Corporations Act 2001 (Cth) for tax agents with a tax (financial) advice services condition

- We do not believe it is helpful nor prudent to include this section in the proposed guidance, given the *Corporations Act 2001* is a separate and distinct regulatory regime to the *Tax Agents Services Act 2009*.
- While the intention of including this reference may be to provide commentary how they relate, we believe the guidance is instead potentially confusing, especially given the obligations apply in different professional contexts.
- The SMSF Association recommends that this section is removed from the guidance.

Are the factors outlined at paragraph 36 in relation to whether a registered tax practitioner has taken reasonable steps to identify and document any material conflict of interest adequate and appropriate? If no, please provide further detail including any additional factors that should be included.

Further to our previous comments regarding this paragraph, we do not believe that the likelihood of conflicts of interests arising is a relevant factor to determine whether a tax practitioner has taken reasonable steps to identify and document any material conflict of interest. Rather it should be the relevant steps the tax practitioner has taken to identify and address likely conflicts of interest, real or apparent, that may arise in each instance.

Another relevant factor that should also be considered is the type of work undertaken by the entity the tax practitioner is associated with, rather than just the type of work the tax practitioner performs themselves.

Are the steps and techniques outlined at paragraphs 53 and 54 in relation to reasonable steps to manage, mitigate, and where appropriate and possible, avoid, any material conflict of interest adequate and appropriate? If no, please provide further detail including any additional steps or techniques that should be included.

The steps and techniques provided as examples in paragraphs 53 and 54 are reasonable and provide tax practitioners with a range of mechanisms they can consider relevant to their circumstances.

However, we believe the final bullet point in paragraph 54 should be amended to:

- referring to independent sources of relevant guidance
- seeking advice from an independent third party, which may include legal advice.

Footnote 21 should also be moved to the 'independent sources of relevant guidance' to make it clear this is an example of relevant guidance, not an independent source of advice.

Of note, the reference should also say the 'Accounting Professional & Ethical Standards Board' not the 'Accounting and Professional & Ethical Standards Board'.

Do you have any general comments regarding the guidance on the obligation under section 25 of the Determination?

We generally support the guidance and note that paragraph 94 is an excellent example of practical guidance that adds value and context for tax practitioners in terms of their obligations and considerations.

Are there additional case study scenarios that would assist registered tax practitioners in understanding how the obligations under section 20 and 25 of the Determination apply practically? If so, what types of scenarios should be addressed?

While the case studies provide examples of how the obligations can apply in practice, they do not cover more challenging scenarios that a tax practitioner may face, including as outlined in paragraph 39:

'where a tax practitioner is undertaking an activity for an agency in their capacity as a tax practitioner and knows of another person's or entity's conflict of interest in undertaking the same or



a different activity for government, section 20 imposes an obligation on the tax practitioner to disclose details of that conflict of interest to the relevant government agency.

The SMSF Association recommends the guidance is amended to include specific case studies that demonstrate how this obligation may apply in practice, including where the other person or entity is not an associate of the tax practitioner. The case studies should explore risks that the tax practitioner should consider before making such a disclosure and what protections may apply should they make the disclosure to the government agency.