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Office of the President

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Director
Tax Agent Regulation Unit
Personal, Indirect Tax and Charities Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: pwcresponse@treasury.gov.au

Dear Sir/Madam

Review of the eligibility requirements for tax practitioner registration with the Tax Practitioners Board – Response to consultation paper

Thank you for the opportunity to respond to the "Review of eligibility requirements for registration with the Tax Practitioners Board" consultation paper (the **Consultation Paper**).

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law and help protect the rights of individuals. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Revenue Law Committee.

We write to respond specifically to Question 27 of the Consultation Paper which reads:

> *"27. Should the Tax Agent Services Act 2009 (Cth) (**TASA**) be amended to require legal practitioners who provide tax agent services, as defined in section 90-10 of the TASA, for a fee or reward, to be registered with the TPB?"*

For the reasons below, we consider that this question should be answered in the negative, and the existing exemption for legal practitioners from registration with the Tax Practitioners Board (**TPB**) should be maintained.

Response to Question 27 of the Consultation Paper

1. It is our view that Question 27 of the Consultation Paper should be answered in the negative. It is not considered necessary or appropriate for legal practitioners to be registered with the TPB.
2. There are two key reasons why this additional registration would be unnecessary and adverse to the interests of both the public and legal practitioners:

(a) *firstly*, it would inhibit the public's ability to seek even basic legal advice on matters involving their personal affairs, ranging from family matters (including family and estate planning or provision) to the structuring of businesses or investments. This will ultimately drive up the costs of the public in obtaining proper advice regarding their personal affairs and in establishing and operating businesses in Australia;

(b) *secondly*, registration with the TPB would be an unnecessary duplication of regulation. Legal practitioners are already subject to stringent regulation under the Legal Profession Act in each Australian jurisdiction, the Australian Solicitors Conduct Rules, and the overarching duties and responsibilities to the administration of justice as officers of the Court.

3. We note that the 2019 TPB Review considered this issue and determined that it was appropriate to maintain the exemption for legal practitioners from registering with the TPB. We agree with the outcome of this earlier review.

4. It is also noted that legal practitioners who prepare and lodge returns or return like statements (services that would have traditionally been considered as 'tax agent services' requiring registration under the *Income Tax Assessment Act 1936* (Cth)) are not exempt from the requirement to register under the TASA. We make no objection to this approach.

5. The concern from Question 27 of the Consultation Paper is that should a proposal as posed by the question be adopted, the TASA will potentially require legal practitioners:

(a) to have to register under the TASA for them to provide legal advice, generally – necessitating registration by significant numbers of legal practitioners who would not generally be considered (by themselves or the public) to be providing 'tax agent services' (as the general community would consider that term); or

(b) if not registered under the TASA, to be obliged to resile from providing 'complete' advice (on what may be, essentially, predominately a legal question) that they would usually be expected, or required as a legal practitioner, to provide, and cause a client to have to obtain additional tax advice at an additional separate cost.

6. There are few if any areas of law that do not intersect with Australia's tax laws.

7. It is considered that the outcomes, that would flow from requiring legal practitioners providing 'non-lodgement' 'tax agent services' to be registered under the TASA, are not appropriate or desirable, including for the reasons outlined more fully below.

8. There is a further concern discussed below relating to legal professional privilege and the use of legally privileged documents in TPB proceedings.

9. For clarity, we have assumed that the reference in Question 27 of the Consultation Paper to *section 90-10 of the TASA*, is a reference to *section 90-5 of the TASA*.

Impairing the ability of the public to seek complete and cost-effective legal advice

10. We consider that imposing this additional registration requirement on legal practitioners may impact the public's ability to obtain meaningful legal advice and the practitioner's ability to satisfy their professional obligation to provide complete advice.

11. To demonstrate this point: if legal practitioners were required to be registered with the TPB, then unregistered legal practitioners would be unable to give even simple, uncontroversial, advice on potentially everyday legal transactions, as tax aspects touch on many everyday transactions. For example, they would be unable to advise a client buying a residential property about issues in connection with ownership and use of the property, as these issues could touch on eligibility for the CGT main residence exemption, the tax or other CGT consequences of deciding to rent the property out, or regarding considerations around the appropriate purchaser entity for example, that a trust may be preferable to a company for purchasing an investment property because a trust can access the 50% general CGT discount. Another example would be that a lawyer may be unable to explain to a client seeking advice regarding their Will and estate or succession planning, the potential tax issues concerning the use of a testamentary trust or be able to give advice on superannuation death benefit nominations where certain persons may be eligible for a tax free distribution, and others would not meet the definition of tax dependent, and find the death benefits may be taxable.

12. Instead, the legal practitioner would only be able to give advice on non-tax matters, and then have to refer the client to a registered tax practitioner (either another legal practitioner or tax accountant) to explain to the client the potential tax issues that may need to be considered, for example, the very simple tax characteristics of a trust as compared to a company, or the consequences of changing the use of their house from their residence, to a rental property for a short term, or that there may be tax consequences if they work from their proposed home or use their proposed home for a small 'home based' business. The very breadth of the definition of 'tax agent services' introduced by the TASA could encompass a general discussion of issues for consideration, with the commentary provided falling well short of formal 'tax advice'.

13. The need for everyday members of the public being effectively 'forced' to obtain separate 'tax' advice unnecessarily increases the cost of seeking even rudimentary advice about basic legal transactions, much less for investment or business structuring, which legal practitioners have traditionally provided. In doing so, it increases the cost of everyday transactions or doing business and investment in Australia, particularly for the class of clients that can least afford those additional costs – individuals, small businesses and "mum and dad" investors.

14. Similar issues would arise out of basic advice around structuring business affairs or personal affairs such as succession planning or family law matters. For example, an estate planning lawyer may be unable to explain the tax advantages of a testamentary trust for infant beneficiaries or give advice on superannuation death benefit nominations where certain persons may be eligible for a tax free distribution, and others would not meet the definition of tax dependent, and find the death benefits may be taxable.

15. The cessation of the general exemption from TPB registration for lawyers may also materially increase the cost of common transactions such as residential conveyances, where solicitors are required to prepare and advise on foreign resident CGT withholding requirements and the acquisition of CGT withholding certificates (and consequent withholding obligation). Such simple advice would require specialist input, materially increasing compliance costs for home buyers and downsizers. A simple "mum and dad" conveyance that may have cost only a few hundred dollars in legal fees could potentially now cost a few thousand dollars. For example, both a legal practitioner and a registered tax agent would be required to advise on a

conveyance as this may also involve the application of the foreign resident CGT withholding obligations and impacts if no withholding certificate can be obtained.

16. The adverse impacts of a change of the nature suggested in the Consultation question would not be limited to small businesses and small investors. Clients in regional areas often have significant family businesses and the need for advice on succession issues. Resources for advice for clients in rural and regional areas are already limited. A change of the nature contemplated will exacerbate the challenges that regional clients already face in obtaining complete legal advice.

17. The proposed change could also impact the ability of legal practitioners to properly complete work in larger transactions. It is standard practice in a merger or acquisition that the vendor makes warranties in relation to tax matters and there are normally clauses that deal with the goods and services tax (**GST**) implications of the transaction.

18. Under the proposal in the Consultation Paper, legal practitioners not registered with the TPB would be unable to advise on the tax warranties or GST clauses that they are responsible for drafting.

19. Similarly, tax advisors who are not legal practitioners holding practicing certificates, but who may be registered with the TPB, are unable to advise a client on the correct drafting of tax warranties or GST clauses because the drafting of legal documents is legal work, which can only be performed by legal practitioners.

20. The practical consequence of this is that **any** legal practitioner who prepares a document containing tax warranties or GST clauses would need to be registered with the TPB as tax agents. Large law firms may be able to manage this issue by having an internal tax team that is registered with the TPB while maintaining their practicing certificate. However, for most if not all small and medium law firms, this solution is impractical and gives rise to a potential conflict of duties discussed further below at paragraphs 39 to 41.

21. It should also be noted that if taxpayers are required to have a Dual Qualified Practitioner review or prepare **any** document with tax specific drafting, the cost of doing business in Australia will increase materially.

22. Legal practitioners are already subject to obligations to not advise on matters outside their abilities and refer those clients to appropriate specialists; the "threat" of action by the TPB will not give rise to any additional deterrence of this behaviour when the same "threat" of compliance actions exist from the Legal Services Commissions or Law Societies.

23. Legal practitioners are also required to provide "complete" advice and have been found to be negligent where advice was incomplete (see *Bartier Perry Pty Ltd v Paltos* [2021] NSWCA 158). As tax touches all manner of transactions and dealings (commercial or otherwise, including family law matters), if these reforms proceed, the obligation of legal practitioners to ensure clients are receiving complete advice may necessitate the use of dual registered practitioners or for clients to be advised that they need to obtain separate tax advice (on the same facts, but at additional cost) where the tax matters are interwoven with legal matters (as in the case of the tax warranties or foreign resident CGT withholding examples discussed above). It is questionable that simply advising a client that they need to obtain separate tax advice may satisfy a legal practitioner's obligation to provide "complete" advice. A change of the nature posed by the Consultation question may then make compliance by legal practitioners with their legal obligations, unworkable.

24. A need for separate advice will ultimately increase the cost of legal advice, which adversely affects the availability of legal advice to the public. The need for a separate TASA registration may also operate to create a split in the legal profession (that does not exist for admitted legal practitioners or under the Legal Profession Act) between legal practitioners who choose to be registered and those who don't. This would create an artificial competitive disadvantage for legal practitioners who are not registered under the TASA and limit choice for the public without any corresponding benefit given the legislative and professional conduct requirements already governing the legal profession.

25. Any comment made by a legal practitioner or conveyancer that relates to tax could constitute a breach of the TASA if the proposal in the Consultation Paper is implemented. This puts practitioners making generalised comments regarding tax (for example, that interest should be deductible on a loan to purchase an investment property) at significant risk of penalties, disproportionate to the risk it poses to the public. Their only option to avoid those consequences will be to oblige the client to obtain separate tax advice at a separate cost. This potential additional cost may prompt clients to avoid seeking that additional advice, at their risk. It is considered inappropriate to put individuals and small business clients who will be cost sensitive into having to deal with whether to obtain the additional advice or 'take the risk'. This potentially increases the risk of those clients turning to unregulated sources of information to base their 'tax' decisions on.

Unnecessary duplication of regulation

26. To explain our concern regarding the regulatory impact of the proposed amendment to the TASA it is necessary to explain briefly the context of the existing TASA as well as the existing regulation of legal practitioners.

The context of the Tax Agent Services Act 2009 (Cth)

27. TASA was implemented to create a common education, conduct and disciplinary regime for tax agents. It replaced the former part VIIA of the *Income Tax Assessment Act 1936* (Cth) (**ITAA36**). The now repealed section 251BC ITAA36, dealt with identifying tax agents who were not "*fit and proper person* ***to prepare income tax returns and transact business on behalf of taxpayers*** *in income tax matters*" (our emphasis).

28. The Explanatory Memorandum for the TASA acknowledge the broadening of tax laws and broadened the concept of a tax agent to relate to those new tax laws. The concept that the tax agent was acting as agent, lodging returns on behalf of the taxpayer (as principal) remained consistent between the TASA and former part VIIA ITAA36.

29. Our understanding was that the TASA was intended to regulate the actions of tax advisors **when they acted as agents on behalf of taxpayers** in dealing with the ATO, including in the preparation and lodgement of tax returns. It would seem that bringing legal practitioners who provide advisory services under regulation through the TASA and TPB would be an expansion of the original purpose of the TASA.

Existing regulation of legal practitioners in Australia

30. Legal practitioners in Australia operate under significant common law and statutory regulation. Practicing solicitors in Australia must:

    (a) be admitted to the roll of solicitors in their respective jurisdiction(s); and

    (b) hold a valid practicing certificate, which must be renewed every year.

31. A practicing solicitor is subject to:

    (a) a *fiduciary duty* under general law to:

        (i) act as an officer of the court for the administration of justice;

        (ii) act in their client's best interest;

    (b) regulation under the *Legal Profession Act* of the relevant jurisdictions;

    (c) regulation under the *Australian Solicitors Conduct Rules* (which are uniform across jurisdictions); and

    (d) regulation under any further specific regulations to their jurisdiction – for example, regulations in respect of incorporated legal practices.

32. The cumulative effect of the above regulation is that:

    (a) a practicing solicitor must be a fit and proper person and must declare that they remain fit and proper each year when renewing their practicing certificate;

    (b) subject only to their overriding duty to the courts, a legal practitioner has a fiduciary duty to act in their client's best interest at all times;

    (c) a practicing solicitor must complete continuing professional development courses at least annually (with the general professional requirement that this continuing CPD is relevant to their areas of practice);

    (d) prescriptive methods are established for:

        (i) how a client engages a solicitor;

        (ii) how a client is to be informed of their rights in respect of the engagement;

        (iii) how a client is to be billed;

        (iv) how a client is to be informed as to their rights in relation to bills;

        (v) how potential conflicts of interest are to be managed;

    (e) solicitors that do not comply with this regulation can:

        (i) have conditions placed on their continuing practice;

        (ii) be barred from practicing;

        (iii) be struck off from the roll of solicitors.

33. This regulatory scheme is enforced by the Legal Service Commissions and Law Societies in each Australian jurisdiction. While the above comments are focussed on the regulatory environment and fiduciary duties for solicitors, we note that barristers are subject to regulations and duties that, for these purposes, are broadly similar in scope and purpose.

Duplication of regulation for legal practitioners providing tax advice

34. It is difficult to see what further protection would extend to clients of legal practices if legal practitioners were *also* obliged to be registered with the TPB.

35. Obligations placed on legal practitioners, in particular their fiduciary duties to their clients, go beyond the obligations placed on registered tax agents in relation to dealings with clients.

36. This is acknowledged by the TPB's explanatory paper 01/2010 on the Code of Professional Conduct (the **Code**) which acknowledges that the Code does not go so far as to create a fiduciary relationship between tax agent and their client.

37. A requirement of legal practitioners to register with the TPB therefore would result in an overlap of regulation with no additional benefits flowing to the public, which was the position reached in the final report of the 2019 TPB review.

38. Further registration requirements would impose additional compliance burdens on legal practices (many of which are small businesses) for no benefit to the industry or for the public seeking tax and/or legal advice.

Irreconcilable conflict of duties as a result of duplication of regulation

39. Recent amendments to TASA and the Code introduced notification obligations where a tax agent is required to:

    (a) notify the TPB within 30 days if they have reasonable grounds to believe that they have, or another tax practitioner has, breached the Code, and that breach is a significant breach;

    (b) notify the TPB where they prepare a materially false statement (i.e., tax return or similar) and the taxpayer does not correct that statement within 30 days; and

    (c) notify current and prospective clients of 'any' matter arising on or after 1 July 2022 that could significantly influence a decision of a client to engage or to continue to engage the tax practitioner to provide a tax agent service.

40. It is easy to see how these notification obligations could extend to information subject to legal professional privilege (**LPP**). Such an obligation will place legal practitioners in an irreconcilable conflict of duties – their primary fiduciary duties to clients (to act in their best interest by maintaining LPP) and a duty to disclose under the Code.

41. Separately, Item 4 of the existing Code requires that tax agents act lawfully in the best interests of your client. While legal practitioners are subject to a similar fiduciary duty, they are subject to a fiduciary duty as an officer of a court which supersedes their duty to their clients (the primacy of the duty to the court resolves any conflict between a legal practitioner's duties to the court and to their clients).

42. This conflict of duties (fiduciary and under the Code) could put a legal practitioner in an irreconcilable conflict between their obligation to act as an officer of the court and their obligation under the Code to act in the best interests of their client.

Further concern - Legal professional privilege and disputes with the TPB

43. There is a further concern that must be considered if legal practitioners were to be subject to TPB registration and TPB compliance activity.

44. Advice given by legal practitioners to their clients is protected by LPP. LPP belongs to the clients, not the legal practitioner.

45. It is conceivable that, if the TPB commences proceedings against a legal practitioner, that practitioner would be unable to defend those proceedings because their advice is subject to LPP and the practitioner is prohibited from introducing it in their defence.

46. It should be recalled that a TPB proceeding is not a court or tribunal matter, and absent any explicit rules permitting a legal practitioner from introducing material covered by LPP for their defence, doing so would be a breach of their professional obligations and expose them to compliance action from the relevant Legal Services Commission or Law Society. The TPB's power to compel the production of documents (section 60-100 TASA) does not affect LPP.

47. Where an investigation is prompted by a client complaint, we understand that the client, in making the complaint, waives LPP over the advice provided. However, there is no such waiver if the TPB commences an investigation on its own initiative, or as is increasingly common, following a referral by the Australian Taxation Office. Absent any statutory ability for the legal practitioner to use material protected by LPP in their defence, legal practitioners in this scenario may be fundamentally unable to contest a TPB investigation and may have their ability to provide tax advice stripped or restricted without natural justice applying.

48. In venues other than TPB investigations, a legal practitioner may successfully have a proceeding permanently stayed if their defence is prejudiced by a client maintaining an LPP claim over critical information. However, there is no guarantee that the TPB will adopt this same approach outside of a binding direction or amending the TASA to explicitly make it a complete defence.

49. Even if a statutory "permission" to use privileged material in defence of a TPB proceeding was legislated (perhaps by amending section 60-100 TASA), there would be further significant concerns about the ongoing "quarantining" of that information from other entities which the TPB is permitted to share information with, such as the Australian Taxation Office.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

Rebecca Fogerty
President