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EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer and Minister for Financial Services

Tax Agent Services Act 2009

Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024

The *Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024* (the Instrument) is a legislative instrument made under section 30-12 of the *Tax Agent Services Act 2009* (the Act). Section 30-12 of the Act provides that the Minister may, by legislative instrument, determine obligations that elaborate or supplement any aspect of the Code of Professional Conduct (the Code). The Code is set out in section 30-10 of the Act and establishes ethical principles that apply to all registered tax agents and business activity statement (BAS) agents (together referred to as ‘tax practitioners’).

The Code is administered by the Tax Practitioners Board (the Board), which regulates tax practitioners across Australia, including their compliance with the Code. Under subsection 30-10(17) of the Act, a tax practitioner must comply with any obligations the Minister determines under section 30-12 of the Act. Where the Board finds a failure to comply with the Code or finds that the conduct constitutes a breach of the Act under section 60-125 of the Act, the Board is able to take a range of actions including making orders or suspending or terminating tax practitioners’ registration. These actions are available to ensure that tax agent services are provided to the community in accordance with appropriate standards of professional and ethical conduct, which supports public trust and confidence in the integrity of the tax profession and of the tax system.

On 2 July 2024, the *Tax Agent Services (Code of Professional Conduct) Determination 2024* (the Determination) was registered. The Determination sets out additional professional and ethical obligations of tax practitioners under section 30-10 of the Act. These additional obligations are built upon the existing principles of the Code as set out in the Act, including honesty and integrity, independence, confidentiality and competence. The Determination commenced on 1 August 2024.

Following the registration of the Determination, the Board began consulting with industry on guidance materials to provide further detail on the Determination obligations to help tax practitioners to understand and comply with their obligations. The Board communicated to stakeholders that it would continue to take a pragmatic and practical approach in enforcing compliance with the additional obligations for all tax practitioners trying to do the right thing. This included providing a reasonable time for tax practitioners to understand their obligations, assess their own practices and implement changes, if required, to comply with the new obligations.

To provide certainty to tax practitioners as to the Board’s approach to transition and implementation of the new obligations, the *Tax Agent Services (Code of Professional Conduct) Amendment (Measures No.1) Determination 2024* was registered on 9 September 2024. The instrument amended the Determination so that the obligations

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under the enhanced Code now apply from 1 January 2025 for larger firms and from 1 July 2025 for smaller firms.

This Instrument now amends sections 15 (about false or misleading statements) and 45 (about keeping clients informed of relevant matters) of the Determination to clarify the provisions to provide further assurance to tax practitioners about how these new obligations are intended to operate. It ensures that tax practitioners and the broader community have certainty as to the scope and intent of these new obligations.

The Act does not specify any conditions that need to be satisfied before the power to make the Instrument may be exercised.

The Instrument responds to stakeholder views provided following the registration of the Determination.

This Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

This Instrument is disallowable and is subject to sunseting.

This Instrument commences on the day following registration of the Instrument. The amendments to the Determination apply from 1 January 2025 for larger firms and 1 July 2025 for smaller firms, as set out in the Determination (as amended).

Details of the Instrument are set out in Attachment A.

A Statement of Compatibility with Human Rights is at Attachment B.

The Office of Impact Analysis (OIA) has been consulted (OIA ref: OIA24-07286) and agreed that an Impact Analysis is not required. The measure is estimated to have no/a low impact on compliance costs.

Details of the Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024

Part 1 – Preliminary

Section 1 – Name

This section provides that the name of the instrument is the *Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024* (the Instrument).

Section 2 – Commencement

Schedule 1 to the Instrument commences on the day after the instrument is registered.

Section 3 – Authority

The Instrument is made under the *Tax Agent Services Act 2009* (the Act).

Section 4 – Schedule(s)

This section provides that each instrument that is specified in the Schedules to this instrument is amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1 – Amendments

Part 1– Amendments relating to false or misleading statements

Item 3 repeals and replaces subsection 15(2) of the Determination which sets out a tax practitioner’s obligations when they become aware of a statement that they prepared or made (directly or indirectly) to the Commissioner, Board or both, was materially false or misleading.

The updated subsection 15(2) clarifies the current provision by:

- expressly stating that the obligation applies only to statements made or prepared by the practitioner (or permitted or directed someone else to make or prepare the statement) instead of relying on the narrative to carry this limitation over from subsection 15(1);
- aligning the situations in which a tax practitioner will have an obligation to take some action to only those cases where they have reasonable grounds to believe (assessed objectively and based on the evidence available to the practitioner) that the statement was relevantly and materially false or misleading because of a failure by someone involved in preparing or making the statement (including the client, tax practitioner or someone else permitted to prepare or make the statement) to take reasonable care, or because someone involved in preparing or making the statement intentionally disregarded, or was recklessly to the operation of, a taxation law;
- setting out the factors in the Determination about what amount of time is considered a reasonable amount of time for a tax practitioner and/or a client (or former client) to

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provide a defensible explanation or to take action to correct a false or misleading statement;

- improving the language to better align with existing provisions and concepts; and
- making clear that in cases where the client does not act to correct a false or misleading statement, after being advised by the practitioner, within a reasonable time period, the practitioner's obligation (under this new Code item) is, depending on the circumstances of the case and the likely harm caused by the client's actions, is to take reasonable steps:
 - to withdraw services from the client where the false or misleading statement is due to recklessness as to the operation of a taxation law or intentional disregard of a taxation law; and
 - if substantial harm has been caused, is being caused, or is likely to be caused, due to the client's actions (or inaction), to notify the Board or Commissioner (as the case requires) that they have advised their client that a correction should be made to a previously made statement, and to the practitioner's knowledge that advice has not been acted upon, and to take further action as the practitioner reasonably considers is needed in the public interest; and
- making clear that the obligations set out in the last dot point do not apply where taking such a course of action would pose a reasonable risk to the practitioner's personal safety, or the safety of a member of their family or staff, or to the extent that such action would be unlawful under another law of the Commonwealth, or of a state or territory, for example, disclosure limitations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* which prevent tipping off a client when such a disclosure could prejudice an active investigation.

Tax practitioners' obligations relating to non-compliant clients broadly aligns with Australian Ethical & Professional Standards Board (APESB) ethical standards. Complying with APESB standards is mandatory for members of Chartered Accountants Australia and New Zealand, CPA Australia, and the Institute of Public Accountants, who comprise around 26,000 registered tax agents.

Tax practitioners are trusted professionals with a responsibility to 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. It is because of this trust, that the laws:

- give taxpayers who engage tax practitioners some safeguards against administrative penalties for false or misleading statements given to the Commissioner of Taxation;
- allow regulatory authorities to apply a rebuttable presumption that reasonable care has been taken to ensure compliance with the taxation laws in relation to statements prepared and/or made by registered tax practitioners; and
- authorise tax practitioners to receive disclosures from, and to support, whistleblowers, in addressing misconduct, including tax avoidance and evasion.

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Given the trust placed in tax practitioners, it is important that an appropriate balance is struck between their duties to their clients and their duties to the support public trust and confidence in the integrity of the tax system. That is, the overarching ethical responsibility to act, when it is needed and where it is appropriate, in the public interest, can be of a higher importance relative to a tax practitioner's duties to client, although these duties are also of great import.

Subsection 15(2) reflects that a tax practitioner has an ethical responsibility to act in the public interest by notifying regulatory authorities of the conduct of a client where there is credible evidence of substantial, actual or potential, harm to the material interests of the broader public from serious non-compliance of the tax laws by a client.

The updated subsection 15(2) identifies the situations in which a tax practitioner will have an obligation to take reasonable steps in relation to a later identified false or misleading statement. The obligations

- vary based on whether the statement was made by the practitioner in relation to their own or an associate's affairs or in relation to a client's affairs; and
- only apply to those cases where they have a reason to believe that the statement was materially false or misleading, because of a failure by someone involved in preparing or making the statement to take reasonable care to comply with a taxation law (with some actions subject to higher thresholds). Innocent or genuine errors or mistakes of taxpayers or practitioners are not intended to be captured by the new obligation with the threshold aligning with the taxation law's administrative penalty safeguard that applies to those taxpayers and tax practitioners who took reasonable care in connection with the making of the statement.

The references in the updated subsection 15(2) to 'taking further action as the practitioner reasonably considers is needed in the public interest' is intended to have the same meaning and operation as it does in the APESB standards. Further actions that a practitioner could consider taking, where the relevant preconditions are met and the practitioner considers it is needed in the public interest, is to notify a client's new tax practitioner of the false or misleading statement, or the client's audit firm.

The new Code item does not replace or alter any other situations in which the Act or other taxation laws require a practitioner to withdraw their services or report of a breach of the law to the regulatory authorities.

Whether a tax practitioner has a reason to believe that a statement was materially false or misleading because either the client or practitioner (or an agent, contractor or employee of the client or practitioner) did not take reasonable care is an objective test based on the evidence the practitioner has. The practitioner is to make a reasonable professional judgement with the information they have available to them. If the practitioner has reason to believe that reasonable care was not taken by the relevant parties, then additional action is required. A detailed explanation of the meaning of reasonable care is set out in *Miscellaneous Taxation Ruling MT 2008/1* and on the Board's website. However, practitioners should not presume the provisions do not apply simply because they wilfully turned a blind eye to what is otherwise intentional or reckless non-compliance.

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The leading case on the meaning of ‘material particulars’ or ‘material respects’ in relation to false or misleading statements is *Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 34 FCR 348. In that case, the Full Federal Court held that, in relation to s 234 of the *Migration Act 1958*, the term “material”, being an expression appearing in many statutes, both in Australia and overseas, requires no more and no less than that; the false or misleading particular must be of moment or of significance, not merely trivial or inconsequential. A statement will be false or misleading in a material particular if it is relevant to the purpose for which it is made and relevant to that purpose if it may, not only if it must or if it will, be taken into account in making a decision under the Act.

Whether the false or misleading statement is ‘material’ will depend on the facts and circumstances, and whether a reasonable person, having the knowledge, skill and experience of a registered tax practitioner, would expect the misstatement or omission to be of substantial import, effect or consequence to the outcome for which it was given. This requires the registered tax practitioner to exercise their professional judgement, taking into account the facts and circumstances of their client and those surrounding the making, or preparing, of the statement.

A tax practitioner is obliged to notify the Board or Commissioner only in cases where the practitioner has a reasonable belief that their client’s actions (or inaction) have caused, are causing, or may cause, substantial harm to the interests of others. When assessing whether another has been harmed, consideration should be given to both financial and non-financial consequences of their actions and inactions. Others includes investors in the client, creditors of the client, employees of the client, competitors of the client, customers of the client, and the public at large, including impacts on public revenue collections, and public trust and confidence on the tax system. Whether any harm is substantial is matter to be assessed based on the impacts on others, Parliament’s views as expressed in the regulatory frameworks it has enacted, including a client’s obligations under the tax law, and a tax practitioner’s obligations under the Act, and a client’s response and integrity of character.

In cases where the tax practitioner is obliged to notify the Board or Commissioner (as the case requires), the tax practitioner is not required to correct the statement or explain to the Board or Commissioner why they believe the statement to be false or misleading or what the tax practitioner otherwise believes the statement should have said. It is for the relevant regulatory authority to consider the notification (being a piece of intelligence and simply a concern, of an ethical nature, of the practitioner about their client’s potential compliance with one or more tax laws), and consider, what, if any, mitigation is required.

Items 2 and 4 make consequential amendments to subsection 15(1) and 15(3) to ensure consistency of language through section 15. These changes do not affect the scope or operative effect of the provision, they just seek to simplify the text and remove duplication.

As stated in the explanatory materials that supported the Determination, the obligation to correct a statement applies to statements that are false or misleading at the time that they are made, regardless of when the tax practitioner becomes aware that the statement was false or misleading. There is no obligation under the Code to take action in relation to a statement that was *not* false or misleading at the time it was made, but later becomes false or misleading because of some later event, for example, there was a change to the law that operates on a retrospective basis, or a decision of a court or tribunal finds that the law

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operates differently to what had been the generally understood interpretation and administrative practice.

While section 15 of the Code does not extend an obligation to correct a statement that was *not* false or misleading at time it was made, but later becomes false or misleading because of some later event, it may nonetheless be appropriate for the tax practitioner to take further action in relation to such a false or misleading statement where they are advising on the matter or on a related matter. Other obligations under the Act or Code may apply to past statements that become false or misleading after they are made, such as the obligation to lawfully act in the client's best interests, to notify the Board of a change in circumstances, or to the notify the Board of a significant breach of the Act or Code.

The new Code item requires certain actions to be taken within reasonable periods of time. What is reasonable in a given set of circumstances will often depend on the circumstances, but factors that should be considered include the type of statement, the details that were false or misleading, the significance of misstatement, the original due date for lodgement of the statement, and any statutory time limits for making corrections (where applicable)¹. At the most general level, corrections should be made as soon as is reasonably practicable, with most statutory contexts setting timeframes of between 30 to 60 days. However, misstatements with lower impacts and no statutory limitations on finalising matters may be corrected over a longer time horizon relative to those with greater impacts and shorter limitation periods. The circumstances of the taxpayer are also relevant, with taxpayers suffering from a natural disaster being given more time to respond.

This new Code item continues to oblige tax practitioners to employ high levels of honesty and integrity in the service they provide and encourages accountability for statements they make or prepare and responsibility for ensuring the Board and Commissioner have access to the most up to date intelligence so as to ensure ongoing public trust in the tax profession and tax system.

Disclosure of confidential information as permitted by section 15 of the Code or another legal obligation, is not a breach of the general confidentiality obligations in the Code, which are subject to lawful obligations to disclose.

When advising your client about a false or misleading statement that should be corrected, tax practitioners should ensure that they advise their client that the statement should be corrected as soon as possible. In some circumstances, there may be legal time limits that apply to making corrections.

Part 2 – Amendments relating to keeping clients informed of relevant matters

Item 6 repeals and replaces subsection 45(1) of the Determination which sets out the different types of information that clients must be advised of by tax practitioners.

The updated subsection 45(1) clarifies the current provision by listing each of the matters, events and circumstances that tax practitioners need to disclose to current and prospective clients.

¹ The statutory limitation periods that apply to amending tax assessments are not a statutory time limit for making a correction – but are nonetheless relevant in determining what is a reasonable time because corrections are to be made within time for an amended assessment to be issued.

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The intent of the new obligation is to ensure that clients are provided with information that is reasonably relevant to them being able to make fully informed decisions as to whether to engage (or continue to engage) a tax practitioner to provide them with a tax agent service, and to ensure the trusted practitioner they engage to represent them, and to act on their behalf, to the Australian Taxation Office, is the right professional for the client.

The obligation seeks to protect clients from being potentially misled or from being subject to potential harm, from not being advised of what is necessary for them to being able to make a fully informed decision as a consumer of tax agent services.

Subsection 45(1) will continue to ensure that prior to engaging, re-engaging or continuing to engage a tax practitioner for their services, clients are fully informed of information that may significantly influence their decision to engage or re-engage the practitioner. This includes advising the client that the Board maintains a register of tax agent and BAS agents, how they can access and search the register, and how they can make a complaint about a tax agent service the practitioner has provided (including the Board's complaint's process).

In addition, the information that needs to be disclosed includes the following event that occur within the last 5 years:

- certain breaches of the Act or instruments made under the Act that have led to penalties or other sanctions;
- matters relating to the solvency of the tax practitioner;
- any conviction relating to an offence involving fraud or dishonesty;
- any sanction or order in relation to promoting or engaging in a tax avoidance or evasion scheme under the tax law;
- any conviction relating to serious tax offences.
- any current conditions applying to registration;

Item 7 amends paragraph 45(2)(b) to clarify the timing as to when disclosures to a client need to occur. Consistent with the Determination as made, advice or disclosure should occur at the time an inquiry is made to engage or re-engage client. A revision to the Determination made by item 5, sets a time for disclosures to existing clients of information for which the client has not been previously advised. In relation to those clients, disclosure should occur within 30 days of the event occurring.

When determining what events have occurred within the last 5 years, the look back period is to be calculated by reference to the time an inquiry to engage or re-engage the client is received. The amendments made by item 5 also clarify that 'prospective' clients covered by section 45 are those clients that make inquiries of a tax practitioner to engage them to provide tax agent services as information to be disclosed to a prospective client is to occur in response to an inquiry to potentially procure tax agents from tax practitioner.

Disclosure to prospective and current clients should go beyond any non-compliance of the individual tax practitioner and extend to matters relating to any company or partnership they are associated with, if the matter could significantly influence the decision to engage

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or continue to engage a tax practitioner within the company or partnership. This provision will further increase the transparency of the tax profession, which is critical to ensuring the integrity of the tax system as a whole.

Section 45 does not operate to limit disclosures that must be made to clients under other laws. For example, following an investigation and finding of the Board of a breach of the Act including the Code of Professional Conduct, by a tax practitioner, the Board can order the disclosure of information by a tax practitioner to clients. Further, in certain situations, a failure to disclose information relevant to a decision to procure services, even if known only to the supplier of those services, can be unlawful under Australian Consumer Law.

Item 9 amends the transitional rules applying to section 45 to make it clear that the 5 year look back period does not apply to matters or events occurring before 1 July 2022 to align with the recent changes to the Board's public register. Further, the transitional rules ensure that no action is required to be taken by tax practitioners before the new obligations begin to apply to them from either 1 January 2025 or 1 July 2025 – by delaying any notification of new events occurring in the transitional period to existing clients until no later than 30 days after the new obligations begin to apply to the tax practitioner.

Part 3 – Other amendments

Items 10 to 17 make small refinements to sections 20, 25, 30 and 40 to remove ambiguity and make clear the intent and scope of the provision.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2) Determination 2024

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Tax Agent Services (Code of Professional Conduct) Amendment (Measures No. 2 Determination 2024* (the Instrument) amends the *Tax Agent Services (Code of Professional Conduct) Determination 2024* (the Determination). The Determination contains obligations that apply to tax agents and Business Activity Statement agents (collectively referred to as tax practitioners). These obligations supplement the existing obligations in section 30-10 of the *Tax Agent Services Act 2009* and together form the Code of Professional Conduct (the Code). The Determination commenced on 1 August 2024, and applies from 1 January 2025 for larger firms and 1 July 2025 for smaller firms.

This Instrument amends sections 15 (about false or misleading statements) and 45 (about keeping clients informed of relevant matters) of the Determination to clarify the provisions to provide further assurance to tax practitioners about how these new obligations are intended to operate. It ensures that tax practitioners have certainty as to the scope and intent of these new obligations, and eliminates possible misunderstandings about how these provisions are intended to operate.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.