



Australian Government
The Treasury



Enhancing the Tax Practitioners Board's sanctions regime

Consultation paper

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Consultation Paper 1

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In the spirit of reconciliation, the Treasury acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples.

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Consultation Process

Request for feedback and comments

The purpose of this consultation paper is to seek stakeholder feedback and views on potential reforms that will enhance the range of sanctions available to the Tax Practitioners Board.

Closing date for submissions: 21 January 2024

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The principles outlined in this paper have not received Government approval and are not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

Enhancing the Tax Practitioners Board's sanctions regime

Introduction

Recent events have exposed limitations in the current regulatory framework for tax practitioners and the broader system in which they operate. On 6 August 2023, the Albanese Government announced a significant package of reforms to crack down on misconduct and rebuild confidence in the systems and structures that keep our tax system and capital markets strong.

The first stage of the government response included enhancements to the regulatory framework that have recently been implemented (via Treasury Laws Amendment (2023 Measures No.1) Bill 2023 (Cth)), including:

- requiring tax and BAS agents, collectively referred to as tax practitioners, not to employ, use or enter into arrangements with a disqualified entity without TPB approval
- changing the registration period for tax practitioners from three years to an annual renewal
- enabling the relevant minister to supplement the Code of Professional Conduct for tax practitioners. (Proposed enhancements to the code are currently open for consultation.)

The second stage of the government response included measures that strengthen the integrity of the tax system and increase the powers of relevant regulators. These measures were introduced to parliament on 16 November 2023 in Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (Cth). These proposals will:

- increase the scope and penalty amount of penalty provisions that apply to promoters of tax exploitation schemes
- improve information exchange between government agencies as well as professional representatives on potential misconduct
- extend whistleblower protection for those who wish to disclose alleged misconduct to the Tax Practitioners Board (TPB)
- enable enhanced TPB investigations and improve transparency of tax practitioner misconduct on the TPB public register.

The next phase of the government response is a suite of consultations that focuses on proposals to further strengthen the regulatory framework and the broader system that tax practitioners operate in. In this stage of the response, Treasury will be undertaking the following:

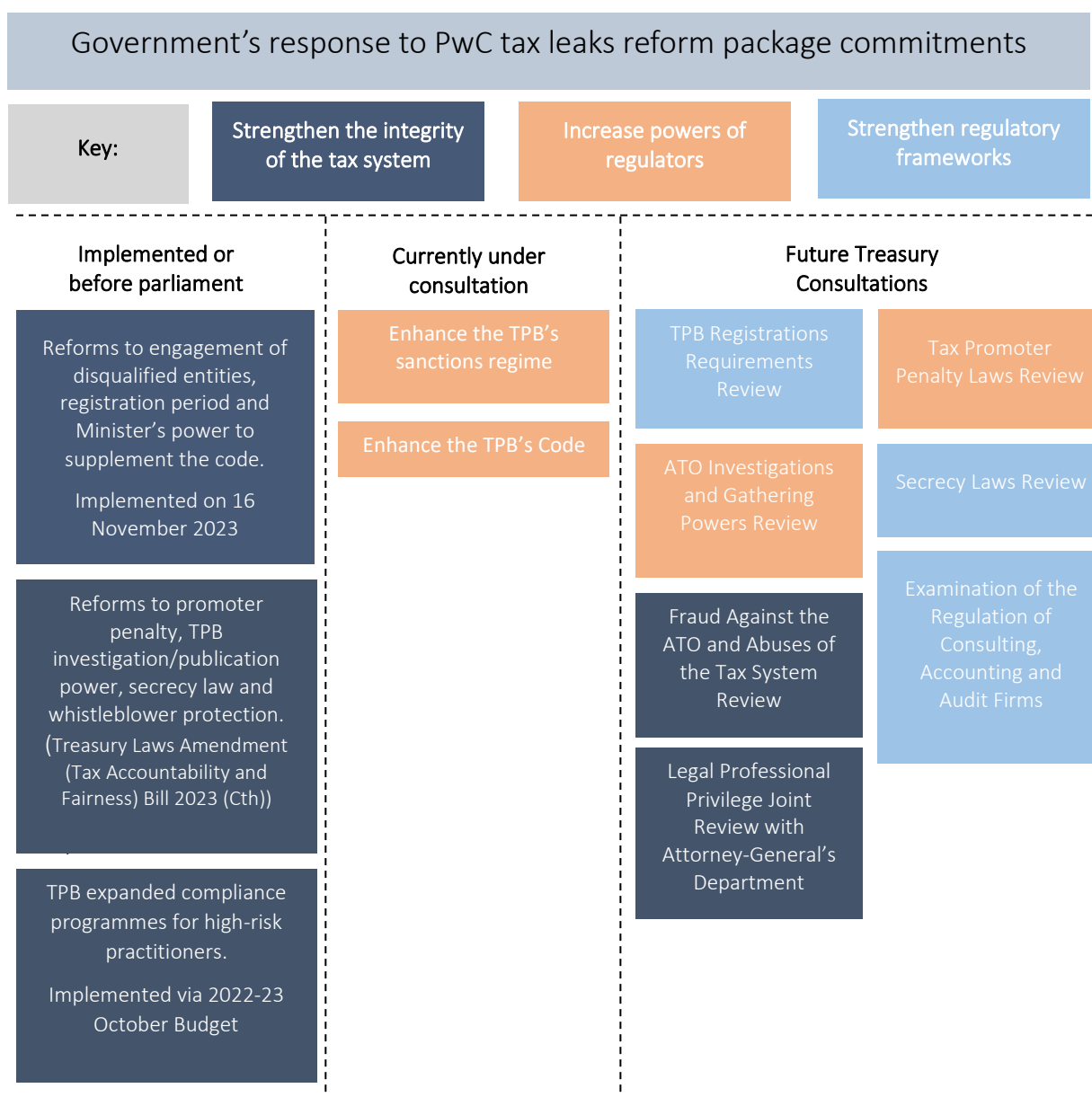
- a review of the sanctions regime that the TPB administers (this consultation paper)
- a review of the tax practitioner registration requirements
- a review of the penalty regime that applies to promoters of tax schemes, and penalties applicable to practitioners who make false and misleading statements to the Commissioner of Taxation
- a review of the Australian Taxation Office's (ATO) and TPB's respective investigation and information gathering powers

- a review of emerging fraud and systemic abuse of the tax and superannuation systems
- a review of the secrecy provisions that restrict information sharing by government bodies such as the ATO and TPB
- a review of the use of legal professional privilege in Commonwealth investigations
- an examination of the regulation of consulting, accounting and audit firms.

Funding has also been provided to the TPB in the 2022-23 October Budget to enable the roll out of an expanded compliance program, targeting higher risk tax practitioners who may be unregistered, designing schemes, driving tax avoidance or promoting evasion or other criminality.

Figure 1 summarises past, current and future work Treasury is undertaking to strengthen the regulatory framework.

Figure 1: Work being undertaken by Treasury to strengthen the regulatory framework



Objective of this consultation

This consultation paper seeks feedback and views on proposed reforms that will provide the TPB with a stronger and more agile sanctions regime. A robust regime will have a greater deterrence effect on misconduct and will allow the TPB to respond to misconduct in a timely manner, with sanctions that are proportionate to the severity of the contravention of the law. It will also allow the TPB to more adequately and appropriately address contemporary forms of misconduct.

The rationale is to enable the TPB to have the ability to impose sanctions that escalate in severity in response to more serious contravention of the law, as it is neither effective nor equitable to enforce serious penalties against all types of offences. This will allow the TPB to respond to a continuum of attitudes towards compliance by imposing appropriate sanctions in accordance with non-compliant behaviour.

This paper contains the following proposals in relation to the TPB's sanctions regime:

- criminal penalties for practitioners that operate without a registration with the TPB
- broader and increased civil penalties in the *Tax Agent Services Act 2009* (Cth) (TASA)
- an infringement notice scheme attached to the civil penalty regime
- a new TPB power to allow it to enter enforceable voluntary undertakings with tax practitioners
- a new TPB power to impose interim and contingent suspensions.

Further proposals to strengthen the regulatory framework, building on the changes to the TPB sanctions regime will be addressed in future Treasury consultations (outlined in Figure 1) throughout the remainder of 2023 and in 2024.

Background

Purpose of the Tax Practitioners Board

The TPB regulates tax practitioners to protect and assure consumers that tax practitioners meet appropriate standards of professional and ethical conduct.

The TPB is an independent statutory body comprising a board appointed by the Assistant Treasurer. The board is responsible for regulating practitioners including administering and investigating practitioners, and for making disciplinary decisions and applying sanctions in appropriate cases. The board is supported by a staff of around 160 people in multiple sites around Australia.

The regulatory functions of the TPB are outlined in the TASA. They include administering the code (and sanctions for breaches of the code), investigating conduct that may breach the TASA, resolving complaints lodged regarding practitioners and unregistered preparers, and seeking civil penalty orders from the Federal Court of Australia in response to breaches by registered tax practitioners.

These regulatory functions support public trust and confidence in the integrity of the tax profession and of the tax system by ensuring that tax agent services are provided to the community in accordance with appropriate standards of professional and ethical conduct. This trust and confidence has been tested with recent events, and it is clear that the TPB needs a greater range of powers that are fit for purpose to discourage and deal with misconduct. The regime needs to be agile and one which provides increased transparency on the regulation of the profession.

Further information regarding the role of the TPB can be found on the TPB's website:

www.tpb.gov.au.

Obligations of tax practitioners

Tax practitioners must comply with the TASA in order to maintain their registration with the TPB and provide tax agent services for a fee or another reward. Ongoing compliance includes maintaining professional indemnity insurance, meeting continuing professional education requirements, notifying the TPB of certain changes in circumstances and complying with the code. By extension, anyone who provides tax or BAS services for a fee or reward without a valid TPB registration is in contravention of the TASA.

TPB registration ensures that practitioners have the qualifications and experience necessary to provide tax practitioner services, meet the 'fit and proper person' requirements of the TASA, and have appropriate professional indemnity insurance cover to protect the public, including consumers. The operation of unregistered tax preparers puts at risk the public trust in the regulatory system.

Current regulatory framework

Where entities fail to comply with the TASA, the TPB may currently impose the following sanctions:

- an administrative sanction for a registered tax practitioner's breach of the code, after conducting a formal investigation, which may include:
 - a written caution
 - an order
 - suspension of registration
 - termination of registration.
- the termination of registration without having to conduct a formal investigation if:
 - an event affecting the continued registration of the tax practitioner occurs (including death, surrender or a company/partnership ceasing to exist)
 - the tax practitioner ceases to meet one of the tax practitioner registration requirements
 - the tax practitioner breaches a condition of their registration.
- the imposition of a period of time within which a registered tax practitioner cannot apply for registration after being terminated (up to 5 years).
- an application to the Federal Court for a civil penalty order and/or injunction (under Divisions 50 and 70 of the TASA) for breaches of Division 50 of the TASA, relating to:
 - registered tax practitioners:
 - : making false or misleading statements to the Commissioner of Taxation ('the Commissioner')
 - : employing or using the services of a deregistered entity(s)
 - : employing or using the services of a disqualified entity(s) unless they have received approval from the TPB
 - : signing declarations as required or permitted by a taxation law as a registered tax practitioner where the declarations have not been prepared by the tax practitioner, another registered tax practitioner or someone working under the supervision and control of a registered tax practitioner and reasonable steps to ensure the accuracy of the document have not been taken.
 - unregistered tax practitioners:
 - : providing tax agent services for a fee or other reward while unregistered
 - : advertising tax agent services while unregistered
 - : representing that an individual is a registered tax agent, BAS agent or tax (financial) adviser, while unregistered.
- the TPB also has limited criminal sanctions available to it under Part III of the *Taxation Administration Act 1953* (Cth) ('TAA').¹

Recent legislative amendments through Treasury Laws Amendment (2023 Measures No. 1) Bill 2023 (Cth) and proposed in Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (Cth) will also strengthen the TPB's ability to address misconduct. The reforms include:

¹ Sections 8C, 8D, 8K and 8N of the TAA.

- enabling the relevant Minister, through legislative instrument, to supplement the existing Code to ensure that emerging or existing behaviours and practices by tax practitioners are properly addressed
- strengthening the TPB's civil penalties by disallowing tax practitioners to employ or use the services of disqualified entities
- empowering the TPB to publish additional details, including potential misconduct of tax practitioners that are currently included on the Register
- extending the TPB's six-month timeframe to conduct an investigation to two years.

Gaps in the current regulatory framework

The recent matters have highlighted the importance of addressing gaps in the enforcement tools available to TPB so that misconduct can be addressed swiftly and appropriately.

Some of the existing gaps were identified by the 2019 TPB review undertaken by Mr Keith James, including:

- the TPB currently only has the ability to issue low-level sanctions (such as written cautions and further education), and high-level sanctions which have serious implications for tax practitioners (including the suspension or termination of registration and civil penalties), but nothing between these two
- under the current sanctions regime, the TPB lacks additional sanction powers to allow for more graduated and proportionate responses by the TPB to tax practitioner misconduct
- the current sanction regime does not allow the TPB to act quickly in certain circumstances where urgent action is required. In particular, where investigations are ongoing, but there are concurrent risks associated with allowing the tax practitioner to continue to practise.

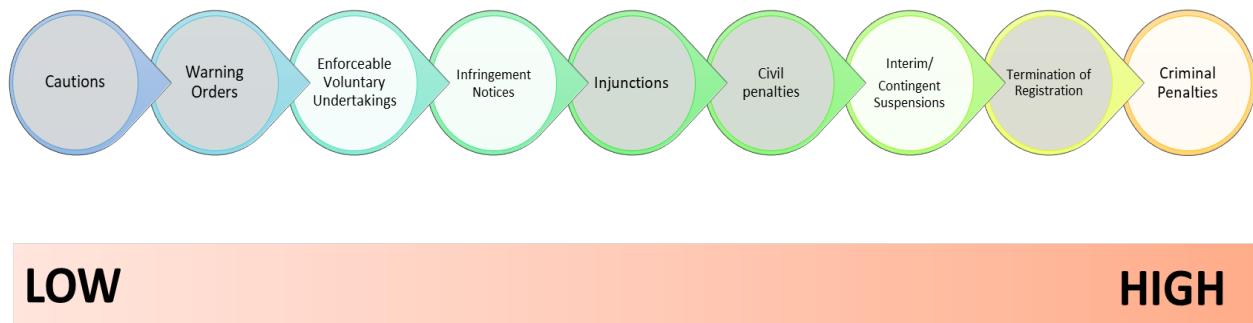
Building on these gaps, recent events demonstrated that egregious behaviour has the potential to harm the tax system and undermine the public's confidence in it. Stronger sanctions are also necessary to deter egregious behaviour and enable the TPB to have a full range of graduated responses. The enhanced sanctions proposed include the ability for the TPB to bring criminal proceedings in appropriate circumstances and an expanded civil penalties regime that can apply to breaches of the code.

The following table summarises the current sanctions framework and the proposed enhancements (the text in bold are the proposed options).

Table 1: Current and proposed future state of TPB sanctions

TPB Sanctions	Current State	Proposed Future State
Low level sanctions	<ul style="list-style-type: none"> – Written cautions – Orders (such as education directions, supervision orders and not taking on new clients) 	<ul style="list-style-type: none"> – Written cautions – Orders (such as education directions) – Infringement notices – Enforceable voluntary undertakings
Medium level sanctions	<ul style="list-style-type: none"> – Orders (such as education directions, supervision orders and not taking on new clients) 	<ul style="list-style-type: none"> – Infringement notices (e.g. where multiple notices are issued for misconduct that contravenes multiple provisions of the code) – Enforceable voluntary undertakings (e.g. where the undertakings are more onerous, proportionate to the wrongdoing) – Interim and contingent suspensions
High level sanctions	<ul style="list-style-type: none"> – Orders (such as education directions, supervision orders and not taking on new clients) – Suspension of registration – Termination of registration (Where tax practitioners cannot reapply for registration after being terminated for up to 5 years) – Court injunctions – Civil penalties for <ul style="list-style-type: none"> : unregistered practitioners : registered practitioners, including making false and misleading statements to the Commissioner of Taxation. 	<ul style="list-style-type: none"> – Suspension of registration – Termination of registration (Where tax practitioners cannot reapply for registration after being terminated for up to 5 years) – Court injunctions – Civil penalties for: <ul style="list-style-type: none"> : Unregistered practitioners : Registered tax practitioners, including making false and misleading statement to the Commissioner of Taxation and the TPB. : Breaches of the code – Criminal sanctions for unregistered practitioners

Figure 2: Proposals to increase the range of powers available to the TPB



The enhanced sanctions regime will bring the TPB in line with other Commonwealth regulators and allow the TPB the ability to impose sanctions that escalate in severity in response to more serious contravention of the law, and support a strategic approach to enforcement, where the regulator is able to ratchet up sanctions as appropriate in response to continuing non-compliant behaviour.

The TPB will publish details of sanctions it imposes on the TPB public register subject to legislative amendments currently before parliament — Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 (Cth). This would reinforce the deterrent effect of the sanctions and provide community with greater transparency and confidence in the tax system.

Balancing expanded sanction powers with safeguards

A robust sanctions regime needs to strike a balance between supporting the majority of tax practitioners who do the right thing, addressing egregious behaviours of the few who bring the integrity of the profession into question, and protecting consumers. The intention of the proposed sanctions is not that the TPB issue more severe penalties in all cases, but rather, with a greater range of sanctions available, the TPB is able to take a proportionate approach and impose suitable sanctions.

To ensure that this balance is met and misconduct is suitably addressed, the proposed new and expanded sanctions available to the TPB will have proportionate safeguards. The TPB will publish guidance and reconsider their internal protocols, in consultation with Treasury and other relevant stakeholders, to provide a high level of accountability and transparency to tax practitioners and the public. This paper also canvasses options for the appropriate level of review and appeal rights (where applicable) to sanctions imposed by the TPB. Feedback from stakeholders on how best to strike this balance overall, as well as on the specific proposals outlined is encouraged.

Key features of the proposed enhanced sanctions regime

The following section will outline the proposed enhancements to the sanctions regime and the relevant consultation questions to which we seek your views. These are:

- The 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.

Reintroduction of criminal penalties for unregistered preparers

The TPB currently has very limited criminal sanctions available to it under the TAA. The TPB can currently seek the application of criminal sanctions penalties against those who are refusing or failing to comply with a taxation law (e.g. by not providing information to the TPB as required under the TASA) and those who make false or misleading statements to a taxation officer.

The criminal penalties available under the current regulatory framework are narrower than criminal penalties that existed prior to the formation of the TPB. Prior to the formation of the TPB and pursuant legislation, criminal penalties existed in the *Income Tax Assessment Act 1936* (Cth) ('ITAA') in relation to the offences regarding unregistered tax practitioners (see Table 2).

Table 2: Criminal penalties under the superseded regime, prior to 2008

Offence	Penalty under previous legislation, applicable prior to 2008
Unregistered practitioners who provide taxation services for a fee	200 penalty units (which would currently equate to \$62,600)
Unregistered practitioners who advertised for tax related services	10 penalty units (which would currently equate to \$3,130)
Tax practitioners who allowed unregistered preparers to perform tax services on their behalf	10 penalty units (which would currently equate to \$3,130)

In addition to offences related to unregistered preparers outlined in Table 2, the ITAA also included criminal penalties for registered preparers for offences such as failing to notify the board of changes in company or partnership structures.

The proposal is to reintroduce the ability for the TPB to seek a criminal penalty for unregistered preparers to target serious contraveners, such as those who repeatedly provide tax agent services while unregistered or those engaging in intentional wrongdoing. It is proposed that the pre-existing offences and corresponding penalties are reintroduced.

Treasury considers that the current civil penalty regime does not sufficiently deter offenders from the type of misconduct that the proposed criminal penalties seek to apply to. Even where the TPB has approached unregistered preparers and/or sought an injunction from the Federal Court, the TPB has found instances where the unregistered preparer continues to provide services. The introduction of criminal penalties in addition to the existing penalty provisions will afford the TPB with discretion to pursue either civil or criminal penalties, depending on the type and persistence of behaviour of the

unregistered preparer. The introduction of criminal offences applicable to unregistered preparers is primarily intended to strengthen the integrity of the tax system, by equipping the TPB with a graduated response mechanism where civil penalties are unsuccessful in deterring this type of misconduct.

Notwithstanding this, Treasury presently considers it unnecessary to reintroduce criminal penalties to the extent and scope that previously existed under the ITAA in relation to registered tax practitioners. Accordingly, the proposed criminal offence will be targeted to address the most serious unregistered contraveners, such as repeat offenders or those engaging in intentional wrongdoing. The proposal is seeking to introduce criminal penalties to unregistered tax practitioners only, unlike the previous regime under the ITAA which also included criminal offences for registered tax agents.

The 2019 TPB review raised the idea of strict liability offences, which generally apply to less serious offences and have capped penalties that apply. Treasury considers that the introduction of infringement notices and enhancing the TPB's ability to publish relevant information on its register for 5 years would be sufficient. These proposed measures would complement the existing regulatory framework.

Criminal penalties example – unregistered preparer

Background scenario

Matthew has previously been penalised by the Federal Court for providing tax agent services for a fee whilst being unregistered. The Federal Court also imposed an injunction applicable for five years prohibiting Matthew from providing tax agent services for a fee or other reward while being unregistered.

Matthew ceases to provide tax agent services for the five-year period of the injunction. The order lapses after five years and despite prior penalties and repeated directions from the TPB, Matthew recommences his operations to provide tax agent services for a fee whilst being unregistered.

Sanctions available to the TPB under the current regime

Under the current TPB sanctions regime, there is no criminal penalty that applies to unregistered preparers. The sanctions available to the TPB relating to unregistered preparers are limited to civil penalties.

Sanctions available to the TPB under the proposed regime

The TPB could apply for a criminal penalty, considering the serious and recalcitrant nature of the misconduct, the direct threat Matthew's conduct poses to the integrity of the tax system and the fact that the Federal Court's injunction has now lapsed.

Consultation questions

1. How effective would the introduction of criminal penalties (and resultant risk of imprisonment) be in deterring unregistered preparers? Are the penalty unit amounts outlined in the previous sanctions regime appropriate?
2. Having regard to other legislative regimes, what would be an appropriate intent threshold to attach to the proposed criminal offence (e.g. intentional disregard, recklessness, etc.)?
3. Are there any limitations, risks or unintended consequences that may result from implementing a criminal penalty for unregistered preparers who provide taxation services for a fee?
4. Are there any relevant sanction measures in existing comparable regimes that have been effective in deterring and/or penalising unregistered persons and/or entities?
5. Are there any other deterrent mechanisms not covered in this consultation paper? Such as strict liability offences for less serious offences and the reintroduction of criminal penalties to the extent of the previous ITAA provisions that would be more effective in preventing unregistered preparers from providing tax services for a fee?

Broader and increased civil penalties in the TASA

A civil penalty is a pecuniary penalty imposed by the court in civil proceedings (as distinct from a fine in criminal proceedings). Importantly, the TPB cannot impose civil penalties itself without making an application to court.

What are the civil penalties currently available under the TASA?

At present, the TPB has powers under the TASA to apply to the Federal Court for a civil penalty order and/or injunction against both unregistered and registered tax practitioners where it is aware of contraventions under Division 50 of the TASA. This includes, for the unregistered, those that provide (or advertise for the provision of) tax agent services for a fee or reward, or falsely represent to others that they are a registered practitioner and for registered tax practitioners, those that make false or misleading statements to the Commissioner, employ or use the services of individuals or firms that have been deregistered by the TPB or sign off on documents that have not been prepared them (or someone under their supervision).

How does the proposal expand civil penalties under the TASA?

The proposal is to expand the circumstances in which the TPB can apply to the Federal Court to impose civil penalties, introduce new civil penalty provisions for breaches of the code, and increase existing penalties. As part of the proposed reforms, the criteria pertaining to section 50-20 of the TASA would be broadened to ensure that both registered tax practitioners and unregistered preparers are liable for civil penalties if they make false or misleading statements to the Commissioner or the TPB. This would strengthen the existing regulatory framework, ensure that the TPB is able to swiftly respond to emerging threats to the tax system, and deter bad actors from making such statements to obtain benefits they are ineligible for.

Additional options to discourage tax practitioners from making false or misleading statements that impair the integrity of the tax system will be considered in a future Treasury consultation paper on proposed promoter penalty law reforms. The paper is expected to be released in the first half of 2024 for consultation.

What is the rationale for the proposed expansion?

The expansion aims to ensure that the existing regulatory regime is strengthened such that the TPB is able to respond to emerging threats to the integrity of the tax system in an agile and proportionate manner.

The code is fundamental to the objective of the TASA as it sets expectations as to how tax practitioners are expected to act while providing tax and/or BAS agent services. Under the TPB's current sanction powers, if tax practitioners breach the code, they may be ordered to undertake particular action or actions, or be suspended or terminated such that their ability to practice as a tax practitioner going forward is put into question.

If implemented, this proposal would allow the TPB to make an application to the Federal Court for the imposition of civil pecuniary penalties for a range of behaviours that are not in line with the code and community expectations of a registered tax practitioner, deterring bad actors from engaging in such misconduct. By way of example, the range of behaviours that would enliven the expanded civil penalty provisions would include behaviours that go against fundamental aspects of the provision of tax agent services, including acting honestly, avoiding conflicts of interest, keeping client information confidential, providing services competently and acting lawfully and in the best interests of a client.

Notwithstanding the above, it should be noted that civil penalties are intended to operate as a graduated response to existing sanctions tools (for example, if a tax practitioner fails to comply with lower-level TPB directions).

How would this apply to companies and partnerships?

Where there is misconduct perpetuated by a limited number of directors or partners within a firm, without all directors or partners being aware, it may be inappropriate to terminate registration of the firm, which may also have disproportionate and undesirable impacts on clients of the practitioners and the public in general.

The proposed expansion of the civil penalty regime aims to provide the TPB with the flexibility to proactively pursue serious contraventions of the code. The change would bring the powers of the TPB into alignment with the Australian Securities and Investments Commission ('ASIC'), which has the power to make applications for civil penalties for breaches to the Code of Ethics in the *Corporations Act 2001* (Cth) for financial advisers. Given the resources and time associated with bringing applications before the Federal Court, Treasury expects that the TPB would only apply for the application of civil penalties where the alleged misconduct is of such a nature that other sanctions mechanisms would not otherwise deliver a proportionate response.

What penalties would apply if the Federal Court finds that the civil penalty provisions have been contravened?

The size of the penalty is determined at the discretion of the Federal Court, up to the maximum penalty set in legislation.

Table 3: Current and proposed civil penalty amounts

	Current maximum penalty (penalty units)	Proposed maximum penalty (penalty units)
Individuals (other than significant global entities)	250 penalty units (\$78,250)	2,500 penalty units (\$782,500)
Bodies corporate (other than significant global entities)	1,250 penalty units (\$391,250)	Greater of: - 50,000 penalty units (\$15,650,000) - 10 per cent of aggregated turnover to a cap of \$782.5 million (2.5 million penalty units)
Significant global entities	The current maximum civil penalty on significant global entities is that of either individuals or bodies corporate and will depend on the relevant structure of the entity	Greater of: - 50,000 penalty units (\$15,650,000) - 10 per cent of aggregated turnover to a cap of \$782.5 million (2.5 million penalty units)

Currently, the highest maximum penalty applying to the civil penalties in Division 50 of the TASA is 250 penalty units (currently \$78,250) for individuals and 1,250 penalty units (currently \$391,250) for bodies corporate. Pursuant to section 50-40 of the TASA, where a partnership contravenes a civil penalty provision, the current maximum resultant civil penalty that may be imposed on each partner in the partnership is:

- if the partner is an individual, an amount equal to one-fifth of the maximum penalty that could be imposed on a body corporate for the same contravention
- in all other cases, the maximum penalty that could be imposed on a body corporate for the same contravention.

The proposal is to increase the maximum penalty units to 2,500 penalty units (currently \$782,500) for individuals and 50,000 penalty units (currently \$15,650,000) for bodies corporate, including those that are significant global entities ('SGEs'). The penalties applying to corporate entities will also be extended to non-corporate SGEs to ensure that large entities engaging in contraventions of the code will be exposed to significant and proportionate penalties, regardless of how they structure their business.

SGEs include global parent entities, and members of groups which have global parent entities with annual global income of more than \$1 billion. An SGE can be a public or private company, a trust, a partnership or an individual. This will ensure that large multidisciplinary firms, including accounting partnerships, are held accountable.

Coupled with the expansion of civil penalties to breaches of the code, the increase in the maximum civil penalty units takes into account the intention of the proposal to expand the role of pecuniary penalties in the TPB's array of tools to address tax practitioner misconduct and protect taxpayers and the tax system. The increase in maximum penalties will deter tax practitioners from treating civil penalties as a cost of doing business.

Consultation questions

6. What are the benefits or risks associated with expanding section 50-20 of the TASA to address registered tax practitioners and unregistered preparers who make false and/or misleading statements to the Commissioner and/or the TPB?
7. Would the proposed increase in civil penalties serve as an effective deterrent to protect consumers and prevent breaches of the code and the TASA more generally? Are the proposed penalties appropriately scaled to adequately address individuals, bodies corporate, trusts, partnerships and SGEs?
8. Are there any lessons that can be learnt from other enforced code regimes (e.g. ASIC's enforcement of the code of Ethics within the *Corporations Act 2001* (Cth) for financial advisors)?

Introduction of infringement notices

Infringement notice provisions supplement offence or civil penalty provisions to provide an alternative to prosecution for an offence, or litigation of a civil matter. An infringement notice can be issued by a regulator and sets out particulars of an alleged contravention of the law. Infringement notices are covered by the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), and generally contain the following features:

- the relevant infringement officer may issue an infringement notice where the officer has reasonable grounds to believe a person has contravened a provision subject to an infringement notice
- the notice must be issued within 12 months of an alleged contravention
- each infringement notice generally contains only one alleged contravention
- the notice must include the statement that if the notice is paid within 28 days of it being issued, it does not constitute an admission of guilt, and that the payment precludes any further liability or proceedings related to the alleged contravention
- the amount payable under an infringement notice will, subject to another Act expressly providing otherwise, generally be the lesser of:
 - one-fifth of the maximum penalty that a court could impose on a person for the alleged contravention
 - 12 penalty units (\$3,756) where the person is an individual, or 60 penalty units (\$18,780) where the person is a body corporate (including a SGE)
- a person may apply to the relevant authority for an extension of time to pay the infringement notice
- the relevant authority may withdraw the infringement notice (a person may also apply to the relevant authority for the notice to be withdrawn). The effect of the withdrawal is as if the notice was never issued

- paying the infringement notice discharges all liability for the alleged contravention, and it is not an admission of fault.

The relevant authority has discretion regarding the issue of infringement notices – it is not a mandatory response to a suspected breach. Views are sought on whether the TASA should be amended to empower the TPB with the agile ability to issue infringement notices. It is proposed that the TPB would be able to issue infringement notices where, on the balance of probabilities, it concludes that the civil penalty provisions applicable to unregistered preparers and registered tax practitioners have been enlivened. The TPB would not be required to undertake a formal investigation to issue an infringement notice.

This aspect of the proposal would address the lack of timely and flexible mechanisms available to the TPB for less serious contraventions of the TASA. Where the TPB is aware of a possible breach of the code, the TPB may conclude that the breach is not of a level that warrants formal investigation, given the associated cost and time, and may not view the breach to be sufficiently serious such that a deterrent is required to set expectations and avoid it occurring again. In such circumstances, the TPB may consider it is appropriate to issue an infringement notice to the relevant tax practitioner. Infringement notices may also be issued alongside other TPB sanctions following a formal investigation, such as written cautions, orders or suspension/termination.

If this proposal were adopted, the TPB would be responsible for developing guidelines as to where it would use infringement notices for contraventions of civil penalty provisions, and when it would proceed with an application to the Federal Court to apply for civil penalties, with the expectation that the TPB would use infringement notices for relatively minor contraventions of the civil penalty provisions, given the penalty unit cap.

The infringement notice payment due date would be able to be extended by consent between the TPB and the tax practitioner. For instance, where the TPB imposes a sanction in addition to an infringement notice (e.g. termination) which is appealed by an entity, the TPB may, upon the tax practitioner's request, agree to extend the infringement notice payment due date on the basis that the appeal will examine whether the tax practitioner has in fact breached the TASA. The imposition of an infringement notice may be reviewed internally by the TPB at the request of the tax practitioner. The ability to appeal other administrative sanctions imposed by the TPB would be unaffected.

Infringement notice example – breach of the code

Background scenario

Jessica is a registered tax practitioner. Jessica was found by the TPB to have breached item 8 of the code by failing to maintain knowledge and skills relevant to the tax agent services that they provide, and item 14 of the code by failing to respond to requests from TPB in a timely and reasonable manner.

Sanctions available to the TPB under current regime

The TPB may issue an education order but would not have stronger deterrent apart from suspension or termination, which may be inappropriate in the circumstances.

Sanctions available to the TPB under proposed regime

The TPB can impose an order on Jessica to undertake a course of education as well as an infringement notice for Jessica for 3 penalty units (currently \$939).

Consultation questions

9. What are the benefits and risks associated with introducing infringement notices as a sanction?
10. Does the ability to impose infringement notices in certain circumstances adequately address the perceived gaps in the TPB's sanction powers for low to medium level contraventions?
11. Are the 12-penalty unit (individuals) and 60-penalty unit (bodies corporate) default levels for infringement notices appropriate? Is the proposed infringement notice regime fair and practical for individuals and bodies corporate?
12. Are there additional safeguards that should be in place to ensure that the imposition of infringement notices by the TPB are reasonable and appropriate?

Clarifying TPB orders

The current scope of TPB orders

Under the TASA, if the TPB is satisfied that a tax practitioner has failed to comply with the Code of Professional Conduct, the TPB may impose one or more administrative sanctions, including giving an order. A TPB order can require that a tax practitioner take one or more actions including, but not limited to:

- completing a course of education or training specified in the order
- providing tax agent services under the supervision of a tax practitioner in the order
- providing only those tax agent services that are specified in the order.

Through Treasury Laws Amendment (2023 Measures No. 1) Bill 2023, the order provisions in section 30-20 of the TASA have been amended to include the following fourth example:

- requiring you to notify, in writing, all of your current clients about the findings of the TPB's investigation specified in the order.

This list is non-exhaustive. The TPB may choose to impose orders other than those listed above, for example, the TPB has in the past imposed orders limiting a tax agent from taking on new clients until certain conditions are met, or requiring tax agents to meet outstanding taxation liabilities.

The Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 would also facilitate further transparency of the orders imposed by the TPB, through its public register. This is intended to provide tax practitioners, current and prospective clients and the broader community with information on specific sanctions as they apply to particular tax practitioners.

While these changes provide further clarity and transparency, there might be a case for the TPB to issue guidance on the types of orders it considers making in relation to failures to comply with the Code of Professional Conduct. Additional guidance from the TPB can assist in delivering a stronger, transparent and more agile toolkit of sanctions.

Consultation question

13. Are there other types of orders that the TPB could issue that would be an effective tool to address tax practitioner misconduct and protect consumers?

Introduction of enforceable voluntary undertakings with tax practitioners

An unregistered or registered tax practitioner would, in certain circumstances, have the option to enter into an enforceable voluntary undertaking with the TPB. An enforceable undertaking is a mechanism that would be available to the TPB before, during the course of and after an investigation.

How will the proposed enforceable voluntary undertakings work?

These undertakings would set out commitments formally and in writing that the tax practitioner agrees to comply with. If the order is not complied with, the TPB would be able to apply to the relevant court for an order regarding that breach, including enforcement of compliance and financial penalties. While non-compliance with the original undertaking is not a contempt of court, once the court has ordered the person to comply, a breach of that order is a contempt of court.

What are the benefits of enforceable voluntary undertakings to both the TPB and tax practitioners?

The availability of enforceable undertakings would provide flexibility to tax practitioners and the TPB. For tax practitioners that are aware they have breached the TASA, there may be actions they can take to rectify or mitigate the breach. For the TPB, an enforceable undertaking may achieve the desired outcome, while avoiding the need to complete costly investigations, and also providing it an enforcement mechanism if the original undertaking is not complied with.

Generally, regulators may set out their policies on acceptable and unacceptable terms of the undertaking (e.g. for example, ASIC's Regulatory Guide 100 and the Australian Competition and Consumer Commission's guidance on section 87B of the *Competition and Consumer Act 2010* (Cth)). In the event this proposal is implemented, the TPB would be responsible for developing and disseminating similar guidance outlining its approach to accepting and administering enforceable voluntary undertakings under the TASA. It is proposed that TPB will also be empowered to publish enforceable undertaking agreements on the Register.

Enforceable voluntary undertaking example – breach of the code

Example 1: Background scenario

XYZ Co. is a registered tax practitioner. The TPB began an investigation into allegations that XYZ Co. had failed to ensure that tax agent services relating to the completion and lodgement of income tax returns were provided on its behalf to a competent standard (code item 7). XYZ Co. admitted to the misconduct alleged by the TPB.

Sanctions available to the TPB under the current regime

Under the current TPB sanctions regime, enforceable voluntary undertakings are not a sanction available to the TPB. The sanctions available to the TPB in this scenario include written cautions and orders (such as education directions).

Sanctions available to the TPB under the proposed regime

XYZ Co. could provide the TPB with an enforceable undertaking that they will do the following:

- Ensure that all staff involved in the provision of tax agent services on behalf of XYZ Co. successfully complete courses in relation to:
 - The TASA and the code
 - The *Income Tax Assessment Act 1997* (Cth)
- Provide confirmation and any evidence required by the TPB that all staff have completed the above training
- Employ 2 additional registered tax agents to provide supervision and control over the tax agent services provided on behalf of the entity, and to provide the TPB with the names and registration numbers of these employees, once employed
- Implement enhanced governance and approval protocols within the practice in respect of ATO lodgements.

Having regard to the nature of the alleged misconduct, the previous compliance history of XYZ Co., the ongoing risk to clients and the public, the TPB considered that it was appropriate to accept the enforceable undertaking put forward by XYZ Co.

Consultation questions

14. Are enforceable undertakings an effective regulatory feature to enhance standards and behaviour?
15. What implementation issues could arise from the use of enforceable undertakings?

Introduction of contingent and interim suspensions

Contingent suspensions

The introduction of contingent suspensions would enable the TPB to suspend a tax practitioner's registration subject to an event occurring. The proposal is for contingent suspension powers to be introduced for breaches of the code, and in cases where a tax practitioner ceases to meet their tax practitioner registration requirements or breaches a condition of their registration.

The TPB currently has the power to suspend tax practitioners, but it is required to set a period of time during which a tax practitioner is suspended (i.e. there must be an end date on the suspension). By providing the TPB with a sanction power to remove a tax practitioner until they remedy their non-compliance, but also allowing flexibility for the registered tax practitioner to re-enter the registration system as soon as they do so, a contingent suspension power would allow the TPB to adopt a balanced and fair approach to sanctioning in these circumstances, while still protecting the public interest and integrity of the system. Contingent suspensions would be reviewable decisions.

Interim suspensions

The introduction of interim suspensions would enable the TPB to immediately suspend a tax practitioner's registration without the need to commence or finalise an investigation. This would enable the TPB to act quickly to stop a tax practitioner from committing further harm to clients or tax system while the TPB is conducting its activities.

This sanction power is similar to ASIC's power to vary, suspend or cancel an Australian Financial Services (AFS) licence with or without a hearing dependent on the circumstances and the gravity of the breach or breach likely to occur. Under the recommendations of the Haynes Royal Commission, this sanction power provided ASIC with a tool to adequately protect investors and consumers where there is a need to deter extreme misconduct or where conduct of the licensee may result in investor or consumer detriment.

Similar to the ASIC suspensions power, an interim suspension would be imposed where the TPB considers at least one of the following has been met:

- there are reasonable grounds to believe there has been harm to the public and/or tax system caused by the tax practitioner relating to misappropriation of client and/or government monies
- there are reasonable grounds to conclude there is a direct threat to the integrity of the tax system if the tax practitioner is able to continue to practice as a registered tax practitioner
- an interim suspension is otherwise warranted in the public interest.

This would be one of the most significant sanction powers available to the TPB given it would allow the TPB to act without investigation findings and not provide tax practitioners with normal due

process. It poses the risk of unfairly damaging careers and livelihoods of tax practitioners if used inappropriately or incorrectly.

The decision would be reviewable to ensure tax practitioners who consider the interim suspension to have been incorrectly applied can appeal to have the decision overturned. The TPB would be limited to applying interim suspensions for up to 90 days at a time, with a need for the Board to reconsider the interim suspension and whether an extension is warranted. In these instances where the TPB has significant cause for concern, the ability to issue interim suspensions will provide the TPB with time to gather evidence and make investigation findings to apply sanctions, such as suspension, termination or applying to the Federal Court for a civil penalty.

Interim suspensions would allow greater flexibility to the TPB to act quickly in cases of damage or harm by tax practitioners to clients, the community the profession and/or the tax system.

Consultation questions

16. Given how significant suspensions are likely to be for registered tax practitioners, should interim suspensions be limited to certain circumstances?
17. Are there any risks as to whether an interim suspension may affect clients/taxpayers and are there any additional safeguards that can be put in place to mitigate these risks?
18. Are the safeguards proposed above sufficient to protect tax practitioners?

Sanctions not considered in this paper

Treasury considers that the sanctions outlined in this paper are sufficient to increase the scope of the TPB's powers and allow a graduated response to tax practitioner misconduct in accordance with the severity of misconduct. However, Treasury welcomes views in relation to any sanctions not considered in this paper.

The 2019 TPB review raised the idea of introducing sanctions consisting of:

- Quality assurance audits – where the TPB could order a practitioner to engage an independent person to audit the processes and procedures of the tax practice where there appears to be weaknesses in internal controls.
- Permanent disbarment – where the TPB would permanently de-register a tax practitioner.
- External intervention – where the TPB would appoint an independent person to manage a tax practice and assist with orderly transition of clients in the event of temporary incapacity or to assist winding up of a practice, or otherwise following termination or cessation of a practitioner's registration.

Treasury considers that the sanctions outlined in this consultation paper adequately address any gaps in the regime, and thus further sanctions are not necessary at this stage. However, Treasury welcome views to the contrary.

Additional consultation questions

19. How could unregistered tax practitioner behaviour be best addressed?
20. Are there any other unethical practices or behaviours that are not adequately addressed under the proposed regulatory framework?
21. Does this proposed package of changes collectively strike the right balance in promoting the integrity of the system, protecting consumers' interests, and facilitating access to quality tax advice?
22. Does the proposed package ensure the TPB as regulator has the right tools to deter, detect and punish bad behaviour by tax practitioner?
23. Are there any other deficiencies in the regulatory framework?
24. Are there any other sanctions, including from the 2019 TPB Review, that should be considered?

Summary of consultation questions

Reintroduction of criminal penalties for unregistered preparers

1. How effective would the introduction of criminal penalties (and resultant risk of imprisonment) be in deterring unregistered preparers? Are the penalty unit amounts outlined in the previous sanctions regime appropriate?
2. Having regard to other legislative regimes, what would be an appropriate intent threshold to attach to the proposed criminal offence (e.g. intentional disregard, recklessness, etc.)?
3. Are there any limitations, risks or unintended consequences that may result from implementing a criminal penalty for unregistered preparers who provide taxation services for a fee?
4. Are there any relevant sanction measures in existing comparable regimes that have been effective in deterring and/or penalising unregistered persons and/or entities?
5. Are there any other deterrent mechanisms not covered in this consultation paper? Such as strict liability offences for less serious offences and the reintroduction of criminal penalties to the extent of the previous ITAA provisions that would be more effective in preventing unregistered preparers from providing tax services for a fee?

Broader and increased civil penalties in the TASA

6. What are the benefits or risks associated with expanding section 50-20 of the TASA to address registered tax practitioners and unregistered preparers who make false and/or misleading statements to the Commissioner and/or the TPB?
7. Would the proposed increase in civil penalties serve as an effective deterrent to protect consumers and prevent breaches of the code and the TASA more generally? Are the proposed penalties appropriately scaled to adequately address individuals, bodies corporate, trusts, partnerships and SGEs?
8. Are there any lessons that can be learnt from other enforced code regimes (e.g. ASIC's enforcement of the code of Ethics within the *Corporations Act 2001* (Cth) for financial advisors)?

Introduction of an infringement notice scheme

9. What are the benefits and risks associated with introducing infringement notices as a sanction?
10. Does the ability to impose infringement notices in certain circumstances adequately address the perceived gaps in the TPB's sanction powers for low to medium level contraventions?
11. Are the 12-penalty unit (individuals) and 60-penalty unit (bodies corporate) default levels for infringement notices appropriate? Is the proposed infringement notice regime fair and practical for individuals and bodies corporate?
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