NOTIFICATION OF SIGNIFICANT BREACHES OF THE CODE OF PROFESSIONAL CONDUCT

INTRODUCTION

This article discusses the implications for tax agents and BAS agents[1] of the amendments to section 30-35 and new section 30-40 of the Tax Agent Services Act 2009[2] ("TASA"), which have operation in relation to significant breaches of the Code of Professional Conduct occurring on or after 1 July 2024. These changes were introduced as part of Treasury Laws Amendment (2023 Measures No.1) Act 2023 ("2023 Act"). This Act was passed by both houses of parliament on 16 November 2023 and was given the Royal Assent on 27 November 2023.

The amendments discussed in this article were proposed by Senator Barbara Pocock of the Australian Greens and were not included in the original Bill as first presented to parliament. Accordingly, there is no part of the Explanatory Memorandum that refers to these amendments. I note that these amendments passed the Senate with a majority of 1 vote[3].

This article will discuss both the technical requirements of this new law and also try to address how tax practitioners will deal with this law in practice.

BACKGROUND

Accountants will be aware of the so-called "PwC scandal". In summary, certain confidential information gained through consultative processes with the Australian Taxation Office ("ATO") was used by some individuals within PwC to advise clients of that firm of proposed changes to the law. These events have caused an outrage in the community and in the political sphere. The PwC scandal motivated parts of the 2023 Act and were certainly the motivation for the amendments that are the subject of this article.

Debate in the Senate

Due to there being no reference in the Explanatory Memorandum (originally or in the supplementary memorandum) I thought it might be useful to see what was said about these amendments in the Senate in order to try and understand the reasoning behind them.

These comments were made by Senator Pocock[4]:

[1] In this article I will refer to tax agents and BAS agents, collectively, as tax practitioners.
[2] All references to legislation in this article will be to the Tax Agent Services Act 2009 unless otherwise stated.
[3] See Hansard [5642] 15 November 2023
[4] This is not intended to be a comprehensive representation of her comments

"The amendments also require tax agents not only to report to the [Tax Practitioners Board] TPB if they've breached the code of professional conduct but also to report if another agent has breached the code. This is an important amendment to prevent partners protecting other partners and turning a blind eye to unethical behaviour. It widens the responsibility for unethical behaviour from the individual to others that are aware of their behaviour. This is what happened in the PwC scandal."

In response to a question from Senator Dean Smith (Liberal Party) as to whether a registered tax agent would have to report a breach if they read about it in a newspaper or a news story, Senator Pocock said:

"My understanding is that it is when a partner, a senior official or anyone in that tax agency[5] has knowledge of something which would be in breach of the code of conduct that they should give that advice to the relevant agency[6]. I imagine that, if the matter is public, that is in a different category, because it would be widely known. When we look at the matter that evolved within PwC, we see that, clearly, a significant breach of ethics had occurred behind closed doors and was not available to public scrutiny."

I note that Senator Smith pressed Senator Pocock and Senator McCarthy (Labour Party) for details of which organisations had been consulted about the proposed changes. Senator Smith asked whether the Institute of Public Accountants, CPA Australia, Chartered Accountants Australia and New Zealand, the Tax Institute, the Law Council of Australia or the Australian Bookkeepers Association had been consulted. No direct confirmation of any such consultation was mentioned in the various responses.

Senator Smith made the point that poor legislation, with good intent, was still poor legislation. The Coalition was obviously concerned that the proposed legislation had not had sufficient scrutiny before being brought before the Senate.

The focus of the changes

From the Hansard record, I conclude that the Australian Greens were concerned about the egregious acts of one member of a firm being covered up by another member of the firm. This was clearly motivated by the PwC scandal. I conclude that the main motivation behind the reporting of significant breaches by one tax practitioner about another tax practitioner's bad behaviour was mainly in relation to the idea that one member of a firm would report the bad behaviour of another member of the same firm and not keep the breach "behind closed doors".

From the Hansard record, I cannot see that there was any consideration of what these new changes would mean from the point of view of the thousands of tax practitioners it will soon affect. The most common issue that will arise in relation to whether a tax practitioner ("the reporting practitioner") reports a significant breach of another tax practitioner ("the breaching practitioner") is when the reporting practitioner does not work for or is not involved with the firm of the breaching practitioner. This will often occur when the reporting practitioner takes on a new client that has been previously serviced by the breaching practitioner. The reporting practitioner finds errors in what the breaching practitioner has done and then feels obliged to

[5] I think that Senator Pocock is referring to one tax agent firm
[6] Here I think Senator Pocock is referring to the Tax Practitioners Board.

report the egregious behaviour of the breaching practitioner. In my view, this will be the most common situation in relation to this new law and I am not sure whether this situation was given any thorough consideration by those that enacted the new law.

EXISTING OBLIGATIONS

It should be understood that the new obligations which are the subject of this article are in addition to existing reporting obligations. These are set out in 30-35 and I will not discuss them here. However, it is useful to note that if a registered tax practitioner does not comply with these obligations, they will breach:

- Section 8C of the Taxation Administration Act 1953, which may carry criminal sanctions; and
- 30-10(2) which requires tax practitioners to comply with the taxation laws in the conduct of their personal affairs (Code Item 2).

TO WHOM THE NEW LAW APPLIES

To be clear, the breach reporting regime only applies to registered tax practitioners. It does not apply to unregistered tax practitioners, including non-registered tax practitioners that are employees of tax practitioners.

WHAT THE NEW LAW SAYS

The new additional obligations are now discussed.

Self-reporting

First, there are amendments to 30-35. This provision places obligations on tax practitioners to notify the TPB of certain changes in circumstances of the tax practitioner. For the applicable circumstances, notification is required when:

"You have reasonable grounds to believe that:
(1) You have breached the Code of Professional Conduct; and
(2) The breach is a significant breach of the Code."

New 30-35(4) states, broadly, that if the above reasonable grounds have occurred, the tax practitioner must give notice within 30 days of the day on which the tax practitioner first had, or ought to have had, reasonable grounds to believe that the tax practitioner breached the Code of Professional Conduct, and that the breach is a significant breach of the Code.

Reporting of other tax practitioners

Section 30-40 says the following:

"30-40 Obligation to notify of significant breaches of the Code of Professional Conduct

(1) If you are a registered tax agent or BAS agent, you must notify the Board, in writing, if you have reasonable grounds to believe that:

a. Another registered tax agent or BAS agent has breached the Code of Professional Conduct; and
b. The breach is a significant breach of the Code.

(2) In addition, if at the time you have reasonable grounds to believe that other agent has breached the Code, and that the breach is a significant breach of the Code:
    a. The other agent is a member of a professional association accredited by the Board under the regulations; and
    b. You are aware of that other agent's membership;
    You must notify the association, in writing, of the breach.

(3) You must notify under subsection (1) or (2) within 30 days of the day on which you first have, or ought to have, reasonable grounds to believe that the other agent breached the Code, and that the breach is a significant breach of the Code.

Significant breach of the Code

Of importance is the meaning of "significant breach of the Code". This is defined to be[7]:

"**Significant breach of the Code** means a breach of the Code of Professional Conduct by a registered tax agent or BAS agent if the breach:

(a) Constitutes an indictable offence, or an offence involving dishonesty, under an Australian law; or

(b) Results, or is likely to result, in material loss or damage to another entity (including the Commonwealth); or

(c) Is otherwise significant, including taking into account any one or more of the following:
    a. The number or frequency of similar breaches by the agent;
    b. The impact of the breach on the agent's ability to provide tax agent services;
    c. The extent to which the breach indicates that the agent's arrangements to ensure compliance with the Code are inadequate; or

(d) Is a breach of a kind prescribed by the regulations for the purposes of this paragraph.

Discussion of terms

There are a number of terms used in the above provisions that require discussion. These are:

- Constitute
- Breach
- Reasonable grounds
- Indictable offence
- Offence involving dishonesty
- Material loss or damage
- Result

[7] 90-1(1)

- Otherwise significant

TPB - DRAFT INFORMATION SHEET

The TPB released TPB Information Sheet TPB(I) D53/2024: Breach reporting under the Tax Agent Services Act 2009 on 30 April 2024 ("the information sheet"). Comments are sought by the TPB on this information sheet by 28 May 2024.

What follows is an analysis of the terms I have set out above. I will refer to what the information sheet says about these terms in my analysis.

"Constitutes"

The definition of "significant breach of the Code" refers to a tax practitioner engaging in conduct that:

- Constitutes an indictable offence under an Australian law; or
- Constitutes an offence involving dishonesty under an Australian law.

The term 'constitutes' is not defined. It must be read with the idea that a reporting practitioner has 'reasonable grounds' to believe that something constitutes the relevant breach. 'Constitutes' does not mean 'convicted' or similar.

The word 'constitute' could be contrasted with the idea of having evidence. For example, the law does not say the reporting practitioner has reasonable grounds to believe they have evidence of an indictable offence or offence involving dishonesty. It seems to me that this indicates a lesser standard. There is no comment about the meaning of this term in the information sheet.

Presumption of innocence

We are used to the idea that a person charged with an offence is entitled to the presumption of innocence until the charges are proven beyond reasonable doubt. This concept cannot be applicable to the significant breach reporting provisions. A reporting practitioner is only required to have 'reasonable grounds' to make a significant breach report. In essence, a reporting practitioner must believe that the breaching practitioner is guilty of a significant breach, even without conclusive evidence.

"Breach"

The information sheet says:

"The breach reporting obligations do not make a distinction between 'actual' or 'alleged' breaches. It seems to me that this clearly opens the door to 'suspected' breaches, keeping in mind that the reporting practitioner is supposed to have reasonable grounds for their belief about the actions of the breaching practitioner.

Reasonable grounds

The information sheet says that 'reasonable grounds' means a reporting practitioner must have a solid foundation or basis for their belief, supported by appropriate facts and evidence. They do not need to have conclusive proof, but they need to be able to appropriately substantiate their claim.

The information sheet says[8]:

"For a registered tax practitioner to have 'reasonable grounds to believe' that they, or another tax practitioner, have breached the Code and the breach is significant, the foundation or basis for the belief does not need to be established to a high evidentiary standard. This means there does not have to be conclusive proof. It is sufficient if a reasonable person, possessing the required knowledge, skill and experience of a registered tax practitioner, would, when objectively considered, form the belief on the same grounds in the same circumstances."

Example

Consider talk at a barbecue or in the pub. Gordon is a registered tax agent and sponsors the local football club. Periodically, the club has social gatherings and Gordon attends. He gets into a conversation with 5 other people and 4 of them use the same tax agent for lodging their tax returns other than Gordon.

The social event is in late August and each of the four people using the other tax agent are really pleased with the big tax refunds that they all recently received. Gordon is curious and wants to understand how these people received such big tax refunds. "I don't know", they say, "But he comes up with all these great deductions". "Yeah, we all claim union dues, but none of us are in union!" "And he claimed a home office deduction for all of us for all the work we (don't) do at home!" [Much laughing].

Gordon asks for the name of the other tax practitioner and the four people tell him. "Don't dob him in though, will you?" the four plead. What should Gordon do? Is this conversation 'reasonable grounds' for saying the other tax agent has engaged in behaviour that constitutes a significant breach of the Code of Professional Conduct? On balance, I would say "yes".

However, the information sheet says[9]:

"If a registered tax practitioner has based the belief on hearsay, gossip or the opinion of third parties and has not made further enquiries or obtained independent verification or advice to substantiate the belief, this will not be sufficient for them to have 'reasonable grounds' for that belief."

This would suggest that Gordon would not have reasonable grounds to make a breach report in the situation described.

"Indictable offence"

[8] [102]
[9] [108]

The new legislation clearly requires tax practitioners to form a view about whether the acts of another practitioner may constitute an 'indictable offence'. Particularly for non-lawyers, this is going to be a problematic aspect of the law. It calls for tax practitioners to form a legal opinion about which they are not qualified. It requires knowledge of all of the various legal jurisdictions in Australia and what those jurisdictions consider to be an indictable offence.

The information sheet says, in summary:

- Determining whether a significant breach has occurred will ultimately depend on the Criminal Law in the various jurisdictions.

- Involve the meaning given to 'indictable offence' in the relevant jurisdiction. The term is undefined for the purposes of TASA and will therefore vary between jurisdictions.

With this being the case, what is the expectation of tax practitioners? Is it possible for a non-lawyer to have 'reasonable grounds' for believing that a person has engaged in a breach that constitutes an 'indictable offence' when the person doesn't know what the term means? I would have thought not. The term 'reasonable' means (in my view) that the position concluded is capable of having reasons advanced as to why the particular position was taken. If you have come to a view about an action without clearly knowing what the meaning of the action is, how can that be 'reasonable'?

Perhaps the courts may take a more open view of this provision than what I am indicating, but the problem for tax practitioners is what to do about this issue now. My view is that legal advice must be sought before a breach notice is given to the TPB based on the significant breach constituting an indictable offence.

In the information sheet, the TPB says it:

"…appreciates that determining whether an offence is covered by 90-1(1)(a) involves legal concepts and laws that tax practitioners may not have expertise in. Whilst tax practitioners are not expected to have conclusive evidence that a breach has occurred, they may wish to seek legal advice in forming a view on the matter. It is up to the tax practitioner to exercise professional judgement as to whether legal advice is sought."

It also says[10]:

"Whilst registered tax practitioners may wish to seek professional advice when determining whether they have reasonable grounds for believing that they, or another tax practitioner, have breached the Code and the breach is a 'significant breach', this is not essential. Whether this is appropriate may also depend on the nature of the breach involved."

Offence involving dishonesty

Much of what I have said above in relation to 'indictable offence' can apply to the idea of an offence involving dishonesty. The key difference being, that 'dishonesty' is not a defined term for the purposes of TASA and may not be for the legal jurisdictions in Australia. The term,

[10] [116]

according to the information sheet is given its ordinary meaning, having regard to the context and purpose of the provision in which it appears.

What may be considered a dishonest act by one person may not be considered to be so by another person.

The information sheet refers to the Macquarie Dictionary for the meaning of the term 'dishonesty' and 'dishonest'. Among other things, it includes these ideas: lying, cheating, stealing, fraud and theft.

On the assumption that different words mean different things, an 'offence involving dishonesty' does not mean an 'indictable offence'. So, what is intended by an 'offence involving dishonesty' under an Australian law is not clear. It would seem that the contemplated dishonest offence is of lesser egregiousness than an indictable offence.

I then begin to wonder about various 'offences'.

- What if I park in a council-controlled parking space knowing that I need to pay for parking in that place, but decide not to pay because I don't want to? Does that constitute an offence involving dishonesty whether or not I get a parking fine?

- What if I am in a supermarket and I slip an apple into my bag and don't pay for it?

- …and so forth.

Material loss or damage

Another problematic part of the definition of 'significant breach' is whether the breach results, or is likely to result, in material loss or damage to another entity (including the Commonwealth).

I first note that the loss can be to any entity, whether it is the taxpayer, their relatives, their associates, their shareholders and so forth. I conclude that this includes an indirect loss as well as a direct loss.

The terms 'loss' and 'damage' and 'material' are not defined for the purposes of the law. Again, the TPB refers to the Macquarie Dictionary to find definitions of the ordinary use of the terms. The TPB prefers a very wide definition of the terms 'loss' and 'damage'. This could include financial and non-financial loss or damage. It could include loss of reputation or breach of privacy provisions. The TPB also refers to adverse impacts on the health and wellbeing of clients as a result of the tax practitioner's conduct.

No doubt loss would also extend to such things as penalties and interest charges.

With regard to the term 'material' the information sheet says[11]:

"Whether loss or damage to the other entity is 'material' will ultimately depend on the facts and circumstances. The TPB acknowledges that the concept of 'materiality' has a subjective

[11] [62]

element in the sense that the degree of significance or importance attaching to the loss or damage, and the impact or consequence it has for the other entity, is specific to that other entity. The same loss or damage may be viewed as material by one entity but not another."

The information sheet also says[12]:

"Because the loss or damage is to another entity, a registered tax practitioner may also not be aware of, or in a position to appreciate, the exact nature and scope of the loss or damage, including how and to what extent it has impacted the other entity.

In light of this, the TPB considers that loss or damage will be 'material' if a reasonable person, having the knowledge, skill and experience of a registered tax practitioner in the same circumstances, would expect it to be of substantial import, effect or consequence to the other entity. This requires the tax practitioner to exercise their professional judgement, taking into account the individual circumstances, including the information known to them about the breach."

I note that there is no reference in the information to the accounting standards concept of 'materiality'[13].

So, what do we conclude from the above? It is very difficult to say. It is very problematic. What is 'material' to one person is immaterial to another. Should a loss to the ATO be compared with the total tax collections of the ATO or should it be some arbitrary dollar figure? Should the loss be compared to an individual's probable net worth? If a loss is not material to one person, but there is a potential loss of the same amount to many people, will the amount, added together, be a material loss?

There is no guidance on these questions except the vague discussions in the information sheet and the directive for tax practitioners to use their professional judgement.

Result or likely to result

The egregious behaviour of a tax practitioner must result or is likely to result in the material loss or damage. Again, the term 'result' is not defined, and the information sheet reverts to the Macquarie Dictionary definition.

In summary, the information sheet says that for there to be a breach that will result in material loss or damage to another entity, there must be sufficient connection or relationship between the breach and the loss or damage, such that it can be said that the loss or damage is a consequence, outcome or effect of the breach[14]. Further, for a breach to be 'likely' to result in material loss or damage, the loss or damage needs to be a probable consequence, outcome, or effect of the breach, not just a mere possibility[15]. However, it is not necessary to determine the question with any certainty.

Otherwise significant

[12] [63] & [64]
[13] AASB 1031
[14] [66]
[15] [67]

Even if an act by a breaching practitioner is not:

- An indictable offence; or
- An offence involving dishonesty; or
- Results or is likely to result in material loss or damage.

…if the act is "otherwise significant", this is still considered to be a significant breach.

What does 'otherwise significant' mean – and to whom? What I might consider significant another person may not. Remember that this term needs to be read with the other things that can cause a significant breach. It seems to me that this 'otherwise significant' category is a lesser form of offence than those mentioned in the dot points above – yet it is still considered to be 'significant'.

When we are considering the 'otherwise significant' behaviour we are invited by the law (not compelled) to consider the behaviour:

1 In terms of the frequency of similar breaches by the tax practitioner; and

2 The impact of the breach on the agent's ability to provide tax agent services; and

3 The extent to which the breach indicates that the agent's arrangements to ensure compliance with the Code are inadequate.

The information sheet says[16]:

"Determining whether a breach is 'otherwise significant' requires a registered tax practitioner to make a judgement based on a holistic assessment of the circumstances and the information known to them at a point in time. Although a tax practitioner is not expected to conclusively determine the issue, they still need to have 'reasonable grounds' for their belief."

The information sheet also says[17]:

"If a registered tax practitioner is undecided whether a breach is 'otherwise significant' but they have reasonable grounds for suspecting it may be, they should also report it."

So, in practice, what does this mean for tax practitioners? It is very difficult to say given that this third category of significant breach is supposed to be something different to the other two (serious) types of breaches.

OBLIGATION TO MAKE YOURSELF AWARE OF BREACHES?

You may wonder whether the new legislation requires tax practitioners to be actively looking for breaches. Put another way, is there an obligation imposed on tax practitioners to actively keep themselves informed about everything "tax" that is going on around them in case a significant breach comes to their attention?

[16] [81]
[17] [90]

One might conclude that such an obligation is implied in the new law, however, I think the better view is that it is not. It seems that tax practitioners are set to a standard whereby they "ought to have reasonable grounds to believe" there has been a breach of the Code. What constitutes the circumstances whereby a tax practitioner "ought" to have known such things will be, no doubt, the subject of some TPB or judicial consideration in the future.

HOW IS BREACH REPORTING TO BE UNDERTAKEN?

If you are to make a breach report, how is this to be done? Notification "must be made" using either:

- 'Notifying a change in circumstances' form on the TPB website; or

- The 'Complaints' form on the TPB website if the notification is in relation to another tax practitioner.
    - I note that this form can be lodged anonymously, but the TPB warns the Board may be unable to verify or respond to the issues raised.
    - The substance of the complaint must be set out in less than 1,000 characters but there is a facility to attach documents.

Notification must be made within the 30-day time period referred to above. Nevertheless, the TPB says that if the 30-day deadline is missed, the breach must still be reported. If this occurs, reasons for the delay must be given as "tax practitioners should be well positioned to report on time"[18].

Notifying professional organisations

The obligation to notify a breaching practitioner's professional organisation arises if the notifying practitioner is 'aware' of the breaching tax practitioner's membership of the organisation. However, the information sheet states that the reporting practitioner must make reasonable enquiries as to whether the breaching practitioner is a member of a professional organisation to which a report should be made[19].

WHAT IF YOU DON'T REPORT WHEN YOU SHOULD?

If a tax practitioner fails to comply with the additional breach reporting obligations, they will breach section 8C of the Taxation Administration Act and 30-10(2) (Code item 2). It is also a factor that may be taken into consideration when determining whether they continue to meet the 'fit and proper' registration requirement. If there is a breach of TASA, there may be consequences for that breach.

VEXATIOUS, MALICIOUS OR FRIVOLOUS REPORTING

One of the concerns of this new regime is some tax practitioners using it to attack competitor tax practitioners. Unfortunately, I think that this is an inevitable unsavoury outcome of this

[18] [126]
[19] [134] & [135]

new law. I trust that this will not be a significant outcome, but the possibility of the new law being used in a frivolous, vexatious or malicious manner is very real and it will happen.

To this end, the information sheet says[20]:

"The TPB appreciates that the nature of the relationship between the parties may, in some cases, make notifying the breach difficult or sensitive (for example, if they are a colleague or associate). It may also have a bearing on the credibility of the notification made and increase the potential for frivolous, vexatious or malicious claims (for example, where one registered tax practitioner is in direct competition to another)."

"The TPB will assess the information provided and make further enquiries (as appropriate) to ensure the reporting of a significant breach relating to another tax practitioner's conduct is reasonable and credible, and is not frivolous, vexatious or malicious.

The TPB may take action against the notifying tax practitioner if the TPB considers that a breach report is frivolous, vexatious or malicious, for example, if the claim involves the making of a false or misleading statement."

LEGAL RISKS

I am not a lawyer and it is beyond my expertise to comment on the possibility of a reporting practitioner being sued by a putative breaching practitioner for loss etc.

However, I note that certain lawyers are raising the prospect of:

- Actions based on defamation of character.
- Loss or damage caused by the reporting practitioner to a putative breaching practitioner's business, particularly if it is found that there is not a significant breach of the Code.
- Loss due to disclosure of confidential information.

CLIENT CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE

The information sheet does discuss the issues of keeping client information confidential and legal professional privilege ("LPP").

The TPB notes that Code item 6 requires tax practitioners to keep client information confidential[21]. However, it considers that breach reporting will not contravene Code item 6 because it is required by law.

With regard to LPP, the information sheet states that TASA does not override the law relating to LPP. Registered tax practitioners should consider whether LPP applies before providing information to the TPB and professional organisations and whether the holder of the privilege wishes to waive that privilege by making disclosure to the TPB or a professional organisation.

WHISTLEBLOWER PROTECTIONS

[20] [109], [111] & [112]
[21] [149]

Currently, there are no whistleblower protections in relation to complaints made to the TPB. This appears to have been an oversight that was pointed out by the James review (2019) into the TPB and TASA. There is a Bill before parliament (at the time of writing) being the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023 that has the object of rectifying that situation.

Schedule 2 to that Bill is applicable and will commence on the later of the first 1 January, 1 April, 1 July or 1 October to occur after the day the Bill receives Royal Assent and 1 July 2024. The amendments apply on commencement.

The Bill amends Part IVD of the Taxation Administration Act ('TAA') to extend whistleblower protections to eligible whistleblowers who make disclosures to the TPB where they believe the information may assist the TPB to perform its functions or duties under TASA.

I note that the whistleblower protections do not currently extend to complaints to professional associations, although that may occur in the future if prescribed in regulations.

Eligible whistleblower

To obtain whistleblower protection, an individual must be an 'eligible whistleblower'. This is defined in section 14ZZU TAA. This provision says:

"An individual is an eligible whistleblower in relation to an entity…if the individual is, or has been, any of the following:

1. An officer (within the meaning of the Corporations Act 2001) of the entity;
2. An employee of the entity;
3. An individual who supplies services or goods to the entity (whether paid or unpaid);
4. An employee of a person that supplies services or goods to the entity (whether paid or unpaid);
5. An individual who is an associate (within the meaning of section 318 of the Income Tax Assessment Act 1936) of the entity;
6. A spouse or child of an individual [referred to above];
7. A dependant of an individual referred to in 1 to 5 above, or of such an individual's spouse;
8. An individual prescribed by regulations…"

It will be seen that a reporting practitioner that does not work for a breaching practitioner's entity is not covered by the definition of an 'eligible whistleblower'. I suggest that these type of people are prime candidates to be prescribed by regulation in the future.

EXAMPLES

I note that the information sheet contains 6 case studies that are designed to demonstrate how the TPB will approach various situations and whether a significant breach notification should be made. Also, the case studies consider situations where significant breach notifications have been made.

Frankly, the case studies are of little use. The outcomes of the case studies are very predictable and do not help tax practitioners to grapple with the difficult issues this new legislation raises.

In this section of the article, I will refer to examples that will illustrate the issues raised by this new law. Some of these are based on real situations of which accountants have made me aware. These examples are just a small selection of the types of issues tax practitioners will face in practice. Tax practitioners reading this article will, no doubt, be able to think of many other examples they have encountered in practice.

Scenario 1 – SMSF art collection

Daddo Designs Pty Ltd has been serviced by Marksman & Co, Chartered Accountants for the last 15 years as their appointed tax agents. The owners of Daddo Designs have a SMSF called the Daddo Retirement Fund. The SMSF is audited by another accountant, Jill Banks.

The owners of Daddo Designs think the fees of Marksman & Co are getting too high, so they visit another accountant to see if the other accountant will take on their work, and at what fee. This accountant is Betty Regan, who is a registered tax agent. Betty, as part of her due diligence in deciding whether to take on the potential new client, asks to see all of the financial statements and tax returns of all of the entities, including the SMSF.

When reviewing the information for the SMSF, Betty notices that there is an art collection consisting of 7 pieces of art. The value of this art is recorded as $450,000. Betty also notices that some lease payments have been received by the SMSF in relation to the artwork and asks the potential client to give more details.

The potential client (the Daddo family) says that 6 of the pieces are in the Board room of Daddo Designs and that Daddo Designs pays an arm's length fee to the SMSF for the lease. The 7th piece is in the dining room of the Daddo's home because "it's a lovely piece of art". The Daddo's seem unconcerned about these arrangements.

Betty informs the potential client that the arrangements contravene Regulation 13.18AA of the Superannuation Industry (Supervision) Regulations 1994 and that an offence of 10 penalty units applies. The Daddo family are shocked at this because they did not think there was a problem with the arrangements. Neither Marksman & Co nor the auditor of the fund made any comment about the arrangement to their client.

On hearing that the trustees of the SMSF may have committed an offence, the Daddo Family says that they do not want Betty's services because she "obviously doesn't know what she is talking about" and have no more contact with her.

Should Betty conclude that either Marksman & Co or Jill Banks have undertaken acts that constitute a "significant breach" of the Code of Professional Conduct and report either or both of them within 30 days to the TPB. Also, should Marksman & Co be reported to CA ANZ? Betty notes that Jill Banks is a CPA, so should she report Jill to the CPA Australia?

The process

Here I will suggest a process that Betty might follow in relation to making the decision on whether to report.

1. Betty must determine whether either Marksman & Co or Jill Banks are registered tax agents or BAS agents.

   It will be obvious that Marksman & Co are registered tax agents. The fact that they are lodging tax returns under a tax agent number is sufficient evidence. Nevertheless, Betty will need to make a decision as to whether to report the firm, Marksman & Co, or an individual at Marksman & Co. If the same individual has been signing the tax returns and SMSF annual return, I would report the individual rather than the firm.

   With regard to the auditor, Jill Banks, it will be necessary for Betty to establish whether Jill is a tax agent or BAS agent. This may not be the case. An SMSF auditor may be a tax agent or BAS agent, but this is not necessary. If Jill is not so registered, Betty cannot make a significant breach report about Jill. For the purposes of this example, I will assume that Jill is a registered tax agent.

2. Betty must determine whether there has been a breach of the Code of Professional Conduct by Marksman & Co and/or Jill Banks.

   There is no definition of the term "breach" in TASA. Presumably a breach of the Code of Professional Conduct simply means a person not doing one of the requirements in Subdivision 30-A of TASA.

   30-10(10) requires tax practitioners to "take reasonable care to ensure that 'taxation laws' are applied correctly to the circumstances in relation to which you are providing advice to a client".

   30-10(11) requires registered tax practitioners to "not knowingly obstruct the proper administration of the 'taxation laws'.

   30-10(12) requires registered tax practitioners to "advise your client of the client's rights and obligations under the 'taxation laws' that are materially related to the tax agent services you provide".

   Of importance in the above is the meaning of 'taxation laws'. This term is defined in section 995-1(1) Income Tax Assessment Act 1997 to mean (for our purposes): [1] An Act of which the Commissioner [of Taxation] has the general administration … and [2] TASA and its regulations. Section 62A of the Superannuation Industry (Supervision) Act 1993 ('SISA') is under the general administration of the Commissioner of Taxation with respect to SMSFs[22]. Accordingly, the provision that is of concern to Betty is a 'taxation law'. Nevertheless, I note that a service provided by an auditor of a SMSF under SISA is not a 'tax agent service' for the purposes of TASA[23].

   In my view Betty is entitled to conclude that both Marksman & Co (or a connected individual) and Jill Banks have both breached the Code of Professional Conduct. I

[22] Item 22, Section 6, SISA.
[23] Section 26 Tax Agent Services Regulations 2022

think this is clear cut for Marksman & Co, but for Jill Banks, this needs more thought.

By auditing an SMSF, Jill is not, by that act, providing a tax agent's service. Nevertheless, she is a registered tax agent and is bound not to breach the Code of Professional Conduct. Jill does have a client, being the trustees of the SMSF. Auditors do form an opinion required under SISA and in that regard, I would think that a SMSF auditor provides 'advice' to their client. Accordingly, in my view, Jill has breached the Code of Professional Conduct because she has not taken reasonable care to ensure that 'taxation laws' are applied correctly to the circumstances in relation to which Jill provides advice to her client.

3. Betty must now decide whether the breach/breaches she has identified are "significant".

   As stated above, SISR makes it an offence to deal with artwork in the way mentioned. However, the offence is that of the trustee. I do not know whether this is an 'indictable offence' under Federal law, but it is irrelevant for the purposes of 30-40 because that provision does not refer to the client. It refers to the tax practitioner.

   However, that is not the end of the analysis. This is because under section 8C(1) of the Taxation Administration Act, among other things "A person who refuses or fails, when and as required under or pursuant to a taxation law to so…to give any information or document to the Commissioner or another person…commits an offence". This is an offence of absolute liability[24]. I assume that this is an 'indictable offence', but I don't know. But who is to know whether section 8C would be applied by the Commissioner? This is too hard to know!

   Would the conduct of either Marksman & Co or Jill Banks result, or likely to result, in material loss or damage to another entity (including the Commonwealth)? I think so, but I am not at all sure. This is because the trustee may be fined 10 x $330 x 7 = $23,100 for the offences. I suppose it is possible that this fine could be applied for each year the offence occurred. It is also possible that the complying status of the fund could be put in jeopardy. It is also possible that the lease fees paid to the SMSF may be regarded as non-arm's length income. How would Betty know this?

   Finally, if Betty came to the conclusion that the above two items of consideration did not result in a significant breach of the Code, would the actions of the accountants and the auditor be an 'otherwise significant' breach of the code? I suspect that many accountants would consider not advising clients about the rules regarding artwork in SMSFs to be egregious behaviour and consider that to be a significant breach.

   On balance, I think Betty should report a significant breach. Once having been shown this information, TASA now imposes an obligation on her to make a decision about whether to report breaches or not. The downside of not reporting is that she might breach the Code or commit an offence and get herself into trouble. The downside of reporting the breaches seems to contain far less risk, although she might end up with less friends in the town in which she works.

[24] Section 8C(1A) Taxation Administration Act

4. Betty must now report the breach to the TPB on its website.

5. Betty must report the breach to both CA ANZ and CPA Australia.

Scenario 2 – ASIC returns not lodged

Joel obtains a new company client and discovers that the company has not lodged the ASIC annual return for the last three years. The company has previously been advised by another tax agent. Should Joel report a significant breach?

No. The lodgement of the ASIC annual return is not a requirement of a taxation law and is not a tax agent service. There is no breach of the Code of Professional Conduct.

Scenario 3 – Tax deductions not claimed for depreciation

It is August 2025 Redmond, a tax agent, has just gained two new clients. They are husband and wife and they own a rental property that they purchased in 2018. The rental property was an existing house. When the couple bought the property, they made extensive renovations to the property including fitting the house out with a very expensive range of new depreciable assets.

The couple previously had Blackman as their accountant and tax agent. Blackman had become aware of the restrictions on depreciation that applied to assets in rental properties, which started to apply in 2017. He advised the couple (in error) that due to the change in the law, no depreciation could be claimed on the new depreciable assets that had been purchased and installed in their second-hand rental property. The couple had been quite disappointed with this advice given the nearly $100,000 they spent on upgrading the equipment and furnishings in the house.

When Redmond reviewed the affairs of the couple, he queried why no depreciation had been claimed on the assets, which were now about 6 years old. The couple informed Redmond of the advice they had received from Blackman. Redmond said that he would be able to correct the error as far back as the assessment amendment period would permit, but would not be able to go back further. In this case the assessments could be amended for the prior two years.

Should Redmond submit a significant breach report to the TPB and the professional association of Blackman?

Redmond concludes that Blackman has breached the Code of Professional Conduct because Blackman has not ensured that his tax agent services were provided competently[25]. The key issue is whether the breach is significant.

If could not be said that Blackman has engaged in behaviour that constitutes an indictable offence or involves dishonesty. It seems that Blackman has simply been incompetent in his dealings with his client.

[25] 30-5(7)

Redmond must then consider whether the acts of Blackman have resulted in material loss or damage to another entity. Redmond considers the couple as the 'another entity' and concludes that they have lost about $40,000 of tax deductions, resulting in about $20,000 of extra tax being paid by the couple over the past years. Is this amount 'material' from the point of view of the couple?

I am sure that if Redmond asked the couple, they would think it material. I am sure the couple would have much preferred the $20,000 in their pockets rather than the ATO. However, is that the only consideration for Redmond? Should Redmond consider the net worth of the couple? The couple are both on incomes that are taxed at the top marginal rate, so is the loss of $20,000 material to them?

On balance, I would say that this does need to be reported because, in my view, the issue of whether something results in material loss or damage needs to be determined from the point of view of the person that suffered the loss. As I have said, the couple would very likely say the loss of the $20,000 cash refund they should have obtained would be material to them. Due to this, I think the loss is material.

There is also the issue of all of the other clients of Blackman that he has been giving this advice to. If the loss of all of those people were added to the loss of the couple that Redmond now services, would that not result in a material loss?

Scenario 4 – FBT not paid on vehicles

Kirk, a tax agent, has a new client come to him that operates a business through a company. The company is registered for GST. When reviewing the company's financial statements and tax returns for a number of past years, Kirk notices that the company has a vehicle in its fixed asset register and that the vehicle has been changed over a few times in the last five years.

Kirk asks the owner of the company, Hubert, about the cars and what they were used for. Hubert is an employee of the company. Hubert says he drives the car at home each night, but it is only used for work purposes. He travels to and from home to work in the vehicle(s) each day. He has another car that he uses for private purposes. The vehicles owned by the company have been a 5-seater dual cab ute, a Mercedes and a Ford Mustang.

Kirk asks whether fringe benefits tax has ever been paid by the company and notes that he has not been provided with any fringe benefits tax returns to review. Hubert says he didn't think they were subject to any tax because they were used only for work purposes. Further, Hubert's previous tax agent never spoke to him about any FBT issue. Hubert wonders whether Kirk is competent, but after Kirk explains to him how the FBT law deems a vehicle to be available for private use, Hubert understands Kirk's points.

What should Kirk do? First, he has an obligation to advise his new client that FBT returns need to be lodged to the extent applicable and any tax paid.

Focusing on the subject of this article, should Kirk report the prior accountant for a significant breach of the Code of Professional Conduct? The issue is whether there is material loss or damage to any part or whether the breach by the prior accountants is 'otherwise significant'.

Looking at the facts, it is possible that the dual cab ute may not be subject to FBT. However, the provision of the Mercedes and the Mustang would have constituted a fringe benefit on each day it was made available to Hubert. So, assuming that both vehicles cost $100,000 and they were used for two years each, the FBT that has not been paid would be in the order of $80,000.

Is a loss of $80,000 (which is tax deductible) a material loss to the Commonwealth? Does Kirk consider whether the fact that Hubert's company must now pay this amount to be a material loss or damage plus any interest charges?

Should Kirk consider this breach to be 'otherwise significant' in relation to the prior tax agent? Does the prior tax agent take this view with all of his or her clients?

On this occasion Kirk contacts the prior tax agent, by email, and asks what advice was given to Hubert and his company regarding FBT on the vehicles. The prior tax agent gives a short reply to say that the correctness of tax information lodged with the ATO is the responsibility of the client. "They sign off on the tax returns and they take the responsibility for them being correct" the previous tax agents states.

Kirk also considers whether, if the ATO audits Hubert's company, penalties will be applied, causing further expense to his new client.

Again, it is difficult to say whether this event should be treated as a 'significant breach', but I think the better view is that he should treat it as being such and lodge a report with the TPB and the prior tax agent's professional body. $80,000 plus possible penalties plus interest charges could add up to $200,000. Hubert is likely to consider that amount 'significant'. If the client is likely to consider the amount 'significant', I think the breach should be reported.

Scenario 5 – Superannuation contributions not paid

The non-payment of superannuation contributions, whether by mistake or by deliberate action is very common and most tax practitioners will come across this issue sooner or later. Whether this type of breach is 'significant' is a perplexing issue.

Jake is a tax agent and he prepares the financial statements and tax returns for a trust client. The trust conducts a business, employs a number of people and also engages some contractors as individuals.

The general ledger of the company is maintained by an external BAS agent who operates a MYOB file to keep track of the company's operations. The BAS agent is also responsible for lodging the company's BASs and the payroll function.

Jake has advised his client and the BAS agent that there are some contractors for whom superannuation contributions should be made. However, the company and the BAS agent refuse to make superannuation contributions on behalf of the contractors because the terms of the engagement with the contractors did not mention anything about superannuation contributions.

The non-payment of the superannuation contributions has been happening for about 5 years. Jake thinks the total contributions that have not been paid could be in the order of $200,000

- $300,000 spread across the 5 individual contractors. Of course, no SGC returns have been lodged in respect of this underpayment of super contributions.

What should Jake do? He might consider 'sacking' the client if they refuse his advice. He should definitely ensure that he has, in writing, clear advice that superannuation contributions should be made on behalf of the 5 individuals. If he is preparing the financial statements, he should take up the liability for this amount and not claim a tax deduction for it.

Should he make a significant breach report in relation to the BAS Agent? Again, Jake is confronted with the question of whether there is material loss or damage or whether the breach is otherwise significant. Does Jake consider the impact on the individual contractors only? Or should he add together all of the non-paid superannuation contributions? Or should he consider how much less the 5 individuals will have when they retire due to the non-payment of the contributions?

I think Jake should report this as a significant breach.

Scenario 6 – Backdated trust distribution minutes

Petra, a tax agent, has an adult client, Kim. Kim is a beneficiary of a family trust that is controlled by her ex-husband, Garth. Kim is told very little about the affairs of the trust being merely a discretionary object of the trust. However, each year she is usually distributed around $10,000 from the trust.

The accountant of Garth's trust usually informs Petra of the amount of distribution and assessable income due to Kim in relation to the prior year around March of the following year. It is now March 2026 and Petra receives an email from Garth's accountant to say that Kim's entitlement for the year ended 30 June 2025 was $11,000 and the taxable income related to this amount is $12,000. Petra is not given a copy of the trustee distribution minute.

Petra would like to receive the information concerning Kim earlier so that she can complete Kim's tax return earlier. She writes to Garth's accountant and asks whether this information could be given to her within 5 months of the end of the financial year. Garth's accountant writes back and says "Don't be absurd. We don't even work out the distributions until the March that follows the year end. You get your information as soon as we've worked it out!"

Petra is concerned that the distribution decision of the trustee of Garth's trust is not made until well after year end, thus making the distributions invalid. This might mean that Kim is not entitled to anything.

Petra emails Garth's accountant and asks Garth's accountant to confirm that the trustee's distribution decision is made by 30 June in the prior income year. No response is received.

What should Petra do? Can she conclude that a breach has occurred? If so, does she have 'reasonable grounds' to conclude that the breach is significant? This is a hard question to answer.

Again, I think, on balance, many tax practitioners would report this as a significant breach. Petra has an email that says the trust distributions are not worked out until after year end. This may indicate that the trustee distribution decisions are not made until well after year end

– although that is not certain. If the distribution minute is completed on the basis of a percentage of distributable income to each beneficiary, the actual amount of distribution may not be worked out until well after year end. This is acceptable to the ATO.

The risk for Petra is if Garth's accountant is audited by the ATO and it is discovered that the trustee's decision is not made by 30 June each year. Would the ATO or the TPB adopt the view that Petra had reasonable grounds, or ought to have had reasonable grounds, for believing Garth's accountants had engaged in a significant breach? This is difficult to say.

Should Petra consider, or conclude, that it is likely Garth's accountants are completing trust distribution minutes late for all of their clients? If that is the case (Petra could reason) the trustees of all of the trusts involved should be paying tax at the top marginal rate on all of the trust income. Is this a material loss to the Commonwealth?

All of this is too hard!

On balance, I think Petra should report the situation as a serious breach.

MY COMMENTS

I will close out this article with my comments on what I think this all means for tax practitioners, the TPB and the community.

Meritorious effort by the TPB

I should first say that I think the TPB has made a good 'fist' of dealing with the interpretation of this law in its information sheet. I think it has done the best it can with a very difficult set of provisions.

I think the TPB has made a reasonable attempt to explain the new provisions, but it had an unenviable job. I can't help having the feeling that this new law was thrust onto the TPB with little consultation and the TPB now has to do its best to administer a piece of legislation that is problematic for everyone.

Nevertheless, the information sheet is not all that helpful. This is not the fault of the TPB. It has had to analyse the problematic and unclear wording of the meaning of 'significant breach' and draw some conclusions about these words. Unfortunately, what has resulted is an overlay on these unclear words with a discussion in the information sheet, which is itself unclear. When I have considered real life scenarios, as set out above, I found little assistance in the information sheet for resolving whether a significant breach report should be made. I was still left wondering what to do even after reading and re-reading the legislation many times and spending many hours analysing what the TPB says in the information sheet.

Without trying to sound proud, if I have difficulty doing this, just about all tax practitioners will have as much, or more difficulty. Several times in the information sheet tax practitioners are left with the directive to use their 'professional judgement'. This is government organisation speak for 'we don't know what this means, so you have to make up your own mind'. This leaves a most unsatisfactory situation for the tax profession.

Tax professionals are warned that 'gossip' and the like will not be accepted as evidence by the TPB and that independent information should be sought to verify any conclusion about whether a significant breach has occurred. In many cases this is impractical. This leaves tax practitioners with the quandary of knowing about a significant breach but wondering whether they will be disciplined by the TPB if the TPB considers the reporting practitioner does not have sufficient evidence.

I am left with the conclusion that tax practitioners are now forced to deal with bad law that has a good intent.

Bad law with a good intent

No tax practitioner would argue with the policy behind the new law. The idea is to shine a bright light on the egregious conduct of those in our profession that do the wrong thing. However, these people are, in my view, very much in the minority.

Most tax professionals see themselves as just that – professionals with strong ethical standards. We try to do the best we can for our clients within the bounds of the law and be the bridge between the complexities of the Australian tax laws and clients that, generally, know little about the laws. We see ourselves as maintaining standards of excellence so that the community and the Government can have confidence that the Australian tax system is being operated largely in accordance with proper observance of the law and that, broadly, the amount of tax collected by the ATO is near correct. We want to get things right and we trust that all our fellow practitioners have the same attitude. So, who can argue against laws that propagate those aims?

But it is not that simple.

Bad law does not become good law simply because the bad law has good intentions. Further, you cannot expect people to make consistently good decisions off the back of bad law, no matter what good intentions lie behind the law. Bad law leads to bad decisions, costs and, in this case, an adverse impact on the profession.

The impact on the TPB

I have to conclude that this new law will create much more work for the TPB. I cannot see any other outcome. This will be by way of many more complaints coming to the TPB by reporting practitioners reporting breaching practitioners. Further, I expect the TPB to receive many more email and telephone queries asking the TPB whether events that have come to the attention of a tax practitioner should be reported to the TPB.

There is a fundamental point that must be appreciated. To report is low risk and not to report is high risk. So, what are tax practitioners going to do, being conservative people for the most part? If in doubt, they will report. It must follow that the TPB workload will increase markedly.

Either the TPB will get massively behind in its workload or it will need to employ many more staff. As the TPB is supposed to be self-funded through the fees paid by tax practitioners, it will follow that those fees will increase (I think) by a significant amount over time. These costs, will, of course, have to be passed onto those that use tax agent services.

Why I think the law (on balance) is 'bad' law

The reason I think this is bad law is because for many of the people that must judge whether they should act, or not act, under the law, the terms used are beyond their natural understanding and are just too ethereal. Legal advice must be taken to understand some of the terms. The TPB's 'guidance' overlays on ethereal terms another set of undefined concepts requiring 'professional judgement'. Adding two unclear sets of ideas together does not make for one clear concept.

What I think will happen in practice

My overall conclusions about this new law are pessimistic. This is bad law that will forever be problematic for the administrator (the TPB) and those that must apply the law (the tax profession).

This law is a significant overreaction to the PwC scandal. It has been 'dumped' on the tax profession due to the actions of a very small number of individuals to the great cost and disgust of the many thousands of tax practitioners that are daily trying to grind out a living by 'doing the right thing'. I am already hearing the voices of tax practitioners wondering whether this profession is something in which they can remain.

This legislation has been introduced with scant effective consultation (if any) and will consume thousands upon thousands of hours of time of those involved with the tax industry in Australia and reduce its efficiency. This will cost, and the costs will eventually be passed on to the public. I also think that the benefits to the Australian people will be nebulous. Maybe I will be proved wrong, but somehow, I don't think I will.

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