
TACKLING TAX ADVISER MISCONDUCT: CONSULTATION



As a part of its response to the recent scandal involving conflict of interest in large consulting firms, the government has released four tranches of draft legislation for consultation aimed at stamping out the practice and strengthening the integrity of the tax system. The draft legislation released relates to bolstering promoter penalty laws, extending whistleblower protections, increasing the ease of information sharing, and Tax Practitioner Board reforms.

Promoter penalty law changes

The promoter penalty provisions in the TAA was introduced in 2006 to deter the promotion of tax avoidance and tax evasion schemes as a response to the rise in mass-marketed schemes which began in the 1990s and evolved into more bespoke and complex schemes. Currently, the promoter penalty laws provide a 4-year period within which the Commissioner may take action against an entity, commencing from the time the promoter last engaged in the promoter conduct.

The government contends that this 4-year period is much too short for modern day schemes which are often complex, requiring the Commissioner to spend a significant amount of time to gather evidence before an application to the Court can be made. The draft legislation, therefore, proposes to change this 4-year period to a 6-year period in which the Commissioner can apply to the Federal Court that an entity has contravened the promoter penalty laws.

Penalties will also be beefed up. Under the new law, the penalty will be 5,000 penalty units for an individual or 50,000 penalty units for body corporates or significant global entities (SGEs), and 3 times the benefits received or receivable (either directly or indirectly) by the entity and associates of the entity in respect of the scheme. In addition, body corporates and SGEs will also be subject to a penalty totalling 10% of the aggregated turnover of the entity for the most recent income year to end before the entity engaged in conduct that contravenes promoter penalty laws (capped at 2.5 million penalty units).

Extending whistleblower protections

While individuals that make disclosures of information to the Commissioner for the purposes of taxation law are currently protected, there are no similar protections for disclosures made to the Tax Practitioners Board. To rectify that, draft legislation has been released for comment which ensures that a disclosure of information would qualify for whistleblower protection if it is made to either the Commissioner or the TPB to enable them to perform their functions or duties. It goes further to ensure that whistleblowers are protected should they make disclosures to several entities for the purposes of obtaining assistance in relation to a disclosure, or to a medical practitioner or psychologist.

Increasing the ease of information sharing

In response to the tax adviser misconduct findings that the current secrecy provisions prevented collaboration and coordination within government, draft legislation has now been released to allow ATO and TPB to share protected information with treasury and prescribed disciplinary bodies regarding misconduct. Treasury will also be able to on-disclose protected information to the Minister or Finance Minister in relation to a breach or suspected breach, as well as any proposed measure or action to deal with the breach.

Tax Practitioner Board reforms

The government will also be pushing through the second tranche of amendments to the TPB which were initially recommended in the final report of the TPB review released in 2020, but have taken on new significance since the tax adviser misconduct scandal. The changes to be introduced include:

- making additional information available to the public on the TPB tax practitioner's register and also publishing detailed reasons for tax practitioner sanctions and terminations;
- extending the period of time that TPB has in which to conclude investigations into potential breaches from 6 months to 24 months. The TPB will also be given the option to not pursue administrative sanctions/civil penalties and instead publish the findings of the investigation on the register; and
- clarifying the delegation process that applies specifically to reviewable decisions of the Board.

Consultation on this suite of measures will run until early October, at which point the government will consider feedback received before the introduction of legislation into Parliament, which was originally planned to occur in 2023. In addition to the draft legislation released, the government has also highlighted more consultations to come in the near future in relation to strengthening regulatory arrangements. These include tackling fraud against the ATO in 2024, the use of legal professional privilege in Commonwealth investigations in late 2024, and enhancing ATO's investigation and information gathering powers, also in 2024.

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