

25 October 2019
Mr Nick Westerink
Individuals and Indirect Tax Division
Treasury
Langton Cres
PARKES ACT 2600

Submission via tpbreview@treasury.gov.au

Dear Mr Westerink

Review of the Tax Practitioners Board – supplementary submission

As the representatives of over 200,000 current and future professional accountants in Australia, the two major Australian accounting bodies Chartered Accountants Australia and New Zealand (Chartered Accountants ANZ) and CPA Australia (together 'the Major Accounting Bodies') make this joint supplementary submission on the Review of the Tax Practitioners Board.

We thank the Review for the opportunity to provide our views on the possible suggestion to implement a dynamic Code of Professional Conduct (the Code), including establishing a forum to ensure appropriate consultation on any proposed changes to the Code. We acknowledge that the Review has considered our concerns over the suggested dynamic Code and has proposed the forum as a potential approach to address those concerns. We make these views based on our understanding of the discussion at the meeting of 22 October 2019.

We make the following summary comments:

1. This proposal is *prima facie* plausible, but our in-principle position is that regulators should not set their own regulations;
2. The Review should consider the legal and administrative processes for the application of the ATO Commissioner's remedial powers (CRP) as a basis for the proposed forum;
3. The forum should only make changes to the Code in limited circumstances where administrative and interpretative approaches are inadequate; and
4. The forum should also develop a Tax Practitioners' Charter.

We maintain that, as a principle, regulators should not have the power to set or amend the requirements they enforce. Given that significant sanctions can apply for a breach, including suspension or termination of a tax practitioner's registration, the prerogative to impose or amend them should remain with Parliament, through legislation or regulations.

If the Review is to recommend a dynamic Code, in addition to amending the law, we suggest that the Review consider the enabling legislation and established process for the exercise of the ATO Commissioner's remedial powers (CRP). This includes approval by a CRP Panel comprised of ATO staff and private sector representatives, a public consultation period, preparation of a draft Legislative Instrument with further public consultation and tabling in Parliament for the disallowance period. The CRP Panel's decisions are binding on the Commissioner and third parties can make submissions for consideration by the CRP Panel.

As with the CRP, we expect that the Tax Practitioners Board (TPB) should only have limited powers to add to the Code. That is, to address instances where the Code is not operating as intended by Parliament, and to be exercised only as a last resort when other options, such as administrative or interpretive approaches are not adequate to resolve an issue.

Any proposed modification or addition to the Code should also:

- not be inconsistent with the intended purpose or object of the law;
- be reasonable, having regard to the intended purpose or object of the law, and
- be reasonable, having regard to the cost of compliance.

Further, this power should only be used by the TPB to resolve general issues that may impact all tax practitioners or a class of practitioners. It should not be used to resolve specific issues affecting individual, or small groups of, practitioners.

The composition of such a forum could be similar to the proposal – senior officers of the TPB, ATO, and the NTLG members, with a representative of the Professional Standards Council in an advisory role. Another option would be for the forum members to be made up of members of existing TPB consultative forums. This would avoid duplication, but may result in a forum that is too large to operate effectively in examining and approving modifications or additions to the Code.

In considering a CRP-style process for the proposed purpose, we note that it will require further consideration and development by the Review and stakeholders. It would need to be designed and tailored to be appropriate to the Code of Conduct context, as differences between the CRP and this proposed arrangement include:

- (i) The CRP does not allow the Commissioner to *add a new* provision to the law. It only allows for the *modification of an existing* provision of the law which has an existing policy intent; and
- (ii) The nature of the Code of Conduct items. They are fundamental and are likely to modify or add onerous conduct or behavioural duties that *impose obligations* on tax practitioners, whereas under the CRP, any tax provisions modified can only be applied *beneficially* for taxpayers.

We also support the development of a Tax Practitioners' Charter for the Tax Practitioners Board (TPB) as recommended in our joint submission at paragraphs 6.5 and 7.32. In the same way it considers changes to the Code, the forum can develop and update a Tax Practitioners' Charter which sets out rights, obligations and expectations between the TPB and tax practitioners.

While we believe the best outcome would be for changes to the Code to be made by amendments to the Act or Regulations, the proposed forum may be a plausible compromise. We suggest that concerns over the TPB having effective power to add to the Code would be ameliorated if the law around the proposed power follows that of the Commissioner's remedial power, and that the process the Commissioner follows to exercise his remedial power be adopted by the TPB, including that the forum's decisions on whether to proceed with a proposed addition to the Code be binding on the TPB.

If you have any queries with this submission, please contact either Gavan Ord (CPA Australia) at gavan.ord@cpaaustralia.com.au or Michael Croker (Chartered Accountants ANZ) at michael.croker@charteredaccountantsanz.com.

Yours sincerely



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