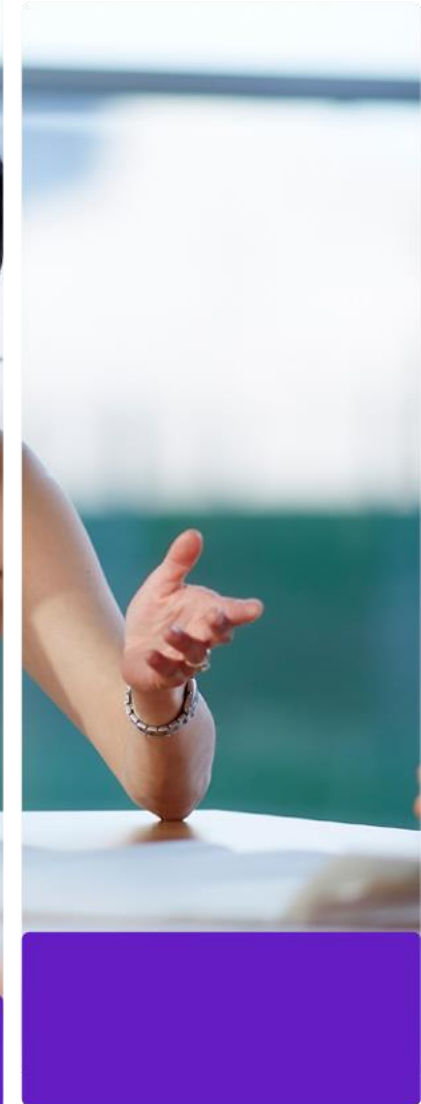
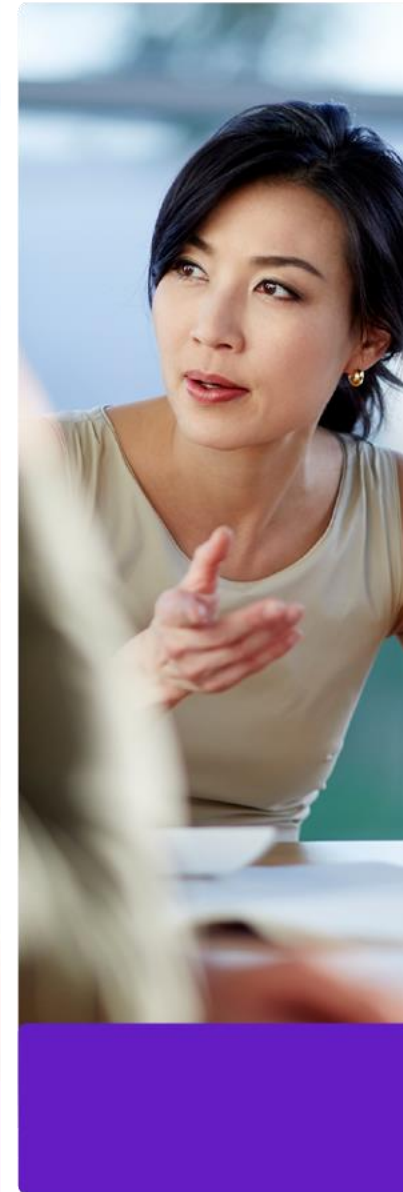


Accountants Daily Live webcast

29 January 2024

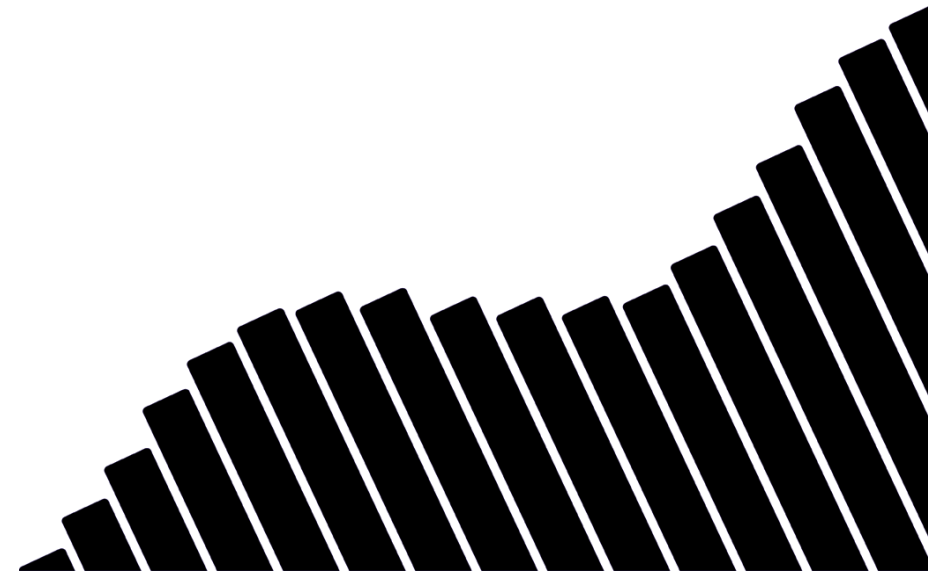
Online



Understanding your new TASA obligations

Presenter:

Robyn Jacobson, CTA FCA FCPA Registered tax agent
Senior Advocate, The Tax Institute



Content

Session outline

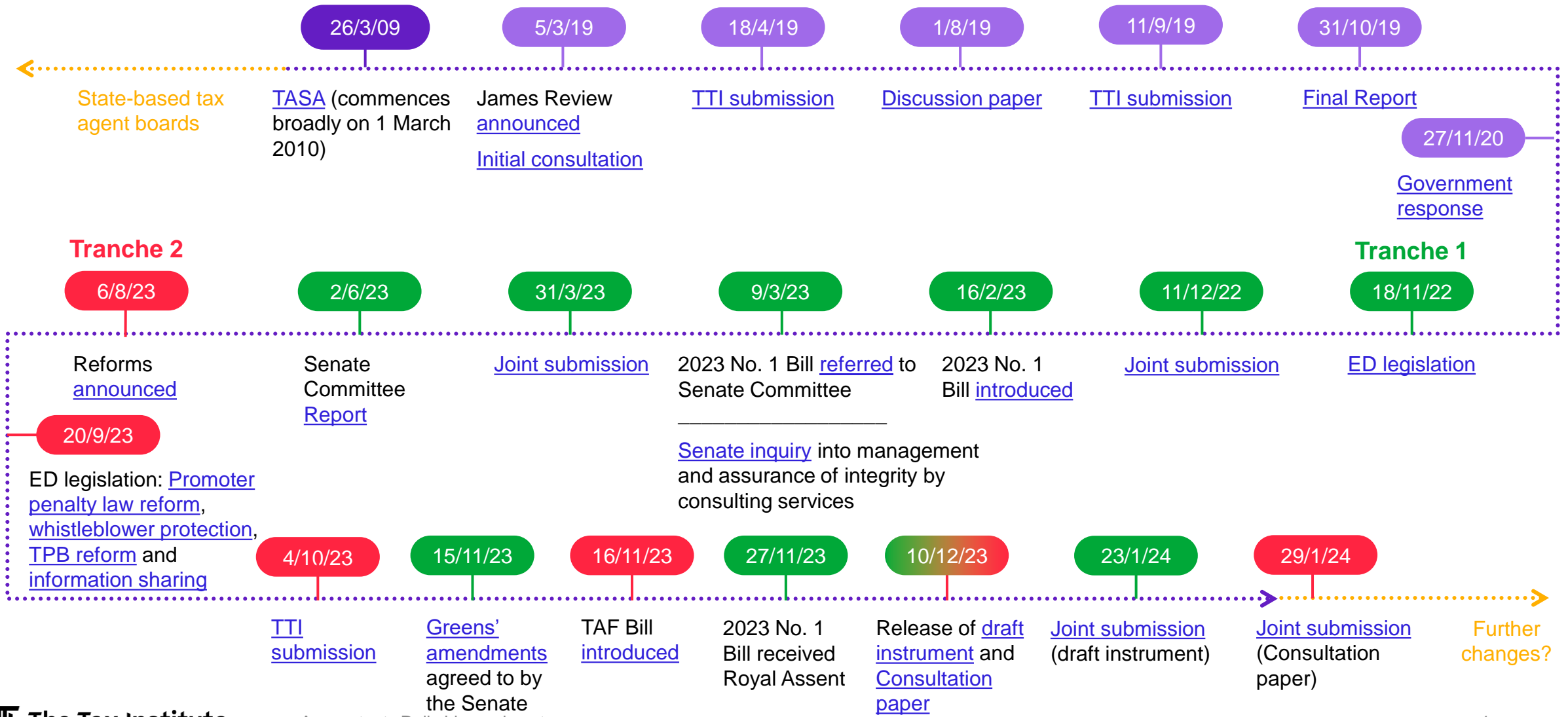
Introduction

Tranche 1 — new law

Tranche 2 — proposed law

Practical takeaways

Historical note ... the TASA journey ...



Code of Professional Conduct

Code item (section 30-10)

Honesty and integrity

- 1 You must act honestly and with integrity.
- 2 You must comply with the taxation laws in the conduct of your personal affairs.
- 3 If:
 - (a) you receive money or other property from or on behalf of a client; and
 - (b) you hold the money or other property on trust;you must account to your client for the money or other property.

Independence

- 4 You must act lawfully in the best interests of your client.
 - 5 You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax agent or BAS agent.
-

Code of Professional Conduct

Code item (section 30-10)

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.

Competence

- 7 You must ensure that a tax agent service that you provide, or that is provided on your behalf, is provided competently.
 - 8 You must maintain knowledge and skills relevant to the tax agent services that you provide.
 - 9 You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing you are doing on behalf of the client.
 - 10 You must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client.
-

Code of Professional Conduct

Code item (section 30-10)

Other responsibilities

- 11 You must not knowingly obstruct the proper administration of the taxation laws.
- 12 You must advise your client of the client's rights and obligations under the taxation laws that are materially related to the tax agent services you provide.
- 13 You must maintain professional indemnity insurance that meets the Board's requirements.
- 14 You must respond to requests and directions from the Board in a timely, responsible and reasonable manner.

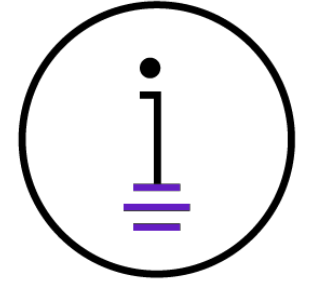
Other responsibilities — New code items

- 15 You must not employ, or use the services of, an entity to provide tax agent services on your behalf if:
 - (a) you know, or ought reasonably to know, that the entity is a disqualified entity; and
 - (b) the Board has not given you approval under section 45-5 to employ, or use the services of, the disqualified entity to provide tax agent services on your behalf.
- 16 You must not provide tax agent services in connection with an arrangement with an entity that you know, or ought reasonably to know, is a disqualified entity.
- 17 You must comply with any obligations determined under section 30-12 [Ministerial power to determine Code].

Tranche 1: new law



(James) Review of TPB



- Announced on 5 Mar 2019
- Purpose:
 - Independent review into the effectiveness of the TPB and the TASA to ensure that tax agent services (**TAS**) are provided to the public in accordance with appropriate professional and ethical standards
- [Final Report](#) released on 27 Nov 2020
- 28 recommendations — Government supports 20 of the recommendations in full, in part or in principle
- 5 of these recommendations form Tranche 1¹

Tranche 1:
enacted law

James Review recommendations

Recommendation	Govt response
1 1.1 Retain the TPB as the statutory authority responsible for regulating tax practitioners	Supports
2 2.1 Update the object clause of the TASA	Supports and included in Tranche 1 amendments
3 3.1 TPB should become a separate agency and receive its own specific appropriation from the Govt rather than as an allocated proportion of the ATO budget	Supports and included in Tranche 1 amendments
4 3.2(a) The CEO of the TPB should be accountable to the Board and become a statutory appointment rather than an ATO employee on secondment to the TPB 3.2(b) Formal secondment arrangements should be put in place for ATO staff seconded to the TPB	Supports in part (does not support the CEO becoming a statutory appointment)
5 3.3(a) TPB and ATO should maintain and publish a plan that sets out how they will work together 3.3(b) Create a Tax Practitioner Governance and Standards Forum (TPGSF)	Supports TTI is a member of the TPGSF

James Review recommendations

Recommendation	Govt response
6 3.4 Amend law to oblige cooperation between TPB/ATO and TPB/ASIC, and to share information/notify each other when belief formed that a breach has occurred	Supports in principle
7 3.5 Amend the whistleblower laws so TPB is an 'eligible recipient'	Noted, will consult (refer Tranche 2)
8 3.6(a) Board composition: at least 1 member should be a community member 3.6(b) Committee composition: 2 must be Board members, 3 rd at Board's discretion	(a) Supports in principle ² (b) Not supported
9 4.1(a) Education and experience requirements: undertake a review to determine if settings are at the right level 4.1(b) Determine whether an amendment to the TASR is appropriate to give the TPB greater flexibility to accept other qualifications that may not fall within traditional tax practitioner courses of study	Noted, will consult
10 4.2 TPB should no longer accredit professional associations as a 'recognised professional association' (remove registration entry pathway based on being a voting member of a TPB recognised professional association, with grandfathering)	Noted, will consult

James Review recommendations

Recommendation

Govt response

<p>11 4.3(a) Amend TASR to give the TPB greater flexibility to accept different types and periods of relevant experience</p> <p>4.3(b) Determine whether an amendment to the TASR is appropriate to amend the amount of relevant experience (and nature of experience) required to be registered as a BAS agent</p>	<p>(a) Supports</p> <p>(b) Will consult</p>
<p>12 4.4 Amend eligibility requirements for company and partnership tax practitioners in the TASA to include a requirement that the entity has appropriate governance arrangements in place that demonstrate who is accountable for the delivery of tax agent services</p>	<p>Supports, will consult</p>
<p>13 4.5(a) Amend the fit and proper person test in the TASA to ensure greater consistency with the requirements of other government regulators (e.g. ASIC, APRA)</p> <p>4.5(b) Current 5-year period in the TASA should be increased or removed entirely</p> <p>4.5(c) Those applying for registration with the TPB, including renewal, must disclose any spent convictions</p>	<p>All: Supports in principle</p> <p>(c) Will consult</p>

James Review recommendations

Recommendation

Govt response

14 4.6 Amend the TASA to include a requirement to declare close associates and/or employees who provide TAS and are affected by the fit and proper person test, and if they have engaged anyone listed on the proposed unregistered practitioners register	Supports in principle and included in Tranche 1 amendments
15 4.7 Convert the 3-year registration period to an annual period (with pro-rated fees)	Supports in part (fees to be determined) and included in Tranche 1 amendments
16 4.8 Following completion of the trial of tax clinics and decisions of the Government to either cease or extend the program, review the issue of tax clinics and the TPB to determine if any longer term amendments may be required	Noted, will continue with the program (too early to conduct a further review)
17 4.9(a) Only those tax intermediaries that are not regulated by any other government body should require registration with the TPB, despite otherwise being required to be registered with the TPB 4.9(b) TPB should have the power, through legislative instrument, to exclude certain other services from having to register with the TPB	Supports

James Review recommendations

Recommendation

Govt response

18 5.1 | Relevant Minister should be given a legislative instrument power to be able to supplement the Code to address emerging or existing behaviours and practices

Supports and included in **Tranche 1 amendments**

Any proposed changes to the Code will be considered first by the TPGSF

19 5.2 | LPP provision (such as in section 70 of the ASICA) be enacted in the TAA, and a protocol similar to that being developed between LCA and the ATO in relation to LPP claims should be developed for tax practitioners generally

Supports in part

20 6.1 | Increase TPB's sanctions powers, including introducing the following sanctions into the TASA, which could be applied to registered and unregistered practitioners: infringement notices, enforceable undertakings, quality assurance audits, interim suspensions, permanent disbarment and external intervention

Noted, will consult

James Review recommendations

Recommendation

Govt response

<p>21 6.2(a) Investigations can commence and/or continue once a registered tax practitioner either has their registration terminated, chooses not to re-register, or is seeking to surrender their registration</p> <p>6.2(b) Remove limitation on the TPB formally gathering information prior to commencing and notifying a tax practitioner of an investigation</p> <p>6.2(c) Remove 6-month timeframe to conduct an investigation</p>	<p>Supports in part</p> <p>(a) Supports and will amend the law</p> <p>(b) and (c) Will consult (refer Tranche 2)</p>
<p>22 6.3 Amend the TASR to enable the TPB to publish more detailed reasons for tax practitioner sanctions, including terminations, on the publicly available TPB Register</p>	<p>Noted, will consult (refer Tranche 2)</p>
<p>23 6.4 An administrative penalty regime, administered by the ATO, should be introduced to impose penalties on tax practitioners who demonstrate an intentional disregard of the tax laws in making, or being involved in making, a statement to the Commissioner</p>	<p>Noted</p>
<p>24 6.5 Safe harbour protection should be extended to cover instances where the tax agent or BAS agent has demonstrated recklessness or intentional disregard with respect to a taxation law</p>	<p>Noted</p>

James Review recommendations

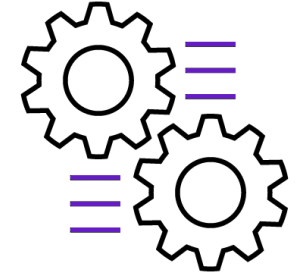
Recommendation

Govt response

25 7.1 A new model should be developed for regulating tax (financial) advisers in consultation with ASIC, FASEA, the TPB and Treasury so tax (financial) advisers will be subject only to a single disciplinary regime	Supports in principle
26 7.2 The Government should initiate a specific review of what advice accountants can and cannot give in respect of superannuation and which accountants that might apply to — such a review could perhaps be undertaken by the Productivity Commission	Supports in principle
27 8.1(a) Expand details of tax practitioners that are currently included on the TPB Register to include publishing a wider range of information, decisions and outcomes 8.1(b) Make available a register of unregistered tax practitioners 8.1(c) Remove time limits on how long certain information appears on the Register	(a) Supports in principle (b) and (c) Not supported (refer Tranche 2)
28 8.2 Include details of tax practitioners who are included on the TPB Register on the Modernising Business Register ³	Supports in principle

³ The Government [announced](#) on 28 Aug 2023 that it will not be proceeding with the Modernising Business Registers program following independent review findings that the program could not deliver value for money, with massive budget and timeline blowouts

Use of disqualified entities⁴



Commenced
1 Jan 2024

New Code items 15 and 16

- New subsection 30-10(15):

You must not employ, or use the services of, an entity to provide TAS on your behalf if:

- (a) you know, or ought reasonably to know, that the entity is a disqualified entity; and
- (b) the Board has not given you approval under section 45-5

- New subsection 30-10(16):

You must not provide TAS in connection with an arrangement with an entity that you know, or ought reasonably to know, is a disqualified entity

- Registered tax agent or BAS agent (**registered agent**) may apply to the TPB for approval to employ, or use the services of, an entity to provide TAS on their behalf⁵

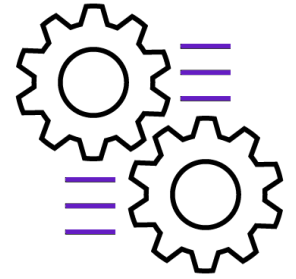
⁴ Gives effect to recommendation 4.6: Part 1 of Schedule 3 to the [2023 No. 1 Act](#)

⁵ New subsection 45-5(1)

Use of disqualified entities

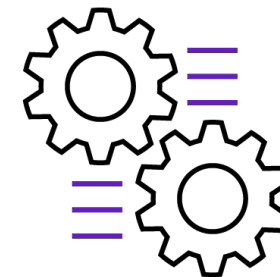
Disqualified entity (DQE)⁶

- An entity is a DQE if it is neither a registered agent nor a qualified tax relevant provider and, within the last 5 years, has:
 - been convicted of a serious taxation offence, a serious offence or an offence involving fraud or dishonesty
 - been penalised under the promoter penalty provisions
 - been an undischarged bankrupt or has gone into external administration
 - been subject to sanctions for a breach of the Code
 - had their registration terminated
 - had their application for registration or renewal rejected
 - been found to have contravened the TASA



**Commenced
1 Jan 2024**

Use of disqualified entities



**Commenced
1 Jan 2024**

- **Obligations of DQE⁷**

- Seeking to provide TAS to a registered agent — required to notify the agent that they are a DQE before they are employed or engaged
- Providing TAS to a registered agent — required to notify the agent that they have become a DQE **within 30 days** of becoming aware they are disqualified (see **transitional rule** below)⁸

- **Penalty for failure to notify the agent⁹**

- Individual — 250 penalty units (currently \$78,250 → \$82,500¹⁰)
- Body corporate — 1,250 penalty units (currently \$391,250 → \$412,500¹⁰)

- **Transitional rule¹¹ — if:**

- immediately before 1 Jan 2024, a registered agent employs or uses a DQE (that is a DQE on 1 Jan 2024) to provide TAS on their behalf;
- immediately before 1 Jan 2025, the registered agent employs or uses the DQE to provide TAS on their behalf; and
- the DQE has not already notified the registered agent that they are a DQE,

the DQE must notify the registered agent within **30 days** of 1 Jan 2025 (by 30 Jan 2025)

⁷ New subsection 45-10(1)

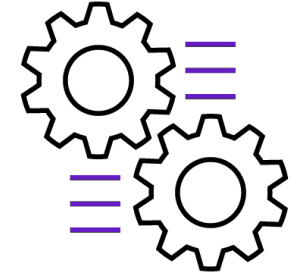
⁸ New subsection 45-15(1)

⁹ New subsection 45-10(3)

¹⁰ Following proposed increase in the amount of a penalty unit from \$313 to \$330: MYEFO 2023–24

¹¹ New section 45-20

New Code items | Draft TPB guidance



**Commenced
1 Jan 2024**

- [TPB\(I\) D51/2023](#) Code of Professional Conduct – Employing or using a disqualified entity in the provision of tax agent services without approval
 - Explains the obligations of registered tax practitioners under Code item 15 (subsection 30-10(15) of the TASA) in respect of their employment, contracting with, or otherwise use of a ‘disqualified entity’ to provide tax agent services on their behalf
 - Comments by 16 Feb 2024
- [TPB\(I\) D52/2023](#) Code of Professional Conduct – Prohibition on providing tax agent services in connection with an arrangement with a disqualified entity
 - Explains the obligations of registered tax practitioners under Code item 16 (subsection 30-10(16) of the TASA) in respect of their arrangements with a ‘disqualified entity’
 - Comments by 16 Feb 2024

Annual registration¹²



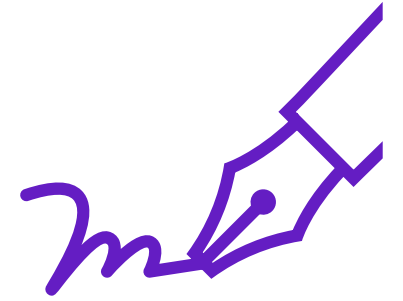
**Commences
1 Jul 2024**

- Registration period reduced from at least every 3 years to at least every year¹³
- Will align with other regulatory obligations of tax practitioners such as maintaining professional indemnity insurance
- To accommodate the shorter renewal period, the maximum time permitted for the TPB to process and determine the outcome of an application will reduce to **4 months** (currently 6 months)
 - Within this 4-month timeframe, TPB must decide whether to accept the new registration application
 - If the applicant does not receive a final decision in this timeframe, the registration application is considered to be rejected by the TPB
 - Renewal of an agent's registration will continue to be active until a final decision is made by the TPB

¹² Gives effect to recommendation 4.7: Part 2 of Schedule 3 to the [2023 No. 1 Act](#)

¹³ Section 20-25 (as amended)

Enable the Minister to determine Code¹⁴



Commences
1 Jan 2024

- [Code](#) sets out professional and ethical standards that registered agents are required to comply with (see **slides 6–8**)
- Minister will be able to specify, in a legislative instrument, additional obligations with which registered agents must comply¹⁵

- **New Code item 17:**¹⁶

You must comply with any obligations determined under section 30-12
[Ministerial power to determine Code]

- Power cannot be used to reduce any existing obligations under the Code
- Obligations must relate to the professional and ethical conduct of registered agents
- Obligations may elaborate or supplement any aspect of the Code but must not be inconsistent with the Code (to the extent a Ministerial determination conflicts with the Code, the conflicting provisions have no effect)

¹⁴ Gives effect to recommendation 5.1: Part 1 of Schedule 3 to the [2023 No. 1 Act](#)

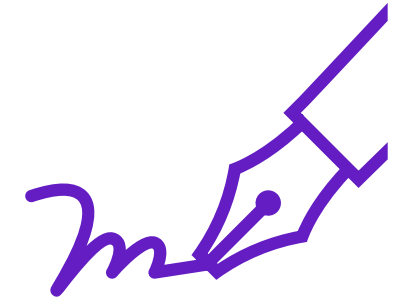
¹⁵ New section 30-12

¹⁶ New subsection 30-10(17)

Draft Ministerial Determination¹⁷

Additional obligations

1. Must uphold and promote the ethical standards of the tax profession¹⁸
2. False or misleading statements:¹⁹
 - Must not make a statement to the TPB, the Commissioner or a government agency that you knew, or ought reasonably to have known, was false, incorrect or misleading in a material particular
 - Must take all necessary steps to correct such a statement as soon as possible after becoming aware
3. Conflicts of interest in dealings with government:²⁰
 - Must take reasonable steps to identify and avoid any material conflict of interest in connection with an activity undertaken for a government agency
 - Must disclose details of any conflict of interest that arises as soon as possible after becoming aware
4. Must maintain confidentiality in dealings with government²¹



Proposed to commence
the day after the
instrument is registered

Joint Bodies'
submission

¹⁷ Exposure draft of the [Tax Agent Services \(Code of Professional Conduct\) Determination 2023 \(Determination\)](#)

¹⁸ New section 10 of the Determination

¹⁹ New section 15 of the Determination

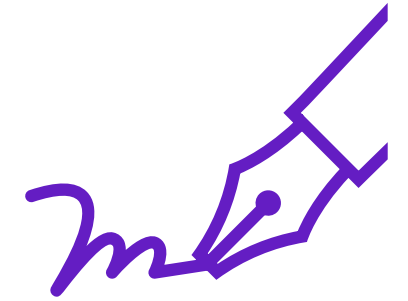
²⁰ New section 20 of the Determination

²¹ New subsection 25(1) of the Determination

Draft Ministerial Determination

Additional obligations

4. (cont.) Must not use any information received (directly or indirectly) from a government agency for your personal advantage, or that of your associate, employee, employer or client without authorisation²²
5. Must keep complete and accurate records relating to the TAS you have provided to each client, including former clients (retain for 5 years after service provided)²³
6. Must ensure those providing TAS on your behalf maintain knowledge and skills relevant to the TAS they are providing, and must ensure those providing TAS on your behalf are appropriately supervised²⁴
7. Must maintain adequate internal control procedures to ensure your compliance with the Code²⁵
8. Must keep your clients informed of all relevant matters²⁶



**Proposed to commence
the day after the
instrument is registered**

[Joint Bodies'
submission](#)

²² New subsection 25(2) of the Determination

²³ New section 30 of the Determination

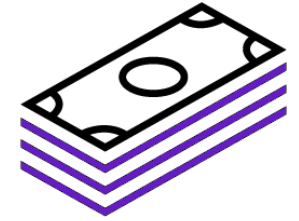
²⁴ New section 35 of the Determination

²⁵ New section 40 of the Determination

²⁶ New section 45 of the Determination

TPB Special Account²⁷

- Establishment of a TPB Special Account²⁸ — means funding for the TPB will largely be independent of the ATO
- Enables a special appropriation to be made specifically for the TPB
- Increases the TPB's independence as it will be legally entitled to an established amount
 - Compared to the current process where the ATO has the final decision regarding the portion of its annual departmental budget allocated to the TPB

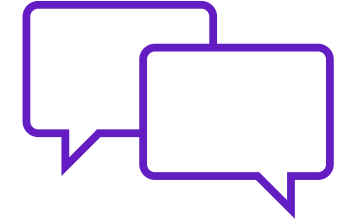


**Commences
1 Jul 2024**

²⁷ Gives effect to recommendation 3.1: Part 3 of Schedule 3 to the [2023 No. 1 Act](#)

²⁸ New Subdivision 60-G

Objects clause²⁹



**Commenced
1 Jan 2024**

- Updates and modernises the object of the TASA:³⁰

To support public trust and confidence in the integrity of the tax profession and of the tax system by ensuring that TAS are provided to the community ~~public~~ in accordance with appropriate standards of professional and ethical conduct

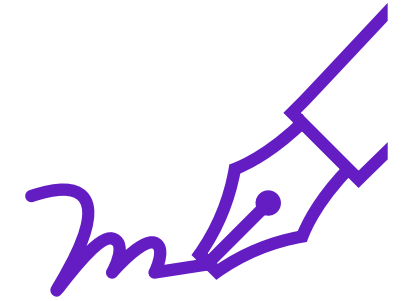
- This is to be achieved by (among other things) providing for:
 - (a) the registration and regulation, by a national Board, of entities that provide TAS;
 - (b) a Code for registered agents;
 - (c) sanctions to discipline entities in relation to their conduct as a registered agent; and
 - (d) sanctions where TAS are provided otherwise than in accordance with the TASA

²⁹ Gives effect to recommendation 2.1: Part 1 of Schedule 3 to the [2023 No. 1 Act](#)

³⁰ Subsection 2-5 (as amended)

Appointments to the TPB³¹

- In appointing a Board member, the Minister must be satisfied the individual is a ‘community representative’ — i.e. they are **not** any of the following:³²
 - a partner in a partnership or an executive officer of a company (director, secretary or senior manager within the meaning of the Corps Act) that is a **prescribed tax agent** (i.e. is a registered agent and has **more than 100 employees**)
 - a former partner in a partnership that is currently a prescribed tax agent, if the individual is receiving regular and ongoing benefits, or has within the last 6 months received a **material benefit**, from the partnership
 - a former executive officer of a company that is currently a prescribed tax agent if either of the following apply:
 - the individual is receiving regular and ongoing benefits, or has within the last 6 months received a material benefit, from the company
 - the individual holds shares in the company



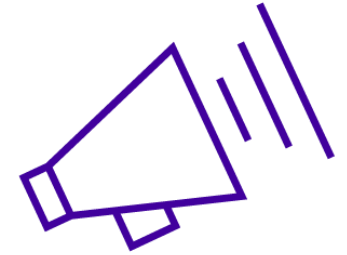
**Commences
1 Oct 2024**

³¹ Gives effect to [amendments](#) tabled in the Senate by the Greens: Part 4 of Schedule 3 to the [2023 No. 1 Act](#)

³² New section 60-25

Additional obligations ('dob-in' provisions)³³

- Where an order is made by the TPB to take action, the registered agent must notify all their current clients about the findings of the TPB's investigation specified in the order³⁴
- Registered agents must notify the TPB if they have reasonable grounds to believe:
 - They have breached the Code and the breach is a 'significant breach'³⁵
 - Another agent has breached the Code and the breach is a 'significant breach'³⁶



**Commences
1 Jul 2024**

³³ Gives effect to [amendments](#) tabled in the Senate by the Greens: Part 4 of Schedule 3 to the [2023 No. 1 Act](#)

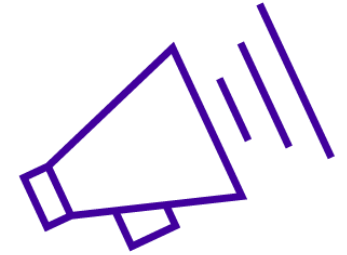
³⁴ New paragraph 30-20(1)(d)

³⁵ New paragraphs 30-35(1)(ba), 30-35(2)(ba) and 30-35(3)(ba)

³⁶ New subsection 30-40(1)

Additional obligations ('dob-in' provisions)

- Registered agents must also **notify the accredited professional association** if they are aware of that other agent's membership³⁷
- Must notify the TPB or the association **within 30 days** of the day on which:
 - in the case of themselves — they became, or ought to have become, aware that the breach occurred and that the breach is a 'significant breach'³⁸
 - in the case of another registered agent — they first have, or ought to have, reasonable grounds to believe that the other agent breached the Code and that the breach is a 'significant breach'³⁹



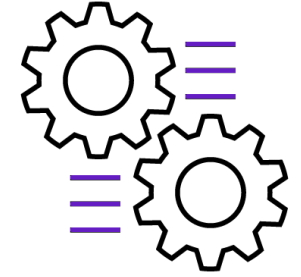
**Commences
1 Jul 2024**

³⁷ New subsection 30-40(2)

³⁸ New subsection 30-35(4) as amended

³⁹ New subsection 30-40(3)

Meaning of ‘significant breach’⁴⁰

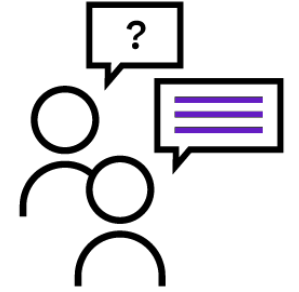


**Commences
1 Jul 2024**

Significant breach of the Code means a breach of the Code by a registered agent if the breach:

- (a) constitutes an **indictable offence**, or an **offence involving dishonesty**, under an Australian law;
- (b) results, or is likely to result, in **material loss or damage** to another entity (including the Commonwealth);
- (c) is **otherwise significant**, including taking into account any one or more of the following:
 - (i) the number or frequency of similar breaches by the agent;
 - (ii) the impact of the breach on the agent’s ability to provide TAS;
 - (iii) the extent to which the breach indicates that the agent’s arrangements to ensure compliance with the Code are inadequate; or
- (d) is a breach of a kind prescribed by the regulations for the purposes of this paragraph

Concerns



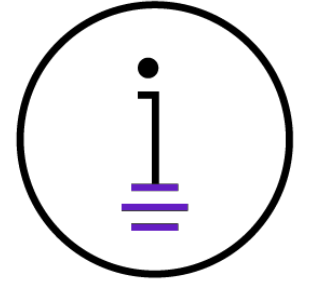
Joint Bodies' [media release](#) issued on 15 Nov 2023

- ‘**Serious concerns remain** that the amendments in their current form may have devastating impacts for any tax practitioner falsely accused of misconduct’
- ‘**Poor tax law design and lack of consultation** can often lead to poor or unintended outcomes for everyone involved, which is why the usual process of parliamentary consultation is in place and should have been followed in this case’
- ‘Any amendments to the law must consider all impacts and become good law, based on sound and considered policy’

Tranche 2: proposed law

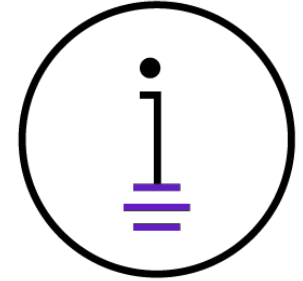


Package of reforms



- **6 Aug 2023:** [Announced](#) by the Government
 - Strengthen the integrity of the tax system
 - Increase the powers of our regulators
 - Strengthen regulatory arrangements to ensure they are fit for purpose
- **6 Aug 2023:** TTI issued a [media release](#)
 - Welcomed the announcement of reform measures to increase the integrity of our tax system and improved collaboration between government agencies and with professional associations
 - TTI members are subject to our [by-laws](#) and [Code of Professional Conduct](#)
- **4 Oct 2023:** [TTI submission](#) to Treasury on exposure draft legislation
- **16 Nov 2023:** [TAF Bill](#) introduced into House of Reps; before [Senate Economics Legislation Committee](#) which will report by 18 Apr 2024
- **10 Dec 2023:** [Draft Determination](#) (Code) and [Consultation Paper](#) on TPB sanctions

Overview of proposed changes



Reform of promoter penalties⁴¹

- Increased maximum promoter penalties (**PP**) for advisers and firms who promote tax exploitation schemes — from \$7.8m to more than \$780m
- Expand PP laws so they are easier for the ATO to apply
- Increase the time limit for the ATO to bring Federal Court proceedings on PP from 4 years to 6 years after the conduct occurred

Commencement⁴⁵

Expanding whistleblower protection⁴²

- Protect whistleblowers when providing TPB with evidence of agent misconduct

Commencement⁴⁵

Reform of TPB⁴³

- Give the TPB more time to complete complex investigations — up to 24 months
- Improve TPB's public register of practitioners

Commencement⁴⁵

Changes to information sharing⁴⁴

- Remove limitations in the tax secrecy laws that are a barrier to regulators
- Enable ATO and TPB to refer ethical misconduct by advisers to professional associations for disciplinary action

Commencement: day after Royal Assent

⁴¹ Schedule 1 to the TAF Bill

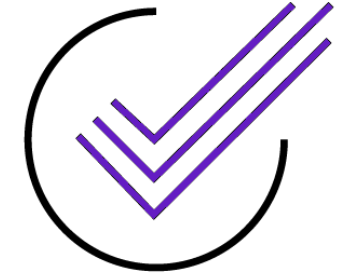
⁴² Schedule 2 to the TAF Bill

⁴³ Schedule 3 to the TAF Bill

⁴⁴ Schedule 4 to the TAF Bill

⁴⁵ Later of: first 1 Jan, 1 Apr, 1 Jul or 1 Oct after the day of Royal Assent; or 1 Jul 2024

Promoter penalties | Overview



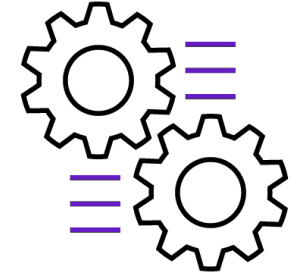
Current requirements

- An entity must not engage in conduct that results in that (or another) entity being a promoter of a tax exploitation scheme⁴⁶
- An entity must not engage in conduct that results in a scheme that has been promoted on the basis of conformity with a product ruling (**PR**) being implemented in a materially different way from that described in the PR⁴⁷
 - Not 'materially different' — if the tax outcome for participants in the scheme is the same as that described in the PR

⁴⁶ Subsection 290-50(1) of Schedule 1 to the TAA

⁴⁷ Subsection 290-50(2) of Schedule 1 to the TAA

Promoter penalties | Overview



Current definitions

- An entity is a **promoter** if all the following requirements are met:⁴⁸
 - the entity markets the scheme or otherwise encourages the growth of the scheme or interest in it;
 - the entity or an associate receives consideration in respect of marketing the scheme; and
 - it is reasonable to conclude that the entity had a substantial role in marketing the scheme

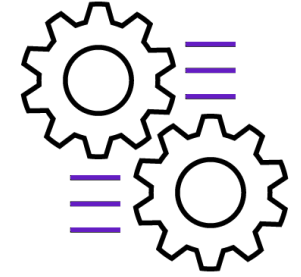
An entity is not a promoter merely because the entity provides advice about the scheme

- A scheme is a **tax exploitation scheme** if it is:⁴⁹
 - reasonable to conclude that an entity entered into or carried out the scheme with the sole or dominant purpose of that or another entity getting a scheme benefit (whether or not the scheme is implemented); and
 - **not reasonably arguable** that the scheme benefit is available at law, or would be if the scheme were implemented

⁴⁸ Section 290-60 of Schedule 1 to the TAA

⁴⁹ Section 290-65 of Schedule 1 to the TAA

Promoter penalties | Overview



Current exclusions and exceptions

- Conduct that occurred by reasonable mistake of fact, due to the act or default of another entity, due to an accident or due to some other cause beyond the entity's control⁵⁰
- Reliance on advice given by or on behalf of Commissioner⁵¹
- 4 years have passed since the entity last engaged in conduct that resulted in the entity being a promoter — unless the scheme involves tax evasion⁵²
- The entity did not know and could not have reasonably been expected to know that its conduct would produce that result⁵³
- Employees whose employers have been ordered to pay PP in relation to the same scheme⁵⁴

⁵⁰ Subsection 290-55(1) of Schedule 1 to the TAA

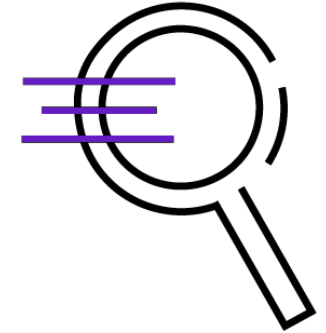
⁵¹ Subsection 290-55(3) of Schedule 1 to the TAA

⁵² Subsection 290-55(4)-(6) of Schedule 1 to the TAA

⁵³ Subsection 290-55(7) of Schedule 1 to the TAA

⁵⁴ Subsection 290-55(8) of Schedule 1 to the TAA

Promoter penalties | Guidance



Cases

[Commissioner of Taxation v Rowntree](#) [2020] FCA 1322

[Commissioner of Taxation v Bogiatto](#) [2020] FCA 1139

[Commissioner of Taxation v Pavihi](#) [2019] FCA 2056

[Commissioner of Taxation v International Indigenous Football Foundation Australia Pty Ltd](#) [2018] FCA 528

[Commissioner of Taxation v Arnold \(No 2\)](#) [2015] FCA 34

[Commissioner of Taxation of the Commonwealth of Australia v Barossa Vines Ltd](#) [2014] FCA 20

[Commissioner of Taxation v Ludekens](#) [2013] FCAFC 100

ATO guidance

[PS LA 2021/1](#): Application of the promoter penalty laws

[Decision Impact Statement](#) – Bogiatto (published 4 Feb 2021)

[Decision Impact Statement](#) – Ludekens (published 7 May 2014)

[Decision Impact Statement](#) – Barossa Vines Ltd (published 31 Mar 2014)

Promoter penalties | Proposed changes

Current	Proposed
An entity can be a promoter only if it receives consideration for marketing the scheme	An entity can be a promoter if it receives a benefit for marketing the scheme
PP laws apply when a scheme is promoted on the basis of conformity with a product ruling , but implemented in a materially different way	PP laws apply when a scheme is promoted on the basis of conforming with a public, private or oral ruling ⁵⁵
Commissioner has 4 years from when an entity last engaged in the alleged conduct to bring a PP case before the FCA, except in the case of schemes involving tax evasion	Commissioner has 6 years from when an entity last engaged in the alleged conduct to bring a PP case before the FCA, except in the case of schemes involving tax evasion
Partners in a partnership have a defence if they prove they did not aid, abet, counsel or procure (or were not knowingly a party, whether directly or indirectly) ⁵⁶	All partners in a partnership and co-trustees of a trust have joint and several liability

⁵⁵ This is irrespective of whether the scheme is actually implemented and regardless of whether the scheme is the subject of the ruling

⁵⁶ Subsection 444-30(4) of Schedule 1 to the TAA

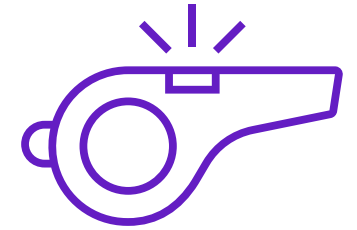
Promoter penalties | Proposed changes

Current	Proposed
The defence of reasonable mistake or reasonable precaution is not available to an employee or agent of an entity	The defence of a reasonable mistake or reasonable precaution is not available to: <ul style="list-style-type: none">• an employee or agent of an entity;• a director of a body corporate;• a partner in a partnership; or• a trustee of a trust
N/A	<i>Tax exploitation scheme</i> extended to DPT or MAAL if: <ul style="list-style-type: none">• the scheme (whether or not implemented) was entered into for a principal purpose (or for more than one principal purpose that includes a purpose) of getting a benefit from the scheme; and• it is not reasonably arguable that the scheme benefit is (or would be) available at law

Promoter penalties | Proposed changes

Current	Proposed
<p>The maximum penalty is the greater of:</p> <ul style="list-style-type: none">• for:<ul style="list-style-type: none">○ an individual — 5,000 penalty units⁵⁷ (\$1.565m → \$1.65m)○ a body corporate — 25,000 penalty units (\$7.825m → \$8.25m); or• twice the consideration received or receivable (directly or indirectly) by the entity or its associates in respect of the scheme	<p>The maximum penalty is the greater of:</p> <ul style="list-style-type: none">• for:<ul style="list-style-type: none">○ an entity other than a body corporate or an SGE — 5,000 penalty units (\$1.565m → \$1.65m)○ a body corporate or an SGE — 50,000 penalty units (\$15.65m → \$16.5m);• 3 times the benefits received or receivable (directly or indirectly) by the entity and associates of the entity in respect of the scheme; or• for a body corporate, a partner in a partnership that is an SGE or a trustee of a trust that is an SGE — 10% of the aggregated turnover of the entity for the most recent income year to end before the entity engaged in the conduct, capped at 2.5m penalty units (\$782.5m → \$825m)

Whistleblower protections⁵⁸



Statutory review
is planned for
late 2024

- A disclosure qualifies for protection if it is made to:
 - the **Commissioner** to assist him in performing his duties under the taxation legislation;
 - the **TPB** to assist it in performing its function under the TASA; or
 - a **medical practitioner or psychologist** for the purpose of obtaining medical or psychiatric care/treatment or counselling
- May allow disclosures to professional associations, unions etc. via future regulations
- Burden of proof is reversed for claims for protection from liabilities by a discloser
- Dob-in qualifies for protection only if all conditions are met:
 - made by an eligible whistleblower⁵⁹
 - made to an eligible recipient (if not the Commissioner or the TPB)⁶⁰
 - information assists the Commissioner in his role OR discloser has reasonable grounds to suggest the information indicates misconduct relating to tax affairs⁶¹

⁵⁸ ATO guidance:
[Tax whistleblowers](#)

⁵⁹ [Section 14ZZU](#) of the TAA

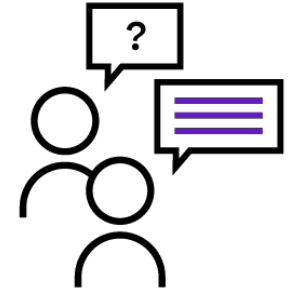
⁶⁰ [Section 14ZZV](#) of the TAA

⁶¹ [Section 14ZZT](#) of the TAA

TPB reform

Current	Proposed
TPB has 6 months in which to conclude investigations into potential breaches of the TASA	TPB has 24 months in which to conclude investigations into potential breaches of the TASA
Details of unregistered tax practitioners can be included on the Register only for 12 months	TASR may specify the timeframes for which information can remain on the Register
Unregistered tax practitioners can be listed on the Register only if their registration has been terminated for a reason other than a reason prescribed by the TASR	TASA or TASR can require information about unregistered entities to be published on the Register Includes where past investigations resulted in no further action taken by the TPB on or after 1 Jul 2022
N/A	A decision to publish information is subject to administrative review

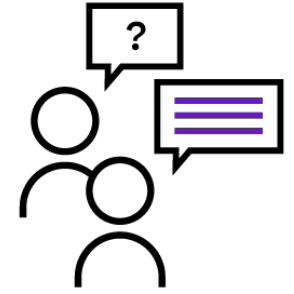
Secrecy provisions | Overview



- Division 355 of Schedule 1 to the TAA (applies from 17 Dec 2010)
- Designed to protect confidentiality of taxpayer information
- Prevents disclosures or on-disclosures of protected information (except to listed parties for listed reasons) — applies to the ATO and other recipients

[Overview of secrecy provisions](#), written by **Jonathan Ortner** FTI, Partner, Arnold Bloch Leibler and Chair of The Tax Institute's National SME Technical Committee (TTI members only)

Information sharing



- Allows ATO officers and TPB officials to share protected information with Treasury:
 - Information must be about misconduct arising out of breaches (or suspected breaches) of confidentiality by intermediaries engaging with the Commonwealth
 - Information must be shared for the purpose of responding to the breach (or suspected breach)
- Allows Treasury to on-disclose to the Minister or Finance Minister

Allows the ATO and the TPB to share protected information with ***prescribed disciplinary bodies (PDB)*** (a professional disciplinary body that is prescribed) where they reasonably believe a person's actions may constitute a breach of the PDB's code of conduct or professional standards

TPB sanctions regime

Proposals to increase the range of powers available to the TPB:

[Consultation Paper](#)⁶²

Current

Proposed

Written cautions⁶³

Warning orders⁶⁴

Enforceable voluntary undertakings

Infringement notices

Injunctions⁶⁵

Civil penalties⁶⁶

Interim/Contingent suspensions

Suspension or termination of registration⁶⁷

Criminal penalties

LOW RANGE

MEDIUM RANGE

HIGH RANGE

[Joint Bodies' submission](#)

⁶² Released on 10 Dec 2023, comments by 21 Jan 2024

⁶³ Section 30-15 of the TASA

⁶⁴ Section 30-20 of the TASA

⁶⁵ Section 70-5 of the TASA

⁶⁶ Division 50 of the TASA and Subdiv 298-B of Sch 1 to the TAA

⁶⁷ Section 30-25 and Division 40 of the TASA

Proposed TPB sanctions regime

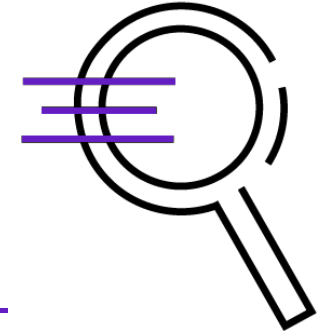


- Reintroduction of criminal penalties for unregistered preparers
- Broader and increased civil penalties in the TASA
- Introduction of infringement notices
- Introduction of enforceable voluntary undertakings with tax practitioners
- Introduction of contingent and interim suspensions

Further sanctions considered unnecessary at this stage

- Quality assurance audits
- Permanent disbarment
- External intervention

Further consultation and reviews



Strengthening regulatory arrangements to ensure they are fit for purpose — consultation will be undertaken to deliver options over the next 2 years:

1. Implement remaining recommendations from the independent review of the TPB
2. Treasury review of the promoter penalty laws
3. Treasury review of emerging fraud and threats to clamp down on systemic abuse of our tax system
4. Treasury and Attorney-General's Department joint review of the use of legal professional privilege in Commonwealth investigations
5. Treasury examination of the regulation of consulting, accounting and auditing firms to consider whether reforms are needed
6. Treasury review of the compulsory information gathering powers of the ATO
7. Treasury review of the secrecy provisions that apply to the ATO and TPB
8. Department of Finance review into the use of confidentiality arrangements across all government agencies to ensure they are fit for purpose, legally binding and enforceable

Practical takeaways

Chronology of amendments



1 Jan 2024

1 Jul 2024

1 Oct 2024

Enacted law →

- Disqualified entities
- Object of TASA
- Minister may determine Code

- Annual registration
- ‘Dob-in’ provisions
- TPB Special Account

Appointments to TPB

Dependent on date of Royal Assent →

Information sharing

Applies to disclosures made on or after the day after Royal Assent, irrespective of when the information was received

Promoter penalties

The later of:

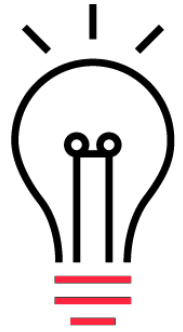
- 1 Jan, 1 Apr, 1 Jul or 1 Oct after Royal Assent; or
- 1 Jul 2024 (start of Schedule 1 to the TAF Bill)




- Whistleblower protection
- Information on TPB Register
- Conclude TPB investigations within 24 months

The later of:

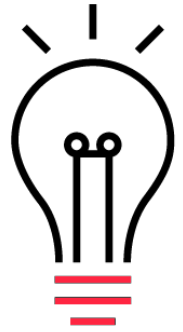
- 1 Jan, 1 Apr, 1 Jul or 1 Oct after Royal Assent; or
- 1 Jul 2024 (start of Schedules 2 and 3 to the TAF Bill)

Checklist



When	Consideration
Generally	<ul style="list-style-type: none">• Refamiliarise yourself with the Code and understand your new obligations• Continue to respect confidentiality, maintain your skills and competence and seek assistance when needed• Always have regard to professional associations by-laws/Codes (TTI By-Laws)• Review clients' engagement letters• Meet professional associations' ethical and professional standards (e.g. CPD) 
1 Jan 2024	<ul style="list-style-type: none">• DQEs – implement relevant hiring checks before taking on new staff• What is required by registered agents to ensure they satisfy Code items 15 and 16?• Consider existing arrangements and whether any disclosures need to be made by DQEs under the transitional rule (by 30 Jan 2025) 
1 Jul 2024	<ul style="list-style-type: none">• Annual registration — set annual reminder, have renewal information ready• 'Dob-in' provisions — understand your new obligations 

Checklist



When

Consideration

The later of:

- 1 Jan, 1 Apr, 1 Jul or 1 Oct after Royal Assent; or
- 1 Jul 2024

- **Promoter penalties**
 - Revisit disclaimers
 - Check professional indemnity insurance
 - Note when advice deviates from ATO view and adopt a reasonably arguable position
 - Review technical positions written by those who purport to support a scheme
 - Engage with ATO (rulings or early engagement)
 - Partners and trustees will need to be more aware of what is happening across the firm due to the joint and several liability
- **TPB Register** — understand what information will be published (once determined)



Ongoing

- Continue to monitor developments and updates, particularly following the various upcoming reviews



Outstanding matters

Issue	Consideration
Dob-in provisions	<ul style="list-style-type: none">• What is the meaning of:<ul style="list-style-type: none">○ 'Reasonable grounds to believe'○ 'Significant breach'○ 'Offence involving dishonesty'• Protection against unfounded claims and lack of protection for many whistleblowers
Annual registration	<ul style="list-style-type: none">• Amount of annual fee? Will other registration requirements change? (e.g. will CPD requirements convert from 3-yearly to annually)
Promoter penalties	<ul style="list-style-type: none">• Need for further guidance on the meaning of 'mere provision of advice' (existing law)• Meaning of 'reasonable arguable position' (existing law)• ATO's practical application of the new measures• How is the value of a benefit quantified to determine the amount of the penalty?
Whistleblower protections	<ul style="list-style-type: none">• Will safeguards in whistleblower protection rules encourage more to come forward?• Process for professional associations to be prescribed entities that can receive disclosures

Outstanding matters

Issue	Consideration
Information sharing purposes	<ul style="list-style-type: none">• Process for professional associations to apply to be a PDB so they can receive protected information from the ATO and the TPB• Requirements for PDB — implications if a professional association has stricter requirements or other requirements in their code (e.g. anti-bullying)?
Next steps	<ul style="list-style-type: none">• What is next in the consultation process? TPB will consult with TPGSF on implementation• Proposed reviews by Treasury, Attorney-General and the Department of Finance (see slide 48)• Supplementing the Code:<ul style="list-style-type: none">○ Expand the confidentiality requirement on tax practitioners to not disclose information received from Australian government agencies, unless the information was obtained for broader dissemination○ Requiring tax practitioners to take reasonable steps to avoid any conflict (real or apparent) in connection with their engagements with Australian government agencies, as well as require tax practitioners to disclose to Australian government agencies any material conflicts of interest where they arise in connection with their engagement by that agency

Questions?



Thank you

Abbreviations

Abbreviation	Explanation
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
BAS	Business activity statement
CEO	Chief Executive Officer
Code	Code of Professional Conduct, section 30-10 of the <i>Tax Agent Services Act 2009</i>
CPD	Continuing professional development

Abbreviations

Abbreviation	Explanation
DPT	Diverted profits tax
DQE	Disqualified entity
ED	Exposure draft
FASEA	Financial Adviser Standards and Ethics Authority
FCA FCAFC	Federal Court of Australia Full Federal Court of Australia
James Review	Review of the Tax Practitioners Board (2019)
LCA	Law Council of Australia

Abbreviations

Abbreviation	Explanation
MAAL	Multinational anti-avoidance law
MYEFO 2023–24	Mid-Year Economic and Fiscal Outlook 2023–24
PDB	Prescribed disciplinary body
PP	Promoter penalties in Division 290 of Schedule 1 to the <i>Taxation Administration Act 1953</i>
PR	Product Ruling
PS LA	Practice Statement Law Administration
SGE	Significant global entity

Abbreviations

Abbreviation	Explanation
TAS	Tax agent service
TPB	Tax Practitioners Board
TPGSF	Tax Practitioner Governance and Standards Forum
TTI	The Tax Institute

Abbreviations

Abbreviation	Legislation
2023 No. 1 Act	<u>Treasury Laws Amendment (2023 Measures No. 1) Act 2023</u>
ASICA	<u>Australian Securities and Investments Commission Act 2001</u>
Corps Act	<u>Corporations Act 2001</u>
TAA	<u>Taxation Administration Act 1953</u>
TAF Bill	<u>Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023</u>
TASA	<u>Tax Agent Services Act 2009</u>
TASR	<u>Tax Agent Services Regulations 2022</u>

Presenter

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Her role is a key engagement and advocacy contact for members of The Tax Institute, government, non-government organisations, regulators and other stakeholders. With more than 30 years in the profession, she brings to the role her 23 years' experience as a professional tax trainer, and preceding roles in public practice.

Robyn is a Chartered Tax Adviser of The Tax Institute, and a Fellow of both Chartered Accountants Australia and New Zealand and CPA Australia.

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