

21 November 2024

Tax Practitioners Board
GPO Box 1620
SYDNEY NSW 2001

By email: tpbsubmissions@tpb.gov.au

Dear Sir/Madam,

Submission on TPB(I) D56/2024 to TPB(I) D61/2024

The Institute of Financial Professionals Australia (“IFPA”) welcomes the opportunity to provide our response to the above draft Information Sheets (IS) released by the Board on 24 October 2024, on aspects of the TASA Code of Professional Conduct (“the Code”).

SOME PRELIMINARY OBSERVATIONS

Before going into the detail of the IS, we would like to make some preliminary observations about the consultation process and also where things have ended up from the perspective of registered tax practitioners (RTPs) operating in smaller firms in particular.

CONSULTATION PROCESS

While the tabling of the initial Determination on 1 July 2024 caught many in the tax profession unaware, we commend the decision to afford RTPs more time to come to grips with the Code changes by introducing transitional provisions after concerns about timing were raised by the joint professional bodies (JPBs).

A subsequent confidential consultation process involving the JPBs resulted in the Assistant Treasurer tabling an amended Determination on 8 October 2024, while another confidential consultation process gave the JPBs the opportunity to help shape the contents of the draft IS.

Because the consultation process was an iterative one, with quick responses from the government side, IFPA as part of the JPBs had a refreshing sense of being heard and responded to in real time. There may have been reasons for this, including Parliamentary pressures, but the dynamic and constructive nature of the consultation process is something Treasury and the Board may wish to apply as a template in future areas of law development.

FINAL WASH UP

In adding more and more rules and exceptions in developing the amended Determination and the IS, particularly in relation to false or misleading statements, have we overdesigned the guidelines so that they risk becoming unusable for many RTPs?

Once all the guidance material is finalised, RTPs will need to have a sound grasp of the amended Determination, the Explanatory Statement and more than 140 pages of guidance material in order to form a view about whether or not they are in breach of the Code.

We note that all these Code changes are presented under the rubric of the PwC leaks, and some might argue that the existing Code must have been deficient since it failed to prevent those leaks.

However, and without knowing all the details of what may have transpired, it would be naïve to think that having had the ministerial Determination as amended in place at the time, supported by volumes of guidance material, would have changed anyone's behaviour. That behaviour, as reported in the media, was clearly in breach of the requirement to act honestly and with integrity, and we note that the RTP involved was de-registered by the TPB for a period of two years for being in breach of sub-section (1) of the Code.

The government and the Board need to consider the many thousands of smaller tax and accounting practices that will never be involved in confidential consultations around proposed changes to Australia's tax laws. Yet they will be directly impacted by a suite of new requirements to comply with which are neither modest nor straight-forward. This is all without any evidence of systemic ethical or behavioural problems being rife in the tax profession as a whole and comes on top of the breach reporting rules that commenced on 1 July 2024.

The existing Code obligations set out in s30-10 of the TAS Act 2009 remain in place, including sub-section (1):

“You must act honestly and with integrity.”

That fundamental requirement of truthfulness and ethical behaviour represents a sound principles-based foundation that already covers things like not making false or misleading statements, managing conflicts of interest and not breaching confidentiality agreements. By all means, elaborate on some of these matters if that is considered necessary, but do RTPs really need 140 pages of guidance material to know how to behave honestly, ethically and competently?

CASE STUDIES PROVE THE POINT

A number of the case studies in the draft IS illustrate the way in which many of the additional requirements imposed under the Determination as amended are already covered under the existing Code. In fact, in virtually every instance in the case studies where a RTP has been adjudged as having breached the Code under the Determination as amended, the guidance material observes that the RTP in question would likely also be in breach of their obligations under existing item 1 of the Code (acting honestly and with integrity) and may no longer be a fit and proper person to be registered as a tax agent.

If the offending behaviour is already caught under the existing Code, why do RTPs need to familiarise themselves with a lengthy and detailed set of new rules?

COMPOUNDING LACK OF CERTAINTY

The steps required to respond to the making of a false or misleading statement made by or on behalf of a client under s15(2) of the Determination as amended are expressed in an interconnected way that involves many separate “reasonable grounds to believe” elements.

For example, before reaching the point of being required to notify the Board or the Commissioner about a false or misleading statement made by or on behalf of a client, the RTP has to have reasonable grounds to believe the statement is false or misleading in a material particular and that the statement resulted from a lack of reasonable care, recklessness or the intentional disregard of a taxation law.

Having advised the client (after a reasonable time) of the need to correct the false or misleading statement and the consequences of failing to do so, the RTP is required to withdraw from the engagement unless doing so creates an unreasonable risk for the RTP, their family or at risk staff members.

Having warned the client and withdrawn from the engagement the RTP is further required to make the notification to the Board or the Commissioner where, after a reasonable time since warning the client, the RTP is not reasonably satisfied the client has corrected the statement and the false or misleading statement resulted from negligence or the wilful disregard of a taxation law and the RTP has reasonable grounds to believe that the client's actions have caused or will cause substantial harm to the interests of others, but again not if doing so creates an unreasonable risk to the RTP, their family or at risk staff members.

When all these forks in the road to having to “dob in” a client rely on the exercise of someone's judgement on successive gateways, it seems inevitable that reasonable people acting in good faith will sometimes reach different conclusions about what action is required (if any) in relation to a particular statement. This uncertainty should be acknowledged in IS D57/2024.

GUIDANCE MATERIAL HAS LIMITATIONS

IS D57/2024 makes an attempt to assist readers in navigating this uncertainty, but fails to achieve the level of certainty RTPs would be expecting.

For example, paragraph 45 lists seven dot points as relevant factors in determining whether a reasonable period of time has elapsed since the RTP came to reasonably believe that a statement given was materially false or misleading (including “any other relevant matters”). Some of these factors are useful up to a point, but there is little or no guidance given on how to weigh up different factors.

Paragraph 107 lists four relevant factors on a RTP not being “reasonably satisfied” that their client has corrected a false or misleading statement, but seems to fall back on fact and circumstances and a case-by-case approach. This is mostly a reflection of the subjectivity of the framework, which is probably unavoidable, but which needs to be acknowledged in the guidance material.

CASE STUDIES

In our view, most of the case studies in the IS are not nuanced enough. Where there are breaches of the Code, they are generally very clear breaches, so that the case studies are not as helpful as they might be in illustrating where the boundaries of the response framework lie.

“DOB IN” REQUIREMENT A STEP TOO FAR

Although the JPBs and the government have agreed to disagree on this point, we wish to state for the record that the requirement to inform the TPB or the Commissioner, as the case may be, about a false or misleading statement that the RTP believes has not been corrected is a step too far and could turn out to be counterproductive.

We acknowledge the comments in D57/2024 about striking a balance between a RTP’s obligations to their client and to the broader community and the tax system as a whole. However, IFPA believes there is a risk that some clients will not grasp the finer details of the response framework and stop being completely truthful in their dealings with their RTP, which would just make matters worse.

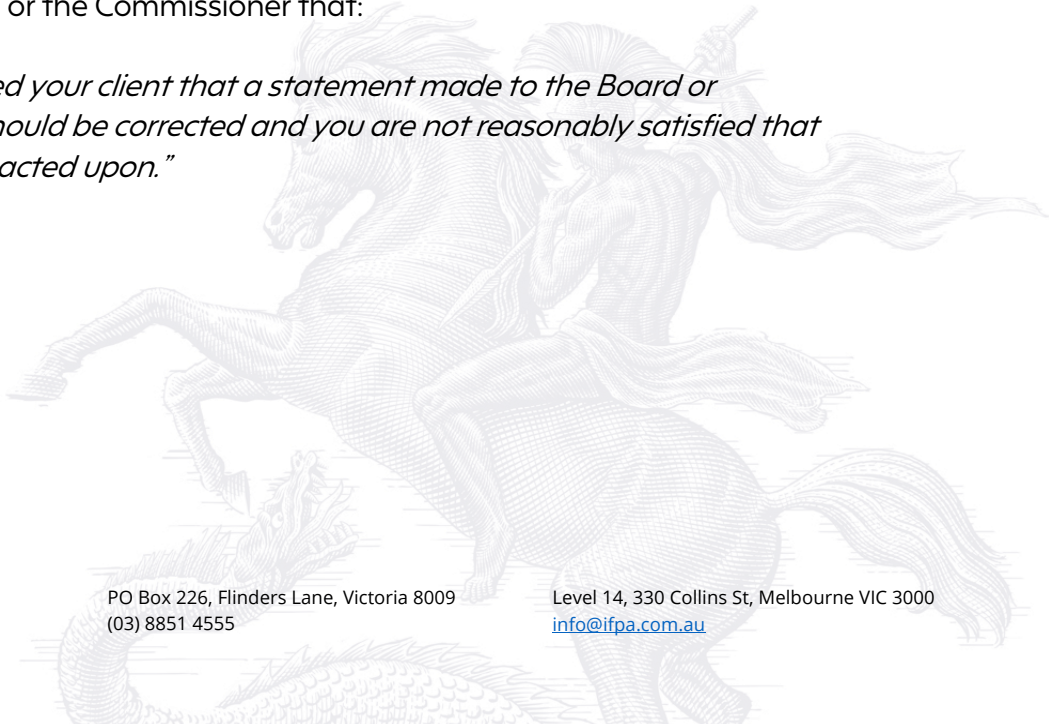
SPECIFIC COMMENTS

Given the confidential consultation process which has occurred already, we do not have many further specific comments, except for two in relation to IS D57/2024 on false or misleading statements:

Details of notification

Where all the conditions are satisfied, the Determination as amended only requires the RTP to inform the Board or the Commissioner that:

“you have advised your client that a statement made to the Board or Commissioner should be corrected and you are not reasonably satisfied that your advice was acted upon.”



There is no requirement to explain what the statement was, when it was made, why it is false or misleading in a material particular, what the correct statement should have been or how the client's failure to correct the statement is causing substantial harm to the interests of others.

This "bare bones" approach to informing the Board or the Commissioner is confirmed in paragraph 67, which states that the limited information disclosed is simply another piece of intelligence for the regulators to consider.

However, paragraph 73, which deals with the "further action" item 5 of the table under s15(2) of the Determination as amended, seems to be saying something different:

Further action for the purposes of this obligation may include (but is not limited to) the following:

- *providing additional information or material to the TPB or ATO, at the request of the TPB or ATO, to assist them in taking the appropriate action in response to the notification*

The IS clearly contemplates that if the regulator asks, then the RTP will be required to provide detailed information about the uncorrected false or misleading statement, provided doing so is in the public interest. In spite of the suggestion in paragraph 67 about the notification merely being another piece of intelligence, it seems highly likely that the Commissioner's curiosity would get the better of him and prompt him to seek additional information from the RTP under item 5, as suggested in paragraph 73.

If that is the case, paragraph 67 should alert users of the IS to the likelihood that the "bare bones" reporting under item 4 could well be expanded into a detailed information request under item 5 which the RTP would have to comply with if doing so is judged to be in the public interest.

RTPs making enquiries or seeking advice

One of the factors listed in paragraph 83 about having reasonable grounds for believing something includes:

"whether, and to what extent, the registered tax practitioner made reasonable enquiries or sought advice to confirm their belief"

We would be concerned if the language used here carries with it the implication that there is an onus on RTPs to perform any sort of investigatory activities in working through the response framework. If information comes to hand in the normal course of events that leads to the RPT forming the view that a false or misleading statement has been made, well and good. But making enquiries and conducting investigations are within the remit of the regulators, not RTPs.

Thank you again for the opportunity to comment on the draft Information Sheets.

Yours sincerely,



Pippa McKee

Chief Executive Officer

ABOUT THE INSTITUTE OF FINANCIAL PROFESSIONALS AUSTRALIA

The Institute of Financial Professionals Australia (“IFPA”) is a not-for-profit membership association (originally known as Taxpayers Australia, then more recently Tax & Super Australia) and has been serving members for over 100 years. With a membership and subscriber base of over 15,000 practitioners, our association is at the forefront of educating and advocating on behalf of independent tax, superannuation and financial services professionals. This submission is made by us on behalf of our members’ interests.

