



Law Council
OF AUSTRALIA

Office of the President

13 August 2024

██████████
Director, Tax Agent Regulation Unit
Personal, Indirect Tax and Charities Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: PwCResponse@treasury.gov.au

Dear ██████████

Review of eligibility requirements for registration with the Tax Practitioners Board

The Law Council welcomes the opportunity to comment on the Consultation Paper entitled *Review of eligibility requirements for registration with the Tax Practitioners Board (Review)*. The Law Council draws on the expertise of its Business Law Section's Taxation Committee in making this submission.

The Review concerns potential reforms to the current eligibility requirements under the *Tax Agent Services Act 2009 (TASA)* for tax practitioners to be registered with the Tax Practitioners Board (TPB) and forms part of the Government's response to the PwC tax leaks.

The Law Council provides this submission in response to Consultation Question 27:

Should the TASA be amended to require legal practitioners who provide tax agent services, as defined in section 90-10 of the TASA, for a fee or reward, to be registered with the TPB?

This submission is made on the basis that tax agent services referred to in Question 27 are defined in section 90-5 of the TASA and are not a BAS service as defined in section 90-10 of the TASA referred to in Question 27.

The Law Council submits that the TASA should not be amended to require legal practitioners to be registered with the TPB. In summary, this is because:

1. the Review has not identified a sufficient rationale for why the exemption for legal practitioners under the current regime should not continue;
2. subjecting legal practitioners to the TASA would conflict with their existing professional obligations; and
3. the existing state and territory regulatory requirements for legal practitioners are extensive and adequate.

Telephone +61 2 6246 3788 • Email mail@lawcouncil.au

PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale Street, Braddon ACT 2612

Law Council of Australia Limited ABN 85 005 260 622

www.lawcouncil.au

The current regime

Insofar as legal practitioners are concerned, from its inception, the TASA has effectively exempted lawyers from being registered as tax agents where a tax agent service is provided as a legal service and the practitioner is not prohibited, under a state or territory law that regulates legal practice and the provision of legal services, from providing that service.¹

The Consultation Paper refers to the ‘2019 TPB Review’ and states that it was considered appropriate for the exemption to remain, noting the regulatory overlaps that would otherwise exist.

The ‘2019 TPB Review’ is the *Independent Review of the Tax Practitioners Board Final Report* dated 31 October 2019 (otherwise known as the ‘James Report’) which considered this issue at paragraphs 4.86 to 4.90 and recommended the continuation of the exemption in order to avoid regulatory overlap and because there was an existing review body—for example a law society (or other statutory body)—in each state or territory, to investigate complaints and impose disciplinary sanctions.²

The Law Council considers that the conclusion reached by the TPB Review relating to the continued exemption for legal practitioners should continue to apply. In particular, no reason has been provided in the current Review as to why the position should be changed or why regulatory overlap is no longer a concern.

Requiring legal practitioners who provide tax advice to be registered with the TPB would result in unnecessary multiplicity of regulators because practitioners would be regulated by their state or territory regulatory bodies, by a bar association (in the case of barristers) and by the TPB.

Further, under the heading ‘Is reform needed?’ the Consultation Paper explains the rationale for proposed reform in the following terms:

Recent events have highlighted the importance of the need for companies and partnerships to adopt strong governance frameworks as they deliver their services. This is particularly important for large multidisciplinary firms who are, given their broad scope of operations, generally at a higher risk of encountering complex practice issues and ethical dilemmas (e.g. conflicts of interest).

With respect, the Law Council considers that the identified rationale does not justify subjecting legal practitioners to registration and regulation as tax agents by the TPB, in addition to regulation by state and territory legal profession regulators in respect of the same service. Furthermore, legal practitioners are subject to stringent ethical obligations owed to clients and overarching duties to the court and the administration of justice. Non-legal practitioners are not subject to the same professional obligations.

Conflicts with existing duties

A more fundamental concern with the proposed reform is that the obligations registered practitioners would owe to the TPB would conflict with the obligations owed by legal practitioners to clients.

One example of such a conflict arises from the recent changes to TASA emanating from the colloquially known ‘dob in’ rules implemented by *Treasury Laws Amendment (2023 Measures No. 1) Act 2023* (Cth) and the *Tax Agent Services (Code of Professional Conduct)*

¹ There is an exception where the practitioner prepares and lodges tax returns and BAS other than as trustee or legal personal representative.

² *Independent Review of the Tax Practitioners Board* (Final Report, 31 October 2019) [4.89].

Determination 2024 (Cth). Following these changes, registered tax agents who have reasonable grounds to believe that another registered tax agent has made a 'significant breach' of the Code of Professional Conduct (**Code**) have two immediate statutory obligations:

1. to notify the TPB of the breach in writing within 30 days; and
2. to potentially report the practitioner to the TPB or the Commissioner of Taxation where a materially false, incorrect or misleading statement was previously made.

Legal practitioners who practice in tax are often consulted by clients about the manner in which the client's tax agent has handled the client's tax affairs. In that context, where a lawyer discovers that the client's tax agent has done something that constitutes a 'significant breach' of the Code, the lawyer (who, if the existing exemption were removed, would also be a registered tax agent and subject to the Code), would have to 'dob in' the tax agent to the TPB, and potentially also the Commissioner of Taxation, whether the client consented or not. This would conflict with the lawyer's duty of loyalty to a client and the duty not to disclose confidential information. Significantly, it would also interfere with the client's right to maintain client legal privilege (**CLP**) over privileged communications.

These are serious—and the Law Council assumes, unintended—consequences. Lawyers' duties to maintain a client's confidence, which arises from the fiduciary nature of the relationship, cannot yield to an obligation to 'dob in' another practitioner to the TPB.

In addition, CLP is a common law right of lawyers' clients that exists to protect the administration of justice and the right of individuals and organisations to seek confidential advice about their legal circumstances.

For completeness, if a legal practitioner were to make frivolous or unsubstantiated claims for CLP on behalf of their client, that would amount to a breach of the legal practitioner's paramount duty to the court, ethical duties and required standard of conduct (see further below).³

Further, the Code of Professional Conduct and the *Tax Agent Services (Code of Professional Conduct) Determination 2024* (Cth) place two fundamental duties on tax practitioners:

1. a duty to uphold and promote the Code of Professional Conduct, which includes a duty to uphold the integrity of the tax system; and
2. a duty of independence, to act lawfully in the best interest of the client.

It cannot be assumed that these duties are always in alignment. Inevitably, disputes will arise between a position taken by a client about the meaning and application of the tax laws (or the administrative policies and practices of the Commissioner of Taxation) and the position taken by the Commissioner on the 'integrity of the tax system'. In this circumstance, the tax practitioner can face a conflict between the tax practitioner's duty to act lawfully in the best interest of the client and the duty to uphold the integrity of the tax system.

³ See, for example, rules 3 to 5 and 32 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.

Regulation of the legal profession

Regulation of the legal profession and the provision of legal services is primarily a state and territory responsibility.

Since 1992, substantial reforms have been implemented to strengthen, harmonise and unify the fundamental aspects of legal profession regulation.

It is generally recognised that the legal profession is now the most comprehensively regulated profession in Australia. The first period of regulatory reform (from 2002 to 2008) resulted in all states and territories (apart from South Australia) enacting a Legal Profession Act based on a comprehensive model legal profession law developed under the policy guidance of the Standing Committee of Attorneys-General.⁴

A second period of reform, between 2009 and 2015, began with a National Legal Profession Reform Taskforce being established by COAG, and culminated in New South Wales and Victoria implementing a Legal Profession Uniform Law and a uniform legal profession regulatory framework across those States from 1 July 2015. Western Australia joined the uniform legal profession regulatory framework (which now accounts for around three-quarters of the legal profession) and the Legal Profession Uniform Law came into operation in that State on 1 July 2022.

Legal profession regulation is now generally consistent across all states and territories in key areas including, for example:

- admission to the legal profession is uniformly based upon a tertiary academic qualification (generally requiring at least five years of university education) involving at least the equivalent of three-years' full time study of law; completing an approved program of practical legal training covering core areas of legal practice skills, values and competencies; and satisfying the Supreme Court that the person is a fit and proper person to be admitted to the legal profession;
- a mandatory 18-month to 2-year period of supervised legal practice (followed, in some jurisdictions by practical examinations) before permitting a legal practitioner to practise unsupervised (i.e. to establish their own law practice or act as a principal in a law practice);
- ongoing personal suitability requirements to hold or renew a practising certificate, supported by the ability of regulators to immediately cancel, suspend or vary practising certificates or conditions in response to instances of misconduct, bankruptcy or commission of certain offences;
- mandatory professional indemnity insurance and continuing professional development, including mandatory ethics training;
- complaint mechanisms for consumer and disciplinary matters, including a range of consumer remedies;
- comprehensive trust money and trust account regulation, including annual independent external trust account and trust records examinations, and mandatory fidelity fund contributions; and
- rules of professional conduct for solicitors, which have been uniformly adopted across seven States and Territories.

⁴ South Australia enacted many of these model provisions in 2012.

Finally, legal practitioners remain at all times officers of the Court and are thereby subject at all times to the inherent supervision and disciplinary powers of the Courts. Indeed, a lawyer's overarching duty is to the Court.

In addition to the above, barristers are subject to ethical and conduct rules specific to barristers, and are regulated by both the state or territory legal profession regulator and the bar association of the state or territory of their practice.

The Law Council considers that regulation of the legal profession and the provision of legal services is and should remain a matter for the states and territories (and the regulators and professional associations regulating solicitors and barristers in the relevant jurisdictions). These regulators have developed and implemented robust and effective regulatory and supervisory frameworks. The Review has not identified any reason why those frameworks are inadequate or why legal practitioners should be subjected to a further layer of regulation by the TPB.

Practical problems

There are two significant practical problems that would also arise from subjecting legal practitioners to registration with the TPB.

First, because of how widely the term 'tax agent service' is defined, any lawyer who provides advice concerning tax matters, no matter how insignificant, could potentially be subject to registration with the TPB. For example:

- property lawyers advising on GST in conveyancing transactions, such as whether a supply of real property is new residential property, or whether the margin scheme applies;
- property lawyers advising on the application of the capital gains tax withholding and GST withholding rules;
- wills and estates lawyers dealing with the taxation obligations of executors of deceased estates;
- corporate merger and acquisition lawyers dealing with tax warranties and undertaking due diligence as part of their usual services;
- family law lawyers advising clients on the main residence exemptions and capital gains tax rollover rules that apply on the breakdown of domestic relationships involving spouses;
- intellectual property lawyers dealing with research and development issues;
- insolvency lawyers who contest preferential payment claims against the Australian Taxation Office or advise on Director Penalty Notices; and
- banking lawyers drafting interest withholding tax clauses.

Second, the 'multiplicity' of regulators and obligations would likely not only affect practitioners but also consumers. An increase in regulation will cause the cost of conducting legal practice—and, therefore, the cost of legal services for clients—to increase.

Contact

The Law Council would be pleased to discuss any aspect of this submission. Please contact John Farrell, Executive Policy Lawyer on (02) 6246 3714 or at john.farrell@lawcouncil.au, if you would like to do so.

Yours sincerely

A handwritten signature in grey ink, appearing to be 'G. McIntyre', written in a cursive style.

Greg McIntyre SC
President