

**Senate Finance and Public Administration References Committee Inquiry into the
management and assurance of integrity by consulting services**

**Written question on notice from the Senate Finance and Public Administration References
Committee to the Tax Practitioners Board**

Question on notice

1. The Senate Finance and Public Administration References Committee (the committee) notes recent media reports which reference a letter sent by lawyers acting for PwC Australia to the Tax Practitioners Board, dated 19 January 2023.

The committee requests that you provide a copy of this letter to the committee for its consideration by COB Wednesday, 6 March 2024.

Answer

A copy of the requested letter is contained in **Attachment A**.

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19 January 2023

BY EMAIL

Mr Michael O'Neill
Secretary and Chief Executive Officer
Tax Practitioners Board
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Sydney NSW 2001

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Dear Mr O'Neill

TPB investigation concerning Peter John Collins

We refer to the decision of the Tax Practitioners' Board (the **Board**) in respect of our client, Peter Collins.

During the course of the investigation, our client had a number of concerns with the process (which arose prior to the outcome), many of which he elected not to raise with the Board at the time. Mr Collins wished to focus on the addressing the substance of the allegations against him as far as possible and to raise only matters of process where absolutely necessary. We understand from the *Tax Practitioner Service Charter* (**Charter**) that the Board values the opinion of tax practitioners and welcomes feedback including complaints, compliments or suggestions. We are therefore instructed to write to you to draw to your attention a number of matters. These comments are intended constructively to assist the Board in developing the important work it does in regulating the tax agents profession.

It is appropriate to acknowledge that during the course of the investigation, there were at times submissions made as to the appropriate course which were considered by the Board. In particular, we submitted that the matter required that there be findings on contravention, prior to submissions on and the Board's consideration of sanction, and this was adopted.

We confine the observations we are instructed to make to a high level at this stage. If any of our comments are unclear or the Board believes it would be assisted by elaboration, we would be pleased to assist.

Against that background, we make the following comments:

1. *The role of the investigations team.* There are two aspects of the role of the investigations team in this matter that we highlight:
 - a. A matter that was of considerable concern was the extent of the involvement of Mr Michael O'Neill in the process. We understand that before we were

involved Mr O'Neill's role was raised by PricewaterhouseCoopers (**PwC**), but its concerns were not actioned. Mr O'Neill was himself a member of the BEPS Tax Advisory Group (**TAG**). As such, it is to be expected he was party to discussions about the confidentiality requirements and he may be expected to have had information relevant to the matters under investigation. He in fact attended relevant BEPS TAG meetings with our client. He was, more generally, involved in the implementation of the BEPS measures as an ATO officer (before joining the Board in August 2018) and this should have been evident from the material available to the investigations team. Mr O'Neill had knowledge of factual matters that could become in issue, as he attended meetings with our client including the initial meetings of the BEPS TAG. As someone who participated in the very process that was the subject of the investigation, the potential for him to have relevant information or to have views derived from his involvement as an ATO officer in the BEPS TAG consultation group relevant to the investigation seems self-evident. In such circumstances, his involvement inevitably raised questions as to independence and conflicts. It is well established that decision making bodies should avoid not just actual bias but the appearance of bias. It is unclear to us why his involvement was allowed to continue, but whatever the reason the apparent independence of the Board was undermined by this.

- b. At the time of the Board's decision making, we were led to understand that it was proposed the investigations team would attend the meetings of the Board Conduct Committee (**BCC**), in circumstances in which our client would not be attending. We made submissions about this, as a result of which we were informed the role of the investigators would be limited to administrative matters. The involvement of investigators in the decision making process in the absence of the person the subject of the allegations has obvious potential to give rise to perceptions of lack of transparency, independence or fairness.
2. *Service of notices on numerous PwC clients, identifying our client as the subject of the investigation.* In the course of its investigation, the Board served notices under the TASA on a large number of companies in July 2021, known by the Board to be clients of PwC, naming Mr Collins and two former partners, which made it apparent that Mr Collins was under investigation. This had a significant adverse impact on Mr Collins' reputation and standing with clients as long as 16 months before the BCC made any decision. There was no apparent need to identify Mr Collins in this way in order to obtain relevant documents and information. The Charter promises to "treat you fairly and abide by the principles of natural justice" and "keep the information we hold about you confidential". It also promises to "respect your privacy in accordance with the *Privacy Act 1988*". The damage to Mr Collins was clearly foreseeable and it remains unclear to our client why the Board considered it necessary or appropriate to take a course that could damage his reputation in this way. That is especially so as we understand that the Board did not ultimately press its requests for documents and information with all of these companies.
3. *Failure to provide information requested.* In the course of the investigation, Mr Collins requested by letter from PwC dated 6 May 2022 copies of the communication between the Board and the ATO relating to the investigation of Mr Collins. By letter dated 31 May 2022 our client was informed that this information would not be

provided to him. While Mr Collins was told the material would not be put before the BCC, no other reason was provided and it was not suggested it was not relevant to Mr Collins or did not concern him, or that such communications did not exist. This seems inconsistent with the Board's Charter which promises to "give you access to information we hold about you" and potentially also inconsistent with the Board's *Privacy Policy*, which explains access that will be provided to personal information. As a matter of procedural fairness, our client was entitled to be given access to all information relevant to his matter in the possession of the Board, whether or not put before the BCC. This lack of transparency was not conducive to confidence in the objectivity or independence of the investigative process.

4. *The Board's decision making.* There were aspects of the decision making which we highlight:
 - a. The Board Conduct Committee expressly declined to consider the detailed submissions in relation to the documents alleged to have constituted the breach of confidentiality acknowledgements (paragraph 8 of the Board's letter of 31 October 2022). Rather, it approached the matter holistically. We have not been able to understand how such an approach is justified in circumstances in which the entirety of the allegations turned on alleged breaches of confidentiality obligations, nearly all of which were solely based upon the Confidentiality Acknowledgements. In those circumstances, the essential first step was to ascertain, on the basis of the evidence, if those acknowledgements had been breached, as if they had not the allegations necessarily failed. Further, we do not understand on what rational basis a view could be formed of the nature of the conduct without first deciding how extensive the breaches were. The holistic approach expressly adopted by the Board also did not address the question of how far the breaches had occurred and the circumstances of them.
 - b. The resulting concern that the matter was addressed at a relatively impressionist level was enhanced by the fact that the 31 October 2022 letter disclosed that the decision in relation to breach was based in part upon the 19 February 2018 confidentiality acknowledgement, despite there being no allegation whatsoever of any disclosure in breach of this acknowledgement. The fact the Board's decision was partly based on a breach of a confidentiality acknowledgement which was not even alleged indicates the allegations and our client's submissions were not the subject of sufficiently detailed consideration. The text on the TPB register continues to make reference to the 2018 confidentiality acknowledgement.
 - c. A further matter that may also indicate a lack of detailed consideration of Mr Collins' submissions is the statement at paragraph 15 of the letter of 31 October 2022 that "the Committee observed that Mr Collins had not identified any arrangements or policies that he had in place to manage the conflicts of interest that may have arisen in his capacity as registered tax agent". However, Mr Collins's submission of 19 September 2022 at paragraph 88 expressly stated "Mr Collins relies on the arrangements that were in place, as identified in PwC's response...". The Committee's

observation would appear to have overlooked this material submission entirely.

- d. The Board's reasons for its sanction decision at paragraph 10 of its letter of 25 November 2022 erroneously referred to "admission of breaches of the TASA". No such admission was made by Mr Collins. We acknowledge that when this was pointed out, the Board corrected its error, which we were informed was an oversight. However, this was an important factor to be considered by the BCC and such an error necessarily leads the subject of the decision to be concerned that the decision has been made on a misapprehension.
5. *Delay and errors in notifications on the Board's Register.* As we have recently discussed in correspondence, it seems to us the Board's statutory obligation to maintain its publicly available Register on your website under section 60-135 of the TASA had the effect that on 23 December 2022 (the date that the decision in relation to Mr Collins took effect) the Board's Register should have been updated to reflect that Mr Collins' registration had been terminated under the TASA and also the reasons for that decision. For reasons that are not apparent, despite the sanction decision being made on 16 November 2022 and the Board's reasons being provided by its letter of 25 November 2022, the Board was still considering the reasons it would state on its Register for that decision, and we were told it was seeking legal advice, as at 23 December 2022. It is quite unclear why the Board was unable to identify the reasons for a decision it had made some five weeks earlier when the time under its governing legislation to include those reasons on its Register arrived. Only today, despite our raising this issue in December, were reasons posted.

Further, the breach of Principle 1 of the Code was identified on the Register as "failed to act honestly with integrity". After we pointed out this was likely to mislead, because it conveyed a finding of dishonesty when none had been made (a most serious matter), steps were taken to address this. We were informed this took some time because of systems legacy issues requiring an IT fix, but the result was that there was posted on the TPB register for a period of over two weeks a statement which might reasonably have been understood by members of the public as conveying our client had been found to have acted dishonestly (a most serious matter), when he has not.

Our client appreciates the Board has obligations to notify the reasons for a termination decision, but in this case that has been done inaccurately and in a manner that we have submitted to you does not comply with the TASA and regulations. Our client considers that more care should have been taken to ensure compliance with the TASA and regulations and to be accurate, so his reputation was not unnecessarily damaged by these delays and errors.

6. *Role of the Administrative Appeals Tribunal.* In the course of the process, various matters, including aspects referred to above, caused us to consider whether it was possible that the Board or some of its staff may in some senses and at some times view its role as preliminary to decision making in the Administrative Appeals Tribunal (**AAT**). We do not know if that is the case, but in the spirit of providing

constructive comment on the process, note we did at times have such a perception. While understandable the Board or its staff would be aware of the role of the AAT, it seems to us it would be unfortunate (and contrary to the very rationale for merits review) if the existence of merits review were to affect primary decision making by the Board. The following points were salient in the context of this matter:

- a. As we are sure the Board is conscious, the Board's decision is an operative decision with a very significant impact on persons affected, regardless of AAT review. For that reason alone, its decisions should be made as if they are not going to be reviewed.
- b. There are various reasons a person may decide not to challenge a decision in the AAT. They may elect to accept the outcome despite reservations rather than go through the stress and costs of contested AAT proceedings. The practical impact of the outcome may not be such as to merit that process. The damage to their career may already have been done by the Board's decision or, in the circumstance of Mr Collins, the damage caused by the Board's investigation before any decision has been made. It cannot be assumed that that a person will apply for AAT review even if they consider the decision to be wrong.
- c. Perhaps most importantly, a person can only challenge the *decision* that is made in AAT proceedings or on judicial review. They cannot challenge the *reasons*, save as a basis for the decision. Where the Board publishes the reasons, if a person is prepared to accept the outcome but considers the reasoning or process flawed an application to the AAT (or for that matter judicial review) is generally not an appropriate or effective remedy. For this reason, that the primary decision is made on the basis it will be the final decision is important, so that the affected member of the profession is treated as fairly as possible.

As you are aware, our client has elected not to challenge the Board's decision. He stands by the regret and contrition he has expressed. Without derogating from those matters, we are instructed to write this letter with a view to assisting the Board understand how some aspects of the process have, from our client's perspective, affected him. It is Mr Collins' hope that these observations will be considered by the Board and can be used to enhance the process for other tax agents subject to an investigation.

Yours faithfully

Ashurst

Cc Mr Ian Klug AM
Chair
Tax Practitioners Board

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