Director
Tax Agent Regulation Unit
Personal and Indirect Tax and Charities Division
Treasury
Langton Crescent
Parkes ACT 2600
E-mail: PwCResponse@treasury.gov.au

Submission from the Tax Justice Network Australia to the *Enhancing the Tax Practitioners Board's sanctions regime.* Consultation Paper

19 January 2024

The Tax Justice Network Australia (TJN-Aus) welcomes the opportunity to make a submission in response to the *Enhancing the Tax Practitioners Board's sanctions regime* consultation paper.

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?

The TJN-Aus believes that introducing criminal penalties will act as an additional deterrent, and their effectiveness will be enhanced if their application is swift and certain for those who break the law.

We are concerned that the level of penalty units amounts outlined in the previous sanctions regime may not be a sufficient deterrent if the person has engaged in illegal conduct for a significant period or has been able to charge hefty fees. The penalty amounts should be supplemented with a penalty that imposes a fine for three times the benefit derived where that amount would be greater than the proposed maximum fine. A penalty of three times the benefit obtained by the criminal activity already exists in several Commonwealth laws, such as the penalty for wage theft in the recently passed *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* under section 327A, for intentional false dealing with accounting documents under Division 490 of the *Criminal Code,* for bribery of a foreign public official under section 70.2 of the *Criminal Code* and for bribery of a Commonwealth public official under section 141.1 of the *Criminal Code.*

There needs to be a high recovery of fines issued; otherwise, introducing fines that can be ignored is probably worse for compliance rates than not having fines at all. When entities can't or won't pay fines, the fines become ineffective. Fines become a meaningless sanction that can ultimately lead to contempt for the law.[1]

[1] Chris Leech, 'Detect and deter or catch and release: Are financial penalties an effective way to penalise deliberate tax evaders?', Tax and Transfer Policy Institute, Australian National University, Working Paper 6/2018, April 2018, 28.

For penalties to be effective, they need to be:[2]

- Proportionate
- Fair;
- Swift;
- Certain;
- Memorable;
- Cost effective; and,
- Incentivise and provide a pathway for the re-integration of the offender into compliance.

Memorable means that when a penalty is applied, it needs to be publicised to the broader body of reporting entities to provide greater general deterrence.[3]

Ideally, victims of unregistered preparers should be repaid the funds they paid. In a case we dealt with Solomon Islands workers on the Pacific Australia Labour Mobility scheme who paid for tax advice from an unregistered preparer who went by the name of Roger 007. The workers were unfamiliar with the Australian tax system, and 'Roger' preyed on that vulnerability. We reported Roger to the TPB. In such a case, it would be just that if a successful prosecution resulted, the workers should be repaid the fees they were charged without pursuing civil action. The costs of such civil action in time and money are likely to deter such action, especially when the targets of the unregistered preparer have been vulnerable groups of people.

2. Having regard to other legislative regimes, what would be an appropriate intent threshold to attach to the proposed criminal offence (i.e. intentional disregard, recklessness, etc)?

Given that it would be evident to anyone who knows about the need to register as a tax practitioner, in most cases, the person operating or advertising as an unregistered preparer will be aware of what they are doing, and the threshold for the criminal offence should be low. In a small number of cases, it may be possible that a person seeks to sell tax advice and does not understand the need to register. However, that would only apply to a few people and only for a first offence.

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?

It would be worth speaking with AUSTRAC about the effectiveness of measures they have been able to use to address unregistered remittance services. AUSTRAC has a range of enforcement tools to ensure the registration of remittance service providers and ensure they comply with their anti-money laundering and counter-terrorism financing obligations.[4] AUSTRAC has the following options available to it to deal with remittance service providers, including those that are unregistered:

- civil penalty orders;
- enforceable undertakings;
- infringement notices; and,
- remedial directions.

[2] Ibid., 40.
[3] Ibid., 42.
[4] https://www.austrac.gov.au/business/core-guidance/consequences-not-complying

AUSTRAC also conducted education programs about the need for remittance services to register.[5]

AUSTRAC assessed in 2015 that it had been effective at keeping high-risk remittance dealers from operating, or continuing to operate as remittance dealers.[6]

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?

As discussed above, we would strongly support the penalty being a multiple of the likely benefit derived from offences to deter unregistered providers. Further, those cheated by unregistered providers should be compensated, which would also help incentivise people to come forward and report unregistered preparers who have ripped them off.

There should also be a public register of unregistered preparers who have been sanctioned. It would assist as an additional form of general deterrence to warn others they will get caught and sanctioned if they operate as unregistered preparers.

6. What are the benefits or risks associated with expanding section 50-20 of the TSA to address registered tax practitioners and unregistered preparers who make false and/or misleading statements to the Commissioner and/or the TPB?

The TJN-Aus supports expanding section 50-20 of the TSA as proposed. It is also our experience that allowing law enforcement agencies more tools to sanction those who break the law increases their ability to use sanctions and ensure the sanctions are proportionate to the violation that has occurred. Braithwaite argued that the 'trick' to successful regulation is to impose the fitting sanction as needed without undermining a regulator's capacity to persuade.[7] The greater the range of sanctions available to a regulator or law enforcement agency, the greater their ability to impose the right level of sanction. As Becker has argued, the desired outcome is to allow a regulator a penalty structure that optimally deters socially undesirable behaviour.[8]

Overly severe penalties can risk alienating the offender from the system and the law enforcement authority, which can negatively affect their compliance behaviour.[9] All penalties risk stigmatising those being penalised and pushing them further away from voluntarily complying, particularly if the people involved in being penalised feel they have been treated unfairly.[10]

---

[5] https://www.austrac.gov.au/business/your-industry/remittance-service-providers/unregistered-remittance-dealers

[6] AUSTRAC, "Post-implementation review: Chapters 58 and 59 of the Anti-Money Laundering and Counter-Terrorism Financing Rules relating to the cancellation and suspension of remittance dealer registrations", 2015, 15.

[7] John Braithwaite, 'To Punish or Persuade: Enforcement of Coal Mine Safety', State University of New York Press, 1985, 117.

[8] Cindy Alexander and Mark Cohen, "Causes of Corporate Crime. An Economic Perspective", in Anthony Barkow and Rachel Barkow (eds.), "Prosecutors in Boardrooms", (New York University Press, 2011), 21.

[9] Chris Leech, 'Detect and deter or catch and release: Are financial penalties an effective way to penalise deliberate tax evaders?', Tax and Transfer Policy Institute, Australian National University, Working Paper 6/2018, April 2018, 40-41.

[10] Ibid., 43.

Conversely, penalties that are too soft do not work as effective general or specific deterrence.[11] For example, Gregg Ritchie, one of KPMG's senior tax partners in the US, broke the law when he advised his firm not to register a tax shelter with the IRS. In a memo to colleagues, he stated, "Firstly, the financial exposure of the firm is minimal. Based on our analysis of the applicable penalty sections, we conclude that the penalties would be no greater than $14,000 per $100,000 in KPMG fees." He also argued it was simply the industry norm "There are no tax products marketed to individuals by our competitors which are registered."[12] He concluded:[13]

> *Any financial exposure that may be applicable can easily be dealt with by setting up a reserve against fees collected. Given the relatively nominal amount of such potential penalties, the Firm's financial results should not be affected by this decision…. The rewards of successful marketing of [the tax structure] product (and the competitive disadvantages which may result from registration) far exceed the financial exposure to penalties that may arise.*

Meta-analysis of what works to deter businesses from breaking the law found that a combination of enforcement strategies worked best, rather than the over-reliance on just one approach.[14] A combination of law, regulatory policy and punitive sanctions was found to significantly deter businesses breaking the law.[15] The researchers concluded:[16]

> *It makes sense to focus on regulatory policies at the middle level of the [regulatory] pyramid where persuasion is generally most needed to achieve compliance. Specifically, our findings indicate that policies may be more successful when industry has some input and policies are coupled with education and consistent inspections. More severe strategies (regulatory investigations, penalties, civil suits and arrest/jail time) should be added where compliance has been difficult to achieve.*

Further:[17]

> *Results offer support for a model of corporate regulatory enforcement that blends cooperation with punishment –the type and amount of enforcement response to be determined by the behaviour of the manager/ company (i.e., responsive regulation). Thus, at the top and even middle levels of the enforcement pyramid, multiple "levers" may need to be pulled to achieve compliance.*

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, corporates, trusts, partnerships and SGEs?

The TJN-Aus supports the proposed level of maximum penalties and their scaling. We note these are the maximum penalties that will be available, and the actual penalties imposed will usually be much smaller based on the severity of the offence. The maximum penalties must be significant enough to ensure that a person or entity cannot calculate that they can come out in front even if the offending behaviour is detected and penalised, as per the example given above in the answer to question 6.

Given that there are very large tax advisory firms, the maximum penalty must be set at a high enough level to deter these entities' willful illegal behaviour. Given that partners and

---

[11] Ibid., 41.
[12] Eugene Soltes, *Why they do it*, (USA: Public Affairs, 2016), 90.
[13] Ibid., 90.
[14] Schell-Busey, Natalie, Simpson, Sally, Rorie Melissa and Alper, Mariel, 'What Works? A Systematic Review of Corporate Crime Deterrence', *Criminology and Public Policy* Vol. 15 No. 2, 2016, 401.
[15] Ibid., 404.
[16] Ibid., 406.
[17] Ibid., 408.

staff in such firms may assist in facilitating hundreds of millions of dollars in tax avoidance and tax evasion by multinational corporate clients, the maximum penalties need to be able to deal with such cases arising.

As a recent example, a former partner at EY Australia who allegedly promoted tax exploitation schemes, Tax Loss Access Schemes, took over $700,000 in unauthorised payments related to the allegations.[18] While the ATO is prosecuting the case under the tax promoter provisions[19], it demonstrates that violations by tax practitioners could be highly profitable and warrant the ability to impose a suitable maximum penalty.

In addition, given it is likely that only a fraction of offending behaviour will be detected and prosecuted for any given person or entity, the deterrent impact of the penalties must be significant enough to ensure the person or entity cannot rely on their undetected offending to provide profits greater than the penalty for the detected offending. As argued by Becker, among equally harmful offences, the optimal sanction is higher for offences that are difficult to detect than for easy-to-detect offences, assuming a higher perceived probability of detection in the latter instance.[20]

9. What are the benefits and risks associated with introducing infringement notices as an sanction?

The TJN-Aus supports the introduction of infringement notices as an additional sanction that the TPB can use. As stated above, we believe the greater the range of sanctions that a regulator or law enforcement agency has at its disposal the better it can cater the sanction to the severity of the breach or violation the person or entity has committed.

Infringement notices appear to have many advantages over other types of penalties because they are quick, easy to administer and can be scaled to be proportionate to the level of culpability. The ability to apply a sanction swiftly after the offending behaviour increases its deterrent impact. If there is a delay between the offending behaviour and the application of the penalty, the effectiveness of the penalty is reduced.[21]

We note that AUSTRAC has used infringement notices regarding its regulated entities and has made some of these notices public to assist with general deterrence.[22] However, not all infringement notices made public through media releases are listed on the enforcement action list. We note that AUSTRAC has the power to issue large infringement notices, given it can seek penalties of up to 100,000 penalty units.

However, research has shown that a key problem with financial penalties is a significant gap between those issued and those paid.[23] A review by the Australian Law Reform Commission in 2002 found that payment of financial penalties to some regulators at the state level was as low as 30%.[24] The Victorian Sentencing Advisory Council found in 2014 that payment of

[18] Max Mason and Neil Chenoweth, "Ex-EY partner in tax case 'took $700k unauthorised payments', *The Australian Financial Review,* 2 November 2023, 3.
[19] Max Mason and Neil Chenoweth, "Big four ex-partner claims colleagues helped in tax scheme", *the Australian Financial Review,* 25 October 2023, 8.
[20] Cindy Alexander and Mark Cohen, "Causes of Corporate Crime. An Economic Perspective", in Anthony Barkow and Rachel Barkow (eds.), "Prosecutors in Boardrooms", (New York University Press, 2011), 21.
[21] Chris Leech, 'Detect and deter or catch and release: Are financial penalties an effective way to penalise deliberate tax evaders?', Tax and Transfer Policy Institute, Australian National University, Working Paper 6/2018, April 2018, 41-42.
[22] See https://www.austrac.gov.au/lists-enforcement-actions-taken
[23] Ibid., 6-7.
[24] Ibid., 24.

infringement notices was 66%, and more than 50% of fines levied by a magistrate were paid.[25] The Council observed the reason for non-payment of fines ranged from "the most compelling of mitigating circumstances to wilful disregard of the law."[26] In 2017, the director of South Australia's Fines Enforcement Recovery Unit gave evidence to a parliamentary committee that up to 40% of fines will never be recovered in some states, while in South Australia, it was 20 to 25%.[27] The US customs authority only collected 31% of outstanding financial penalties from 1997 to 2000.[28]

The Inspector General of Taxation reported that the ATO had found the probability of recovering debts, both unpaid taxes and unpaid fines, to be approximately 2% after they have aged more than a year.[29]

Thus, with the power to issue infringement notices, the TPB will need to have a strategy and tools to deal with individuals and entities that will refuse to pay them.

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?

As per the answer to 9, the TJN-Aus believes that the TPB will be more effective to drive compliance the greater the range of sanctions it has at its disposal.

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?

The TJN-Aus believes that the proposed levels for infringement notices are appropriate and infringement notices are fair and practical.

14. Are enforceable undertakings an effective regulatory feature to enhance standards and behaviour?

We support the introduction of enforceable undertakings. Though there has been little evaluation of the deterrent effect of enforceable undertakings, there is some emerging promising evidence that they can be effective if designed and coupled with other mechanisms for corrective action.

As enforceable undertakings are enforceable, they can be seen as forming a bridge between the strategies of persuasion and enforcement by a regulator. On the one hand, the sanction is based on negotiation between the regulator and the offender. Such negotiations may lead to the settlement of the matter through the acceptance of an enforceable undertaking. The use of persuasion over other enforcement strategies is often a more effective use of a regulator's limited resources. In addition, the sanction can provide useful feedback to the offender and the regulator, because the sanction aims to influence behaviour and encourage a culture of compliance.[30]

On the other hand, if the undertaking is not complied with, the regulator may enforce the undertaking in court. The enforcement option gives the regulator an edge because such an

[25] Ibid., 24.
[26] Ibid., 25.
[27] Ibid., 25.
[28] Ibid., 26.
[29] Ibid., 27.
[30] Marina Nehme, "Enforceable undertakings' practices across Australian regulators: lessons learned", *Journal of Corporate Law Studies* (2021), 314-315.

option increases the chances that an undertaking will be complied with. Rational actors will know that non-compliance with an undertaking can lead to enforcement.[31]

A pilot research project conducted for the Australian Security and Investments Commission (ASIC) published in 2018 found that enforceable undertakings for financial crimes improve compliance behaviour in competitor businesses.[32]

A limitation of this study was that the finding was based on interviews with people in companies in the same business segment as businesses subjected to enforceable undertakings. The assessment was not made by studying the actual behavioural change of other firms in the same business segment. Thus, the evaluation drew its conclusions on what interviewees said the impact of the enforceable undertakings had been rather than an assessment of the actual behavioural change across businesses in the same sector. The researchers indicated they could not find any previous research into the general deterrence effect of enforceable undertakings.[33]

By 2021, 18 Federal and State regulators had the power to use enforceable undertakings.[34]

A 2021 paper by Associate Professor Tess Hardy found that enforceable undertakings can have the advantage of requiring the business or individual in question to make systemic changes to their business model, which may far outweigh any available civil penalty. Requirements to repair or rebuild systems may have a more substantial specific deterrence impact on a business than a one-off fine.[35] The requirements might also be backed up with independent monitoring.

Associate Professor Hardy further noted that the effectiveness of enforceable undertakings as a tool for general deterrence is undermined if they take years to negotiate and are not made public.[36]

15. What implementation issues could arise from the use of enforceable undertakings?

To ensure regulatory accountability and avoid perceptions of capture or bullying, regulators must be clear about how enforceable undertakings will be relied on. It must be made clear when and what undertakings may be accepted and how breaches will be dealt with.[37]

In their 2015 assessment, the Australian National Audit Office was critical of ASIC's holding enforceable undertaking information in multiple systems. That resulted in the risk that ASIC staff could not see the whole picture when dealing with enforceable undertakings, especially when there was a lack of staff training around enforceable undertakings.[38]

---

[31] Ibid., 315.
[32] Nehme, Marina, Anderson, Jessica, Dixon, Olivia and Kingsford-Smith, Dimity, 'The General Deterrence Effects of Enforceable Undertakings on Financial Services and Credit Providers', Centre for Law, Markets and Regulation (2018), 4.
[33] Ibid., 11.
[34] Marina Nehme, "Enforceable undertakings' practices across Australian regulators: lessons learned", *Journal of Corporate Law Studies* (2021), 284.
[35] Tess Hardy, 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement', *Industrial Law Journal (2021),* 139-140, 152-157.
[36] Ibid., 147.
[37] Marina Nehme, "Enforceable undertakings' practices across Australian regulators: lessons learned", *Journal of Corporate Law Studies* (2021), 288.
[38] Ibid., 288-289.

If a regulator's action is perceived to be procedurally unfair in negotiating an enforceable undertaking, a negative perception regarding the use of enforceable undertakings may develop in the regulated community and the public.[39]

For Australian regulators able to make use of enforceable undertakings, there is a range of responses from the regulators concerning making their procedures around enforceable undertakings public:[40]

- The regulator can be required by legislation to disclose the process for entering into enforceable undertakings;
- The legislation governing the regulator gives the regulator the option of whether to disclose their processes;
- The legislation governing the regulator is silent on whether the regulator should disclose their processes, but the regulator has decided to do so; and
- The legislation governing the regulator is silent on the need to disclose the processes around enforceable undertakings, and the regulator has decided not to reveal the processes.

In addition, consideration needs to be given as to if enforceable undertakings should be made public. Doing so would demonstrate regulatory expectations. It may additionally encourage accountability by highlighting instances where there are discrepancies in the treatment of similar alleged breaches by the regulator.[41]

The Therapeutic Goods Administration and the Civil Aviation Safety Authority must publish details of their enforceable undertakings.[42] AUSTRAC has been allowed the discretion as to if it makes an enforceable undertaking public.[43]

While not required to make its enforceable undertakings public, the ACCC has made the following available to the public:[44]

- A register of enforceable undertakings, which includes every enforceable undertaking accepted and varied by the regulator since the inception of the sanction;
- Each original enforceable undertaking is accessible online (if the enforceable undertaking includes confidential information, the confidential information is removed before publication);
- A media release providing a quick summary of the enforceable undertaking; and,
- A summary of the enforceable undertaking in the register.

A challenge with ensuring that enforceable undertakings have a general deterrence effect is that the undertaking documents are legal instruments that contain a range of legal jargon. That restricts their accessibility. A pilot study into the deterrent effect of ASIC's enforceable undertakings revealed that some regulated entities found understanding the terms in enforceable undertakings challenging. Others found the promises made in the enforceable undertakings to be clear but not the reasons why an enforceable undertaking was adopted rather than some other enforcement approach. Enforceable undertakings on the ASIC register were scanned into the system, meaning it was very difficult to analyse them as a simple online word search was not possible.[45]

---

[39] Ibid., 289.
[40] Ibid., 290.
[41] Ibid., 291 – 292.
[42] *Therapeutic Goods Act 1989 (Cth)* s 42YL and *Civil Aviation Act 1988 (Cth)* s 30DK(4)
[43] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)* s 197(5)
[44] Marina Nehme, "Enforceable undertakings' practices across Australian regulators: lessons learned", *Journal of Corporate Law Studies* (2021), 292.
[45] Ibid., 295.

In some instances, enforceable undertaking statutory provisions have attempted to deal with these issues. For example, regulators such as Comcare, Access Canberra, SafeWork NSW, WorkCover (Qld), SafeWork SA and WorkSafe (Tas) have published notices of decisions to accept a workplace health and safety undertaking and the reasons for that decision. Such an approach will likely facilitate stakeholders' understanding of why an enforceable undertaking was acceptable to deal with a particular alleged conduct.

The practices of ASIC and the ACCC of issuing a media release or including a summary of an enforceable undertaking in their register allow an enforceable undertaking to be described in simple terms. Such practices facilitate different stakeholders' understanding of what is to be expected from an enforceable undertaking. Such increased understanding potentially increases the regulatory effects of enforceable undertakings on both those party to the undertaking and the broader business community. For example, it may bring the enforceable undertaking to the attention of customers impacted by the breach. That may help them to make a claim against the offender.[46]

Some concern has been raised about regulators failing to assess if enforceable undertakings achieve intended community benefits. Even in cases where the enforceable undertaking is designed to be restorative in nature, there is little disclosure or accountability regarding the extent to which consumers have been compensated for losses.[47]

Additionally, while promises such as implementing a compliance or educational program are designed to prevent similar conduct from occurring in the future by raising awareness of undesirable conduct within the organisation, there is no guarantee that such promises will achieve the desired outcomes. The extent to which the enforceable undertaking targets the root of the problem and the extent to which the sanctioned firm embraces the terms of the undertaking will be factors in determining the extent to which the firm may really change its culture.[48]

A professional adviser expressed concern that enforceable undertakings often fail to address the root cause of the breach:[49]

> *And none of the EUs address the fundamental root cause, which would have covered things like systems, data architecture, monitoring systems, documentation quality and consistency.*

Accordingly, there is a need to ensure that when negotiating the terms of an enforceable undertaking, regulators focus on the culture of the firm and the desire within the firm for change, in addition to the technical aspects that resulted in the breach.[50] A firm's history of corporate misconduct may provide evidence of the firm's culture and whether they are likely to take an enforceable undertaking seriously.[51]

There is a danger that a regulator can seek to impose unreasonable terms in an enforceable undertaking, especially in cases where the bargaining power of the regulator exceeds that of the offender. As Gerard Niernberg observed:[52]

> *Sometimes, when an opponent seems to be "on the run", there is a temptation to push him as hard as possible. But that one extra push may be the one that breaks the camel's back. Simply stated, one of the first lessons the negotiator must learn is*

[46] Ibid., 296.
[47] Ibid., 303.
[48] Ibid., 303.
[49] Ibid., 303 – 304.
[50] Ibid., 304.
[51] Ibid., 305.
[52] Ibid., 306.

> *when to stop… All parties to a negotiation should come out with some needs satisfied.*

Ultimately, an offender's lack of satisfaction with the terms of an enforceable undertaking due to the perceived unreasonableness of the promises may defeat the purposes of the undertaking as it may lead to resentment. Resentment will be problematic as the enforceable undertaking is based on cooperation. The resentment can lead an offender to diminish cooperation, which may mean the offender stops complying with an undertaking or will only adhere to the letter and not the spirit of the undertaking.[53]

On the flip side, there is also a danger that a regulator becomes too cozy with the offender and provides inadequate terms of the undertaking. Behavioural economist Dan Ariely found in various tests around dishonesty that it's important to counteract the first time someone is detected as being dishonest. Once a person starts being dishonest, it can lead to other acts of dishonesty over time:[54]

> *The first act of dishonesty might be particularly important in shaping the way a person looks at himself and his actions from that point on – and because of that, the first dishonest act is the most important one to prevent.*

Thus, a response that is too soft from a regulator may make an offender feel that the behaviour was not serious or that the regulator is a joke that can be disregarded.

An example of concern where a regulator was willing to go softer than community expectations has been the ATO's dealings with PwC. In particular, it is deeply concerning that the ATO was willing to reach a settlement with a 50% reduction in penalty for PwC in March 2023 over false claims for legal professional privilege over 150 documents related to tax advice to a multinational client.[55] The settlement came after the Tax Practitioners Board in November made findings that the firm used information provided by Peter Collins in breach of the confidentiality agreement signed with the Treasury to market tax dodging schemes to PwC clients in 2016 and 2017.[56] It is hard to grasp why the ATO concealed the deal with PwC from the Tax Practitioners Board, only disclosing it to the Senate Committee on Finance and Public Administration References Committee in late July 2023.[57] In defence of the ATO, they secured a commitment from PwC to conduct staff training sessions around the use of legal professional privilege over documents over the next three years. If PwC fails to comply, it faces a further $642,600 fine.[58]

To ensure accountability with the terms of the enforceable undertaking, it is essential to impose a formal obligation on the offender to report their compliance with the terms of their enforceable undertaking. ASIC's monitoring system has been subject to several criticisms in the past, including the regulator's lack of proper monitoring of the undertakings and the lack of transparency attached to the monitoring process.[59] ASIC has sought to implement reforms to address these criticisms. For example, ASIC has implemented a policy of publicly reporting the offender's compliance with the enforceable undertaking they have entered into.

---

[53] Ibid., 306.
[54] Dan Ariely, 'The (Honest) Truth about Dishonesty', HarperCollins Publishers, London, 2012, 137.
[55] Neil Chenoweth, 'PwC secret settlement ahead of email release', *The Australian Financial Review,* 31 July 2023, 5; and Neil Chenoweth, 'ATO halved $1.4m PwC fine, aborted action', *The Australian Financial Review,* 25 October 2023, 8.
[56] Neil Chenoweth, 'PwC secret settlement ahead of email release', *The Australian Financial Review,* 31 July 2023, 5.
[57] Ibid.
[58] Neil Chenoweth, 'ATO halved $1.4m PwC fine, aborted action', *The Australian Financial Review,* 25 October 2023, 8.
[59] Marina Nehme, "Enforceable undertakings' practices across Australian regulators: lessons learned", *Journal of Corporate Law Studies* (2021), 309.

The initiative sends a message to regulated entities that ASIC is closely monitoring offenders' compliance with the terms of their undertakings.[60]

A downside to enforceable undertakings is that regulators in Australia have rarely been willing to take court action in response to the undertaking being breached by the offender. A review of enforceable undertaking cases from 2008 to 2018 found such enforcement action only occurred ten times, and more than half of these were by the ACCC.[61] Courts have not always been willing to enforce the terms of enforceable undertakings, nor have they been fully supportive of such enforcement.[62] Even where a breach of an enforceable undertaking has occurred, the courts may decide not to enforce the undertaking as they consider the terms of the undertaking too difficult to comply with or that the terms are no longer relevant.[63]

Accordingly, in several cases, instead of seeking to enforce the offender's compliance with the terms of their enforceable undertaking, regulators have decided to bring proceedings in relation to the original breach. In such cases, the judge usually took the enforceable undertaking into account when assessing the appropriate penalty to be imposed.[64]

16. Given how significant suspensions are likely to be for registered tax practitioners, should interim suspensions be limited to certain circumstances?

We support the suggested circumstances given in the consultation paper for the use of interim suspensions:

- 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; and
- An interim suspension is otherwise warranted in the public interest.

18. Are the safeguards proposed above sufficient to protect tax practitioners?

The TJN-Aus believes the proposed safeguards are sufficient to protect tax practitioners.

22. Does the proposed package ensure that the TPB as regulator has the right tools to deter, direct and punish bad behaviour by tax practitioners?

The TJN-Aus welcomes the package of proposed reforms to improve the ability of the TPB to be an effective regulator. The effectiveness of some of the measures, such as enforceable undertakings, will be highly dependent on how they are legislated and implemented. There will be a need to assess the impact of the new sanction tools to ensure they are effective after they have been put in place. Further reforms may be needed if non-compliance rates remain unacceptably high.

23. Are there any other deficiencies in the regulatory framework?

We believe that, at the moment, the effectiveness of the TPB is constrained by the board of the TPB needing to be too involved in approving the application of sanctions. We believe that as part of the necessary reforms, appropriate staff within the TPB should be able to impose

[60] Ibid., 311.
[61] Ibid., 315
[62] Ibid., 316.
[63] Ibid., 317.
[64] Ibid., 317.

sanctions without the board's approval. Such an ability should undoubtedly apply to the ability to impose infringement notices and low-level enforceable voluntary undertakings. As noted previously, criminological research has demonstrated that deterrence is best served when a sanction is imposed swiftly after detecting the breach. Thus, appropriately reducing administrative 'friction' in imposing sanctions will increase the deterrent effectiveness of the TPB.

Dr Mark Zirnsak
Secretariat
Tax Justice Network Australia
c/- 29 College Crescent
Parkville, Victoria, 3052
Phone: 0409166915
E-mail: mark.zirnsak@victas.uca.org.au

Background on the Tax Justice Network Australia

The Tax Justice Network (TJN) is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels.

The Tax Justice Network believes our tax and financial systems are our most powerful tools for creating a just society that gives equal weight to the needs of everyone. But under pressure from corporate giants and the super-rich, our governments have programmed these systems to prioritise the wealthiest over everybody else, wiring financial secrecy and tax havens into the core of our global economy. This fuels inequality, fosters corruption and undermines democracy. We work to repair these injustices by inspiring and equipping people and governments to reprogram their tax and financial systems.

The Tax Justice Network Australia (TJN-Aus) is the Australian arm of TJN.

In Australia, the current members of TJN-Aus are:

- ActionAid Australia
- Aid/Watch
- Anglican Overseas Aid
- Australian Council for International Development (ACFID)
- Australian Council of Social Service (ACOSS)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union (AEU)
- Australian Manufacturing Workers Union (AMWU)
- Australian Nursing & Midwifery Federation (ANMF)
- Australian Services Union (ASU)
- Australian Workers Union, Victorian Branch (AWU)
- Baptist World Aid
- Caritas Australia
- Centre for International Corporate Tax Accountability & Research (CICTAR)
- Community and Public Service Union (CPSU)
- Electrical Trades Union, Victorian Branch (ETU)
- Evatt Foundation
- Friends of the Earth (FoE)
- GetUp!
- Greenpeace Australia Pacific
- International Transport Workers Federation (ITF)
- Jubilee Australia
- Maritime Union of Australia (MUA)
- National Tertiary Education Union (NTEU)
- New South Wales Nurses and Midwives' Association (NSWMWA)
- Oaktree Foundation
- Oxfam Australia
- Publish What You Pay Australia
- Save Our Schools
- SEARCH Foundation
- SJ around the Bay
- TEAR Australia
- The Australia Institute
- Union Aid Abroad – APHEDA
- United Workers' Union (UWU)
- Uniting Church in Australia, Synod of Victoria and Tasmania
- UnitingWorld
- Victorian Trades Hall Council
- World Vision Australia