15 July 2024

The Hon Mr Stephen Jones MP
Assistant Treasurer and Minster for Financial Services

By email: stephen.jones@treasury.com.au

Cc: michael.wijnen@treasury.gov.au

Dear Assistant Treasurer,

Tax Agent Services (Code of Professional Conduct) Determination 2024

Chartered Accountants Australia and New Zealand, CPA Australia, Institute of Public Accountants, The Tax Institute, Australian Bookkeepers Association, Institute of Certified Bookkeepers, Institute of Financial Professionals Australia, Financial Advice Association of Australia, NTAA PLUS and SMSF Association (collectively **the Joint Bodies**) represent the tax profession as the external members of the Tax Practitioners Board (**TPB**) Governance and Standards Forum (**TPGSF**).

The Joint Bodies write to you to express our strong concerns about the construct and implications of provisions of the legislative instrument registered on 2 July 2024, the Tax Agent Services (Code of Professional Conduct) Determination 2024 (the **LI**). The LI imposes additional obligations on registered tax and BAS agents (**tax practitioners**) under the Code of Professional Conduct (**Code**) in section 30-10 of the *Tax Agent Services Act 2009* (**TASA**). This follows the release in December 2023 of an exposure draft of the LI (**draft determination**) for public consultation.

The Joint Bodies welcome more robust and effective regulation of the tax system and the tax profession. However, rules that create inconsistencies and uncertainties work against compliance and good governance. In practice, tax practitioners, many of them in small businesses, will find it difficult to comply with certain aspects of the LI in its current form.

From the outset, the Joint Bodies have consistently expressed concerns about the Minister being able to unilaterally alter Code obligations, as it avoids more robust scrutiny from Parliament. We request the Minister withdraw the LI as registered and conduct further targeted consultation to ensure an equitable outcome that allows effective compliance with and better oversight of the LI.

Our primary concerns relate to the following aspects of the LI:

1. **Section 45 — Keeping clients informed of all relevant matters**

   Our members are very concerned about the obligation to keep their current and prospective clients informed of 'any' matter that could significantly influence a decision of a client to engage them. For clarity, the scope of section 45 of the LI should clearly exclude matters unrelated to a tax practitioner's ability to provide tax agent services as a fit and proper person.

2. Section 151 — Retrospectivity

Tax practitioners need to consider matters as far back as 1 July 2022 to determine if these need to be disclosed to their current and prospective clients. Notwithstanding the transitional provision in section 151, the retrospective nature of the LI and the commencement date of 1 August 2024 places a significantly onerous and impracticable requirement on tax practitioners.

3. Confidentiality (subsection 15(2))

A new obligation in the LI that was not included in the draft determination requires a tax practitioner to report their client to the TPB or the Commissioner of Taxation if a statement prepared by the tax practitioner is materially false, incorrect or misleading and the client refuses to correct the statement within a reasonable time. This change could be considered to operate inconsistently with subsection 30-10(6) of the TASA and will cause unnecessary disruption and confusion for tax practitioners acting in their clients' best interests.

4. Start date

The Joint Bodies are concerned that the LI's commencement date of 1 August 2024 is unrealistic and unachievable for many tax practitioners who are already operating under heavy workloads to assist their clients and ensure tax revenue is correctly calculated and paid. As a minimum, a six-month period should be allowed before the commencement of the LI to enable an effective implementation.

Further consultation and co-design

Having regard to all the matters mentioned herein and otherwise included in the LI, we request the Minister withdraw the LI as registered and conduct further targeted consultation on the LI to ensure that the new measures can be fairly implemented and that there are no unintended consequences for tax practitioners or the regulator, the TPB.

We acknowledge the release of the draft determination for public consultation in December 2023 on which the Joint Bodies made a submission on 23 January 2024 (a copy of which is attached in **Appendix B**). Following this, some important changes were made to improve the LI based on our feedback, such as:

- better targeting the overarching ethical obligation in paragraphs 10(b) and 10(c) of the draft determination by imposing a prohibition against engaging in conduct that undermines public trust, rather than a general duty to protect public confidence in the integrity of the tax system;
- improving the record-keeping obligation to make it more flexible to adapt to a wider range of circumstances; and
- changing the quality assurance obligation to one instead relating to a quality management system.

However, the final LI contains previously unseen obligations together with significant additional implications of the provisions that were amended following the public consultation and which have not been subject to public consultation. Overall, we continue to hold significant concerns about the LI and the detrimental aspects that outweigh the improvements made to address our concerns.

The Code was originally written in a principle-based approach 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. Adding prescriptive obligations that use vague or unfamiliar concepts detracts from the breadth, generality and certainty of the existing Code. Further, there is a degree of duplication and overlap between the existing Code obligations in section 30-10 of the TASA and the additional Code items set out in the LI.

We set out below in **Appendix A** matters that, in our view, require amendment before the LI can be implemented. Accordingly, we seek the withdrawal of the LI as registered so further consultation can be undertaken. We support the intention of many of the provisions of the additional Code requirements, however, they must be implementable and able to be complied with by tax practitioners and effectively administered by the TPB.

In light of the above concerns, and to further constructive collaboration, the Joint Bodies request urgent discussions and we will be in contact this week. If you would like to discuss any of the above, or to arrange a meeting with the Joint Bodies, please contact the Co-Chair of the TPGSF, Matthew Addison, on 0421 553 613.

Yours faithfully,

Kelvin Deer
Director
Australian Bookkeepers Association

Simon Grant
Group Executive, Advocacy and International Development
Chartered Accountants Australia and New Zealand

Ram Subramanian
Interim Head of Policy & Advocacy
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General Manager Policy, Advocacy and Standards
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Tony Greco
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The Institute of Certified Bookkeepers

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Tracey Scotchbrook
Head of Policy and Advocacy
SMSF Association

Todd Want
President
The Tax Institute

Appendix A

1. Commencement date

At a minimum, we request a deferral of the commencement date of at least six months, as we sought in our joint submission, being no earlier than 1 February 2025. This is required to allow a reasonable period for the TPB to provide necessary guidance and for tax practitioners to become aware of and understand their new obligations under the LI.

The LI was made on 1 July 2024, registered on 2 July 2024, and has a commencement date of 1 August 2024. Practitioners are an integral part of the tax system but the commencement date in a few weeks does not recognise a collaborative process or respect for the role of the profession. These are major changes that affect tax practitioners in lawfully delivering their services to their clients. It is unreasonable that tax practitioners are expected to comply with their new obligations without any available guidance from the TPB and leaves little time for tax practitioners to understand and implement the required substantive changes during Tax Time which is a particularly busy period in assisting clients meet their tax obligations.

The timing of the commencement date is particularly concerning when the provisions of the LI are considered in conjunction with the new breach reporting obligations in the TASA, which commenced on 1 July 2024 and require tax practitioners to self-report 'significant breaches' of a Code item within 30 days of becoming aware, or when they ought to have become aware, of the breach. Tax practitioners may be left in the position of needing to self-report a 'significant breach' of the additional Code items even before the regulator (the TPB) has been able to finalise its guidance on the new breach reporting rules or provide even draft guidance, let alone final guidance on the implementation of the additional Code items in the LI.

The commencement date of 1 August 2024 is unreasonable and may not be practically achievable for a wide cross-section of the profession.

To allow for further consultation and the registration of a revised LI, we seek a six-month transition and implementation period.

2. Consistency with existing Code items

We draw your attention to section 30-12 of the TASA:

> 30-12 Minister may determine Code of Professional Conduct obligations
>
> (1) The Minister may, by legislative instrument, determine obligations for the purposes of subsection 30-10(17).
>
> (2) The obligations must relate to the professional and ethical conduct of *registered tax agents and BAS agents. The obligations may elaborate or supplement any aspect of the *Code of Professional Conduct but must not be inconsistent with the Code.

We are concerned that the new requirements expressed in the LI are inconsistent with existing provisions in the legislated Code items. In particular, we refer to areas of confidentiality and requirements to disclose certain information in further detail below.

We are also concerned that the obligations under the LI requiring certain disclosures may in fact be inconsistent with Human Rights and Privacy legislation.

3. Confidentiality – paragraph 15(2)(c)

We seek further consultation and consideration of the intent of the new requirement in paragraph 15(2)(c) of the LI (which was not in the exposure draft determination) and how this is intended to operate in conjunction with existing obligations.

Code item 6, in subsection 30-10(6) of the TASA, states:

> Confidentiality
>
> (6) Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission.

New paragraph 15(2)(c) of the LI imposes an obligation on tax practitioners to report on matters that may include clients' information, without their permission and with potential repercussions for clients. The requirement under paragraph 15(2)(c) imposes a new obligation that appears to be inconsistent with Code Item 6 in its operation and effect, contrary to subsection 30-12(2) of the TASA as set out above.

We appreciate what we understand to be the intent of the new provisions. However, with limited time to understand and implement a practical approach to give effect to the policy intent, and in the absence of adequate clarification and guidance from the regulator, this measure is not able to be implemented by 1 August 2024 as the LI currently requires.

4. Keeping proper client records – section 30

Without further practical guidance from the regulator, we remain concerned with the broad, onerous and comprehensive extent of this new requirement to expand the record-keeping requirements of tax practitioners.

Phrases in the accompanying Explanatory Statement to the LI (**the ES**) such as 'keep records of all relevant information underpinning that return …' and 'the records that a tax practitioner keeps in order to comply with section 30 could include the records that a client must also keep' are all-encompassing and may require tax practitioners to retain duplicate copies of significant client business records.

This new obligation appears to conflict with many government policies and legislative provisions relating to privacy, data minimisation and security.

5. Ensuring tax agent services … are provided competently – section 35

a. In the absence of consultation and co-design of further guidance and explanation, that part of the ES relating to section 35, read in conjunction with that part of the ES containing the list of bullets relating to section 10, creates a new systemic and documentation obligation on tax practitioners that requires significant consideration before commencement of the provision.

b. We are also concerned that subsection 35(1) creates an obligation for formal skills training in advance of the performance of any work to ensure those entities providing tax agent services on behalf of tax practitioners maintain the skills and knowledge relevant to the tax agent services the entities are providing (and those services are provided competently per the heading of the provision which does not itself form part of the law). Such skills and knowledge are typically, at least in part, acquired initially through on-the-job training. Further clarification and guidance on this point is required.

For these additional reasons, we are of the view that the commencement date of 1 August 2024 is not achievable.

6. Quality management systems – section 40

We note that the guidance in the ES in relation to section 10 of the LI acknowledges:

> What the obligation … requires in practice will depend on the individual circumstances of each tax practitioner and may depend on the size and nature of a particular practice and the degree of authority and control of an individual within a firm.

However, this recognition of the size and nature of a practice and the extent of authority and control of an individual within that firm is not replicated through the rest of the guidance on the LI. The extent of governance and documentation of quality management systems, and policies and procedures, in a large firm would be generally expected to be more sophisticated and exceed that developed and maintained by a sole practitioner. In the absence of further consultation and guidance that clarifies the extent to which these systems, policies and procedures are developed and maintained, and the nature of such policies and procedures, this provision is a significant overreach for many smaller tax practitioners and will present enormous challenges to practitioners to comply by 1 August 2024. Failure to do so could constitute a self-reportable breach if considered to be a 'significant breach' of the Code that would need to be reported within 30 days of 1 August 2024.

We note that while the TPB intends to consult and provide guidance on the LI, the likelihood of this being developed and available to tax practitioners before the commencement date of 1 August 2024 is very low.

7. Keeping your clients informed of all relevant matters (section 45)

We are particularly concerned at the requirement in section 45 which imposes a broad and all-encompassing obligation on every tax practitioner to advise all current and prospective clients of 'any matter that could significantly influence a decision of a client to engage …' the tax practitioner.

The obligation in section 45 that extends to 'any matter' that could significantly influence a decision of a client to engage a tax practitioner is an overreach. As section 45 is currently drafted, 'any matter' could easily be very widely interpreted to include matters unrelated to a tax practitioner's ability to provide tax agent services as a fit and proper person. We consider that the Government did not intend this consequence, but the far-reaching scope of the provision is extremely concerning and will cause great uncertainty and worry across the profession.

Without limiting the scope of paragraph 45(1)(a), the ES explains that relevant matters could include:

- a prior material breach of the Act or instruments made under the Act;
- a current investigation by the Board of a material breach;
- any sanctions imposed by the Board;
- any conditions applying to registration;
- any potential use of disqualified entities in relation to that client or potential client;
- any charge or conviction relating to an offence relating to fraud or dishonesty;
- imposition of a promoter penalty under the tax law; or
- any charge or conviction relating to a tax offence.

These matters broadly all relate to outcomes of investigations that can be substantiated and which are highly relevant to a client's decision to engage a tax practitioner.

However, the listed matter 'a current investigation by the Board of a material breach' is concerning as it could lead to premature disclosures in the case of investigations that ultimately clear a tax practitioner of any wrong-doing and cause irreparable damage to the practitioner's reputation and livelihood.

Further, the obligation of having to notify matters arising on or after 1 July 2022, more than two years before the commencement of the LI, imposes an unreasonable retrospective obligation on tax practitioners.

As raised in our submission, we consider that all reporting obligations should commence after the date of registration for the instrument and apply to matters occurring on or after that date. A six-month period should be allowed before commencement of the LI to accommodate for effective implementation.

Appendix B

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