



28 September 2020

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Sent via email to legcon.sen@aph.gov.au

Dear Committee Secretariat

SUBMISSION: CRIMES LEGISLATION AMENDMENT (ECONOMIC DISRUPTION) BILL 2020

The Tax Practitioners Board (TPB) is pleased to provide you with a submission in relation to the inquiry into the Crimes Legislation Amendment (Economic Disruption) Bill 2020 (the Bill) which was referred to the Senate Legal and Constitutional Affairs Committee on 3 September 2020.

This submission specifically addresses the following amendments proposed by the Bill:

- (a) Schedule 1 of the Bill – Money laundering; and
- (b) Schedule 6 of the Bill – Information.

While the TPB is not directly impacted by the Bill, the TPB considers that some aspects of the Bill are particularly relevant to the TPB and the *Tax Agent Services Act 2009* (TASA), noting that it may impact on the TPB's regulated population of registered tax practitioners who operate as a key intermediary in the Australian tax and superannuation system.

Background

Role and functions of the TPB

The TPB is an independent statutory body that administers the TASA and *Tax Agent Services Regulations 2009*. The TPB is responsible for registering and regulating entities providing tax agent services in Australia, including tax (financial) advice services and business activity statement (BAS) services.

The object of the TASA is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct (see section 2-5 of the TASA). This is to be achieved by (among other things):

- (a) establishing a national Board to register tax agents, BAS agents and tax (financial) advisers (collectively referred to as registered tax practitioners);
- (b) introducing a Code of Professional Conduct in the TASA (Code) for registered tax practitioners; and
- (c) imposing sanctions to discipline registered tax practitioners.

Further, the underlying policy objectives of the TASA include, but are not limited to, enhancing the protection of consumers of tax agent services and strengthening the integrity of the tax system and the tax profession.

The TPB's statutory functions are provided in section 60-15 of the TASA and include the following:

- (a) to administer the system for the registration of registered tax practitioners;
- (b) to investigate applications for registration and conduct that may breach the TASA;
- (c) to impose sanctions for non-compliance with the Code;
- (d) to issue, by legislative instrument, guidelines to assist in achieving the functions mentioned in paragraphs (a), (b) and (c);
- (e) such other functions as are conferred on the Board by the TASA, the regulations or any other law of the Commonwealth; and
- (f) to do anything incidental or conducive to the performance of its functions.

The TPB is subject to strict secrecy and disclosure provisions which govern the use of official information obtained under the TASA to ensure that there is a high level of protection (see sections 70-35 to 70-45 of the TASA). This includes offence provisions for recording or disclosing official information and on-disclosure of official information. One of the exceptions to the prohibition on disclosure of official information is that the TPB may make a record for, or disclosure to, an authorised law enforcement agency officer for the following purposes:

- (a) investigating a serious offence;
- (b) enforcing a law, the contravention of which is a serious offence; or
- (c) the making, or proposed or possible making, of a proceeds of crime order (see subsection 70-40(4) of the TASA).

As at 1 August 2020, there were 78,532 tax practitioners registered with the TPB, which consists of 43,525 tax agents, 18,724 tax (financial) advisers and 16,283 BAS agents.

The TPB's compliance framework

1. Fit and proper person requirement under the TASA

The tax practitioner registration requirements are prescribed in section 20-5 of the TASA and include, but are not limited to, a fit and proper person requirement. This applies to each individual registered tax practitioner, each director (in the case of a company registered tax practitioner) and each individual partner and director of any company partner (in the case of a partnership registered tax practitioner).

The criteria for determining whether an individual is a fit and proper person considers, among other things, whether the individual is of good fame, integrity and character, whether the individual has been convicted of an offence involving fraud or dishonesty during the previous five years, and whether the individual has been sentenced to a term of imprisonment during the previous five years (see section 20-15 of the TASA).¹

¹ Further information on the tax practitioner registration requirement to be a fit and proper person is contained in the [TPB Explanatory Paper TPB\(EP\) 02/2010 Fit and Proper Person](#).

If the TPB is satisfied that a registered tax practitioner has ceased to meet one of the tax practitioner registration requirements, the TPB may terminate the registration of the registered tax practitioner (see sections 40-5, 40-10 and 40-15 of the TASA).

2. *The Code of Professional Conduct*

Once registered with the TPB, registered tax practitioners must comply with the requirements under the TASA, including the Code. The Code governs the ethical and professional standards of registered tax practitioners. For example, subsection 30-10(1) of the TASA requires registered tax practitioners to act honestly and with integrity (Code Item 1).²

If a registered tax practitioner breaches the Code, the TPB may impose one or more administrative sanctions under the TASA for that breach (see section 30-15 of the TASA).

Independent review of the TPB

An independent review of the TPB (the Review), led by Mr Keith James, was conducted in 2019, with the final report being provided to Government on 31 October 2019. The Review considered, among other things, the TPB’s administrative sanction regime and information sharing arrangements. At the time of preparing this submission, we are awaiting the Government’s response to the Review.

The Review’s preliminary view on the TPB’s administrative sanction regime is that the TPB should be equipped with an agile sanctions regime to respond to emerging issues in the profession, suggesting a number of possible additional sanction tools. The Review also advised that effective information sharing between government organisations is needed to reduce the number of government interactions for registered tax practitioners and consumers and to focus compliance and monitoring activities. The Review further suggested that the TPB’s information sharing arrangements should be strengthened, possibly by force of legislation.

The TPB’s submission on the Bill

The TPB’s submission in relation to particular Schedules of the Bill is provided at Table 1 below.

Table 1: The TPB’s submission on the Bill

Schedule	TPB submission
<p>Schedule 1 – Money Laundering</p> <p>Amendments to the <i>Criminal Code Act 1995</i> (Criminal Code)</p>	<p>The TPB notes that Schedule 1 of the Bill proposes various amendments to Division 400 of the <i>Criminal Code</i> to broaden the existing Commonwealth money laundering offences to address the behaviour of modern money laundering networks, noting that the amendments repeal the existing definition of ‘proceeds of crime’, and instead create new offences for engaging in conduct in relation to ‘proceeds of general crime’ which is distinguished from ‘proceeds of indictable crime’ offences. It is also noted that the amendments expand on the concept of ‘dealing with money or other property’ in the context of ‘proceeds of indictable crime’ offences and introduces the concept of ‘engaging in conduct in relation to money or other property’ for ‘proceeds of general crime’ offences.</p>

² Further information on Code Item 1 is contained in the [TPB Explanatory Paper TPB\(EP\) 01/2010 Code of Professional Conduct](#).

Schedule	TPB submission
	<p>The TPB suggests that these amendments to the Commonwealth money laundering offences have the potential to apply to a wider range of criminal behaviour. On this basis, there is a greater likelihood that the amendments may impact on the TPB’s regulated population of registered tax practitioners, noting that most registered tax practitioners are not governed by the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> and the <i>Anti-Money Laundering and Counter-Terrorism Financing Rules</i>.³ Any implications for registered tax practitioners under these amendments would raise serious concerns for the TPB regarding compliance with the TASA and may lead to flow-on regulatory impacts for the TPB. For example, the TPB may have concerns regarding compliance with the tax practitioner registration requirement to be a fit and proper person and the requirement under Code Item 1 to act honestly and with integrity.</p> <p>In particular, the TPB has experience of tax practitioners supporting or enabling serious crime. In some circumstances, the crime involves a fraud on the Commonwealth (for example, phoenixing or systemic failure to remit to the Australian Taxation Office (ATO) pay as you go withholding). In other circumstances, tax practitioners incorrectly report income of their clients, themselves or their associates (for example, failing to disclose millions hidden in secrecy accounts offshore leading to tax evasion). Alternatively, tax practitioners may be aware of clients acting unlawfully (for example, taking and hiding cash in the black economy). Some of these cases are subject to criminal investigation via the ATO.</p> <p>The TPB finalised some 2,000 matters in 2019-20, from complaints to investigations. The TPB’s future investigations program, including a Joint Compliance Strategy with the ATO, will focus on higher risk tax practitioners which number in excess of 2,700. The TPB considers it common, in investigations, that there is a misstatement of taxable income, in a material amount, in one or more of their tax returns (for themselves and/or their clients/associates). Such misstatements, if made with requisite intent, may lead to law enforcement enquiries regarding the ‘proceeds of general crime’. This is particularly so when the relevant client has assets and a lifestyle which is not commensurate with their taxable income as disclosed to the ATO.</p>
<p>Schedule 6 - Information</p> <p>Amendments to the <i>Proceeds of Crime Act 2002</i> (POC Act)</p>	<p>The TPB notes that Item 10 in Schedule 6 of the Bill amends subsection 266A(2) of the POC Act to expand the circumstances in which documents or information obtained using information-gathering powers under the POC Act can be subsequently disclosed to, and used by, particular bodies for particular purposes. For example, the amendments allow disclosure to a “Professional disciplinary body” for the purpose of “Enabling or assisting the body to perform any of the body’s functions” to ensure that evidence of a serious breach of professional standards can be passed onto these bodies to assist in investigating professional facilitators of serious and organised crime.</p>

³ The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and the *Anti-Money Laundering and Counter-Terrorism Financing Rules* aim to prevent money laundering and the financing of terrorism by imposing a number of obligations on the financial sector, gambling sector, remittance (money transfer) services, bullion dealers and other professionals or businesses that provide particular services.

Schedule	TPB submission
	<p>As per our comments in relation to Schedule 1 of the Bill, the TPB’s expectation that the amendments to the Commonwealth money laundering offences would have a greater likelihood of capturing the TPB’s regulated population of registered tax practitioners, means it is critical that the TPB should be listed as a recipient for information sharing purposes since the documents or information obtained under the POC Act would be critical to the TPB carrying out its regulatory functions. For example, this would assist the TPB in carrying out its regulatory functions of investigating applications for registration and conduct that may breach the TASA, imposing sanctions for non-compliance with the Code, and ultimately protecting consumers of tax agent services.</p> <p>While the TPB works closely with co-regulators and external stakeholders (for example, the ATO and recognised professional associations) to better understand and act on high-risk tax practitioner behaviour, the TPB is a separate Commonwealth regulator with a distinct role of regulating the tax profession and would benefit from more effective information sharing arrangements between government organisations to deliver on its regulatory functions.</p> <p>Consistent with the approach taken for professional disciplinary bodies, the TPB suggests that Item 10 in Schedule 6 of the Bill should include a new amendment that specifically lists the TPB as an authority that would receive disclosures of documents or information obtained under the POC Act for the purpose of enabling or assisting the TPB to perform any of its functions. This would ensure that the TPB has more effective information sharing arrangements in place and receives evidence of serious misconduct to assist in its investigations. It is also noted that any documents or information received by the TPB would be subject to a high level of protection, since the TPB adheres to strict secrecy and disclosure provisions contained in the TASA.</p> <p>In implementing the POC Act amendments, tax practitioner misconduct will be a vital source of intelligence for law enforcement agencies. Similarly, where organised crime is subject to police investigation, intelligence on intermediaries who are (or who should be) registered tax practitioners, would be of great assistance to the TPB.</p> <p>Whilst many of these tax crime investigations are conducted under the Serious Financial Crime Taskforce (SFCT), the TPB is not a member of this SFCT. This has led to curious circumstances where the TPB has inadvertently conducted an investigation on the same target as the SFCT, however the TPB were advised that intelligence could not be shared with the TPB. The TPB appreciates that in some circumstances there may be operational sensitivities which impede intelligence sharing. However, in most cases, it is important that a whole of government and coordinated approach is undertaken so as to increase effectiveness of investigations and prevent unintended consequences (e.g. accidental harm to a whistle blower).</p>

Yours sincerely

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Chair
Tax Practitioners Board