

# EXPOSURE DRAFT

## EXPOSURE DRAFT EXPLANATORY STATEMENT

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

#### *Tax Agent Services Act 2009*

#### *Tax Agent Services (Code of Professional Conduct) Determination 2023*

The *Tax Agent Services (Code of Professional Conduct) Determination 2023* (the Instrument) is a legislative instrument made under section 30-12 of the *Tax Agent Services Act 2009* (the Act). Section 30-12 of the Act provides that the Minister may, by legislative instrument, determine obligations that elaborate or supplement any aspect of the Code of Professional Conduct (the Code). The Code is set out in section 30-10 of the Act and establishes ethical principles that apply to all registered tax agents and Business Activity Statement (BAS) agents (together referred to as ‘tax practitioners’). This Instrument sets out additional professional and ethical obligations of tax practitioners under section 30-10 of the Act. Taken together, these obligations form the Code of Professional Conduct for tax practitioners in Australia.

The Code is administered by the Tax Practitioners Board (the Board), which regulates tax practitioners across Australia, including their compliance with the Code. Under subsection 30-10(17) of the Act, a tax practitioner must comply with any obligations the Minister determines under section 30-12 of the Act. Where the Board finds a failure to comply with the Code or finds that the conduct constitutes a breach of the Act under section 60-125 of the Act, the Board is able to take a range of actions including making orders, or suspending or terminating tax practitioners’ registration.

The Instrument is part of a larger range of measures giving greater efficacy to the Board’s regulation of the tax practitioner profession. It follows amendments to the Act that introduced the concept of disqualified entities who, due to certain findings of misconduct, cannot be used to provide tax agent services on behalf of a tax practitioner without the Board’s permission.

The Instrument elaborates on and supplements the Code to outline the high professional and ethical standards expected by the community of individual tax practitioners. This improves transparency and accountability and gives the public greater confidence and assurance in the integrity of the profession. This Instrument contributes to the strengthening of the regulatory framework and the regulation of the profession in the context of recent public scrutiny of misconduct in the tax practitioner profession. While some of the professional and ethical obligations found in the Instrument are general in nature, others specify obligations relating to dealings with the Government as a client. All these additional obligations are consistent with the Code as set out in the Act.

This Instrument is a disallowable instrument that is subject to sunseting.

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

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This Instrument commenced on the day after registration or immediately after commencement of Part 1 of Schedule 3 to the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023*, whichever occurs later.

Details of the Regulations are set out in Attachment A.

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## ATTACHMENT A

### Details of the Tax Agent Services (Code of Professional Conduct) Determination 2023

#### Part 1 - Preliminary

##### Section 1 – Name

This section provides that the name of the instrument is the *Tax Agent Services (Code of Professional Conduct) Determination 2023* (the Instrument).

##### Section 2 – Commencement

Schedule 1 to the Instrument commenced on the day after registration or immediately after commencement of Part 1 of Schedule 3 to the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023*, whichever occurred later.

##### Section 3 – Authority

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

##### Section 4 – Definitions

This section provides definitions for key terms used in this Instrument.

##### Subdivision A – Preliminary

#### **Additional obligations relating to the professional and ethical conduct of registered tax agents and BAS agents**

Section 5 identifies that the purpose and authority for this Instrument is section 30-12 of the Act, which permits the Minister to determine additional obligations that form part of the Code of Professional Conduct (the Code). The Code consists of the obligations in section 30-10 of the Act together with any obligations determined by the Minister under section 30-12 of the Act. All registered tax agents and BAS agents (together referred to as ‘tax practitioners’) are required to comply with the Code.

This Instrument does not create any new obligations on tax practitioners that are inconsistent with their obligations under the Code.

##### Subdivision B – Honesty and integrity

#### **Upholding and promoting the ethical standards of the tax profession**

Consistent with the new notification requirements relating to identified breaches of the Code in Subdivision 30-C of the Act, section 10 of the Instrument requires tax practitioners, both on their own and in cooperation with other tax practitioners, to uphold and promote the Code and protect public trust and confidence in the integrity of the tax profession and tax system. Section 10 also requires tax practitioners to work collectively to take reasonable steps to hold each other accountable for compliance with the Code and to protect public trust and confidence in the integrity of the tax profession and tax system.

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In effect, section 10 applies to the conduct of tax practitioners individually, requiring tax practitioners to themselves comply with the Code and not to bring the profession into disrepute. It also applies more broadly to tax practitioners' interactions with other tax practitioners, which extends to their employees, contractors or others assisting in the provision of tax agent services. Interactions where tax practitioners must encourage compliance with the Code include supervising or collaborating with both registered and unregistered tax and BAS agents, offering tax advice to clients, and providing statements on behalf of clients to regulators.

This extended application recognises that all tax practitioners play an important role in upholding an ethical tax system that the public can rely upon, and that tax agent services are often provided collectively by multiple people within an organisation. This is particularly relevant as a company or partnership may be a registered tax practitioner, which employs or otherwise engages individuals who are not themselves registered tax practitioners but who work under the guidance and supervision of other employees or partners who are registered tax practitioners. Section 10 ensures that the tax practitioner is responsible for their conduct and the conduct of any unregistered individuals providing tax agent services on their behalf.

As part of tax practitioners' obligations under section 10, they must take reasonable steps to hold other tax practitioners accountable, which necessarily extends to the employees and contractors of those other tax practitioners. Reasonable steps will depend on the circumstances of each case and may depend on the size and nature of an organisation and the degree of authority and control of an individual within that organisation. Without limiting the interpretation of what 'reasonable steps' means, these could include:

- providing training and resources on complying with the Code;
- undertaking underperformance management processes in relation to breaches of the Code;
- instituting mechanisms for staff to report and address concerns about conduct that may breach the Code;
- providing directions to staff not to engage in specific conduct where that conduct may breach the Code;
- maintaining appropriate records relating to potential breaches of the Code;
- amending or correcting false or misleading statements in documents or conversations;
- having recruitment processes that include police checks and checks of the Tax Practitioners Board's (the Board's) register and disqualified entities; and
- encouraging compliance with the Code when considering remuneration, including promotions and bonuses, as well as in other human resource policies.

Certain actions may indicate a failure to uphold and promote the Code and to take reasonable steps to hold other tax practitioners accountable. Without limiting the interpretation of what a failure to take 'reasonable steps' means, these could include:

- *not* removing staff from a project or work area where there are reasonable concerns about potentially unethical conduct relating to the project or work area;

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- asking *not* to be informed of, or for appropriate records to be made of, information relating to potential breaches of the Code;
- destroying evidence relating to any potential breach of the Code;
- taking or threatening any adverse action against an individual who raises concerns about potentially unethical conduct; or
- rewarding an individual for engaging in unethical conduct or otherwise encouraging such behaviour.

Despite this, a breach of the Code by a tax practitioner is not of itself or on its own evidence that another tax practitioner has failed to take all reasonable steps to hold that tax practitioner accountable.

The Board has discretion to determine the sanctions that may be applied to a tax practitioner in relation to a breach of the Code, which will have regard to the degree of misconduct and level of culpability involved in any failure to comply with section 10.

### **False or misleading statements**

Subsection 15(1) requires tax practitioners not to make false, incorrect or misleading statements to the Commissioner of Taxation or the Board in any capacity (either personal or professional) and in any way (including the giving of a document, the making of an oral statement or omission) in circumstances where they knew or ought reasonably to have known when making the statement that the statement was not true or was misleading. Similarly, section 15(1) requires tax practitioners to not omit information that would result in such a statement being false or misleading.

A statement provided to the Commissioner includes a statement provided to the Australian Taxation Office.

The nature of the obligation is one of truthfulness and integrity. The provision is concerned with particulars that are material in nature. That is, it is not concerned with particulars that are trivial in the circumstances in which the statement has been made. Tax practitioners are required to not make a statement that is false, incorrect or misleading in a material particular. They are also required not to omit certain matters or things from statements they make where that omission makes the statement false, incorrect or misleading in a material respect. A statement should not be contrary to fact, nor should it give the wrong impression as regards a material particular. Expanding this obligation to include statements made in a tax practitioner's personal and professional activities highlights the importance of a tax practitioner's role in representing the tax profession and preserving public confidence in the tax system, particularly when making representations to the Board or Australian Taxation Office for their own or their clients' tax affairs.

Subsection 15(2) requires tax practitioners to take all necessary steps to correct any statement they have provided to the Board or Commissioner as soon as possible after becoming aware that it was false, incorrect or misleading in a material particular or was misleading in a material respect due to an omission. This encourages tax practitioners to be accountable and make corrections to ensure the Board and Commissioner have access to the most accurate information. Correcting information also displays the goodwill of the tax practitioner and may be factored into any potential sanctions pursued by the Board for breach of the Code.

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### *Statements made to other Australian government agencies*

Subsections 15(3) and 15(4) extend the same obligations in relation to false, incorrect or misleading statements as subsections 15(1) and 15(2) to statements provided to other Australian government agencies. However, these subsections apply only to statements made by a tax practitioner in their capacity as a tax practitioner. Australian government agency is defined at section 995-1 of the *Income Tax Assessment Act 1997* as the Commonwealth, State or Territory, or an authority of the Commonwealth, State or Territory. They include the Australian Securities and Investments Commission, Department of the Treasury and the Australian Competition and Consumer Commission.

### Subdivision C – Independence

#### **Conflicts of interest in dealings with government**

Section 20 requires tax practitioners to take reasonable steps to identify and avoid material conflicts of interest related to their dealings with Australian government agencies. Conflicts of interest may be direct or indirect, apparent or real, and may involve a potential or perceived benefit or gain arising from these activities such as a misuse of confidential information obtained in government dealings or interference in the government's decision-making process.

Avoiding a material conflict initially requires tax practitioners to identify existing or potential conflicts of interest and take reasonable steps to prevent them from affecting the tax practitioner's advice or decisions, or the client's decisions. Reasonable steps will depend on the circumstances and can consider the size of an entity, the type of work it does and the likelihood of conflicts of interest arising, among all other relevant factors.

Examples of reasonable steps include, but are not limited to:

- training staff on identifying, disclosing and avoiding conflicts of interest;
- procedures for disclosure and record-keeping of potential conflicts of interest; and
- procedures for avoiding conflicts of interest, which could include preliminary conflict checks prior to accepting clients, allocating staff to projects to avoid potential conflicts of interest, maintaining a conflict register and information handling procedures that utilise technology to limit information access to those with a legitimate need to know.

Section 20 also imposes an obligation to disclose details of a real or potential material conflict to the government agency they are dealing with as soon as a tax practitioner becomes aware of the conflict. Details to disclose to the government agency about a real or perceived conflict of interest may include:

- the nature of the conflict;
- the extent of the conflict;
- what interest, association or incentive gives rise to the conflict;
- the identity of the agents or others related to the conflict and the extent to which they have been involved in the services provided to the client;
- when the conflict was identified;

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- how the advice or services provided to the client might have been different had there not been a conflict of interest;
- any benefit obtained due to the conflict of interest; and
- whether any actions have been taken or are proposed to avoid the conflict or to mitigate any damage arising from the conflict.

A tax practitioner should err on the side of caution and disclose details to a government agency where there is some uncertainty as to whether a conflict of interest arises or whether the conflict is material or not.

The obligation to disclose a conflict of interest to government is not limited to a tax practitioner disclosing information about their own potential conflicts but extends to any material conflict of interest that they are aware of that arises in connection with an activity undertaken for the agency. For example, where a tax practitioner is undertaking an activity for an agency in their capacity as a tax practitioner and knows of another person's or entity's conflict of interest in undertaking the same or a different activity for government, section 20 imposes an obligation on the tax practitioner to disclose details of that conflict of interest to the relevant government agency.

Following the disclosure of a conflict of interest with a government agency, the continued engagement of the tax practitioner will be at the agency's discretion based on the nature of the conflict and any mitigating actions taken by the tax practitioner.

### Subdivision D – Confidentiality

#### **Maintaining confidentiality in dealings with government**

Subsection 25(1) prohibits tax practitioners disclosing information from an Australian government agency that was obtained directly or indirectly in connection with activities they undertake for the government agency as a tax practitioner, unless there is a legal duty to disclose or in other specified circumstances. There is no restriction on the disclosure of government agency information received outside of activities undertaken as a tax practitioner, such as government information obtained from a publicly available government website or through the media.

The specific circumstance in which it is permitted to disclose government agency information obtained in connection with activities undertaken for government as a tax practitioner is where:

- it is reasonable to conclude that the agency authorised further disclosure of the information; and
- any further disclosure of the information was consistent with the agency's authorisation.

In practice, this will ensure that government agencies can establish the limits on who and how information may be shared, and tax practitioners who fail to comply with these restrictions will be found in breach of the Code.

Subsection 25(1) also complements section 20 in circumstances where disclosure is authorised to certain tax practitioners with a need to know the information, and not authorised to be disclosed to people who may have a material conflict of interest. For

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example, these requirements may limit authorised disclosure of government information to certain tax practitioners or individuals within an entity, rather than the entirety of an entity.

There is no requirement for information to be marked as confidential or identified as for limited distribution for subsection 25(1) to prohibit further disclosure of it. However, these may be relevant factors in interpreting whether it is reasonable to conclude that further disclosure of the information is authorised by the government agency.

Subsection 25(2) limits the use of information from an Australian government agency that was obtained directly or indirectly in connection with activities undertaken for the government agency as a tax practitioner. Such information cannot be used for personal advantage, or for the advantage of an associate, employee, employer or client, except where:

- it is reasonable to conclude that the agency authorised using the information in a way that may provide for such advantage for the tax practitioner or their associate, employee, employer or client; and
- any further use of the information was done consistently with the agency's authorisation.

It is not necessary that the use was likely or guaranteed to result in an advantage. A certain use would be prohibited by default if that use could potentially result in advantage.

This obligation imposes a strict restriction on tax practitioners to ensure that no personal advantage is taken using government information, except where it is reasonable to conclude the agency authorised this use. Subsection 25(2) also extends further than subsection 25(1) to capture associates, employees, employers or clients, in recognition that tax practitioners may use information for the personal advantage of others and potentially receive benefits indirectly through this unauthorised disclosure.

### Subdivision E – Competence

#### **Keeping of proper client records**

Section 30 requires tax practitioners to keep complete and accurate records relating to tax agent services provided to each of their clients, including former clients. Section 100 provides for this to apply to making and keeping records relating to tax agent services that are provided after commencement of this Instrument, not to tax agent services provided before commencement. As this obligation exists for former clients, if a tax practitioner ends an engagement with a client, they are still required to generate and retain records of the services provided within the engagement period.

Records must be in English or readily accessible and easily convertible to English. Records on each tax agent service provided need to be retained for at least 5 years after the service was provided. For matters that are not complex, a tax practitioner must keep adequate details of all services provided including information exchanged with the client and advice provided to the client. For a complex matter, adequate details of all services provided will include the relevant facts, assumptions and reasoning underpinning any advice provided to the client. If one client received tax agent services on a range of matters of different levels of complexity, the level of detail kept in each record of services provided can vary.



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Proper record-keeping is essential to maintain the integrity of a tax practice, particularly when disputes or queries arise in the future on the legality or accuracy of advice. Where tax practitioners are compliant with section 30, they will be able to refer to their records as clear evidence of their actions and clarify whether any wrongdoing occurred. Requiring the retention of records for 5 years also ensures alignment with the standard timeframe for record-keeping prescribed in Australian tax law.

### **Ensuring tax agent services provided on your behalf are provided competently**

Section 35 provides that tax practitioners must ensure that adequate supervision is offered to those providing tax agent services on their behalf, and these individuals have the relevant skills to provide services competently.

This complements the elements of the Code contained in the Act, which requires that all tax practitioners maintain the relevant knowledge and skills necessary to ensure that tax agent services are provided competently by themselves and others on their behalf. Section 35 extends this by ensuring that not only registered tax practitioners are required to maintain skills, but individuals who provide these services on their behalf also maintain sufficient skills and knowledge to provide services competently. Due to the nature of the tax profession, particularly in large firms, a range of employees including interns, contractors, and associates may all work collectively to provide tax agent services on behalf of a registered tax practitioner. Ensuring that all these individuals are appropriately supervised and competent when providing tax agent services is an essential part of tax practitioners' duties as registered agents are ultimately liable for the delivery of competent tax agent services and any sanctions for non-compliance.

In practice, this will require tax practitioners to ensure that unregistered staff providing tax agent services on their behalf are provided with adequate training to provide the services they are providing on behalf of the practitioner competently, and substantive review and sign-off of work is conducted prior to sending work to the client or submitting returns on behalf of the client.

### Subdivision F – Other responsibilities

#### **Quality assurance and other internal controls**

Section 40 requires all tax practitioners to have sufficient internal control procedures to ensure they are compliant with the Code. Although the note to section 40 provides further explanation of procedures that may be included, the extent of internal controls in place will differ significantly between tax practitioners based on whether they run individual practices or if they are a large company providing various streams of tax agent services to multinational clients. Where a larger or more complex firm is providing tax agent services, it is expected that extensive internal controls are in place to ensure all tax practitioners are compliant with the Code. Examples of this include:

- regular training of new and existing staff on their obligations under the Act when providing tax agent services whether or not as a registered tax practitioner;
- the use of information barriers where there is a conflict of interest between current and former clients;

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- quality assurance processes and systems to review the accuracy and standard of tax agent services being provided to clients;
- authorisation and risk management processes considering potential conflicts of interest prior to accepting new clients;
- file management system with access controls, limiting the users able to access confidential information;
- documented reporting lines and responsibilities to ensure staff duties are effectively segregated and prevent the incidence of fraud or non-compliance; or
- independent internal control reviews.

Comparatively, individual tax practitioners with clientele from the local community would require less sophisticated internal controls. These may include physical controls over filing cabinets, conducting a conflict of interest check prior to engaging or re-engaging a client, and regularly updating software to ensure information remains confidential.

Section 40 also applies to broader organisational policies and procedures that have an impact on compliance with the Code and integrity. For example, the obligations could require an organisation to have appropriate policies and procedures in relation to recruitment, training, supervision, information sharing, reporting, record-keeping, security, information technology, human resources, dealing with complaints and workplace culture. Ultimately, tax practitioners will be required to exercise professional judgement to determine appropriate controls dependent on a range of circumstances including the size, nature and clientele of the organisation.

### **Keeping your clients informed of all relevant matters**

Section 45 imposes an obligation on tax practitioners to clearly advise all prospective and current clients, in writing, of any matters that are reasonably relevant and material to the client's decision on whether to use their tax agent services, inform clients of the Board's public register and complaints process. In practice, general information in relation to the register and the complaints process must be provided to all clients upon engagement or re-engagement, whereas any relevant matters will only be advised if and when a matter arises.

This requirement ensures that prior to engaging or upon re-engaging a tax practitioner for their services, clients are fully informed of any matters that may impact their decision to engage a tax practitioner. Without limiting the interpretation of the section, relevant matters could include:

- a prior material breach of the Act;
- a current or former investigation by the Board;
- any sanctions imposed by the Board;
- any conditions applying to registration; or
- any potential use of disqualified entities in relation to that client or potential client.

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Disclosure to prospective and current clients should go beyond any non-compliance of the individual tax practitioner and extend to any company or partnership they work under. This information may all be relevant to a client's decision in relation to whether they engage with the tax practitioner or seek tax agent services elsewhere. This provision will further increase the transparency of the tax profession, which is critical to ensuring the integrity of the tax system as a whole.

### Application

This Instrument applies to tax practitioners on or after the day it commences, unless otherwise specified.

### Transitional rules

Section 45 will apply to matters that have arisen on or after 1 July 2022. For matters which arose between 1 July 2022 and commencement, disclosure to clients must be made within 90 days of this Instrument commencing.