

Tax Practitioners Board
GPO Box 1620
SYDNEY NSW 2001

Via Email: tpbsubmissions@tpb.gov.au

16 February 2024

Dear Mr O'Neill,

Code of Professional Conduct – Information Sheets – Disqualified Entities

The Financial Advice Association of Australia¹ (FAAA) welcomes the opportunity to provide feedback to the Tax Practitioners Board on the 'Code of Professional Conduct – Employing or using a disqualified entity in the provision of tax agent services without approval' and the 'Code of Professional Conduct – Prohibition on providing tax agent services in connection with an arrangement with a disqualified entity' draft information sheets.

The core membership of the FAAA are financial advisers, although some of our members are also tax agents. We have therefore undertaken an assessment of these information sheets with an eye to the potential implications for our financial adviser members. We note that the definition of a disqualified person excludes someone who is a 'qualified tax relevant provider', which is a term reserved for financial advisers authorised to provide tax (financial) advice services. Despite this reference to qualified tax relevant providers, there is no other clarification of the application of these new Code obligations for financial advisers. We assume that there is no direct application. It may, in our view, be worthwhile explaining that there is no direct applicability to financial advisers as they are not subject to oversight by the TPB.

¹ The Financial Advice Association of Australia (FAAA) was formed in April 2023, out of a merger of the Financial Planning Association of Australia Limited (FPA) and the Association of Financial Advisers Limited (AFA), two of Australia's largest and longest-standing associations of financial planners and advisers.

The FPA was a professional association formed in 1992 as a merger between The Australian Society of Investment and Financial Advisers and the International Association of Financial Planning. In 1999 the CFP Professional Education Program was launched. As Australia's largest professional association for financial planners, the FPA represented the interests of the public and (leading into the merger) over 10,000 members. Since its formation, the FPA worked towards changing the face of financial planning, from an industry to a profession that earned consumer confidence and trust, and advocated that better financial advice would positively influence the financial wellbeing of all Australians.

The AFA was a professional association for financial advisers that dated back to 1946 (existing in various forms and under various names). The AFA was a national membership entity that operated in each state of Australia and across the full spectrum of advice types. The AFA had a long history of advocating for the best interests of financial advisers and their clients, through working with the government, regulators and other stakeholders. The AFA had a long legacy of operating in the life insurance sector, however substantially broadened its member base over a number of decades. The AFA had a strong focus on promoting the value of advice and recognising award winning advisers over many years. The AFA had strong foundations in believing in advocacy for members and creating events and other opportunities to enable members to grow and share best practice.

We have however given further thought to this and are conscious that it could be possible for a person who is a former financial adviser to be working in a tax agent or BAS agent practice. In the event that they had been disqualified by ASIC or had been subject to a sanction by the Financial Services and Credit Panel (an entity within ASIC), then they would not necessarily (subject to other criteria) be considered to be a disqualified entity. It might be worthwhile clarifying that this disqualified entity obligation largely relates to disqualification under the TPB regime.

We note that a number of the sections in TPB(I) D51/2023 and TPB(I) D52/2023 are the same or very similar and when considering the related content, we ask the question as to whether it makes sense to combine these two information sheets? We would also suggest that there will be confusion between the requirements of Code Items 15 and 16, which might be best addressed by dealing with both issues in the one information sheet.

Other Feedback

Our other feedback is as follows:

TPB Information sheet TPB(I) D51/2023

- With respect to the disqualified entity definition, we note the inclusion of the 'Has become an undischarged bankrupt...' category. It is worthy of making the point that someone can be in bankruptcy for up to eight years. In that event, they would get to a point after five years, where whilst still being bankrupt, arguably they would no longer be a disqualified entity. This is as a result of the definition seemingly being for the five year period from the initial bankruptcy through to the fifth anniversary. This seems to be a strange situation.
- With respect to the disqualified entity definition, we note the inclusion of the 'Has had action taken against it under subsection 30-15(2) of the TASA'. We are conscious that someone who had been investigated by the TPB and been the subject of a written caution or an order, would not be considered as a disqualified entity whilst they remained registered as a tax agent or BAS agent, however if they were to later (within 5 years) move to an employed role and cease their tax practitioner registration, then they would become a disqualified entity. This would be a complex situation for both the individual and their employer. This information on sanctions is not available on a public register and if they were recently registered, then there may be an assumption that there would be no complication.
- As noted in the point above, the same situation would arise with respect to the 'Has been found by the TPB, after being investigated under section 60-95 of the TASA, or by a Court, to have contravened the TASA' provision. A registered tax practitioner who moved into a different role where they were an unregistered employee could immediately become a disqualified entity, even on the basis of a written caution or an order.

- We note that Table 2 does not suggest undertaking a police/criminal history check. This might be good practice in any case, however will help to determine the occurrence of any verdicts related to serious offences and offences involving fraud and dishonesty.
- We note the expectation in Table 2 for employment agreements and other contracts to allow immediate termination in the event of a disqualified entity provision arising. This would require significant work and cost to put in place. It also may not be possible to make these changes under workplace relations law or contractual law without incurring significant additional expense.
- Whilst we note the suggestion in paragraph 24, to cease engagement or employment with a disqualified entity, this may result in the payment of damages or redundancy.
- The guidance does not specify what a registered tax practitioner should do with a contractor/employee in the period between being notified that they are a disqualified entity and getting confirmation of the result of a request to the TPB to continue the arrangement. Are they expected to cease immediately, and what should happen with respect to all the work that is in the process of completion?

TPB Information sheet TPB(I) D52/2023

- In our view, the primary complication with TPB(I) D52/2023 and Code item 16 is that it is not well explained and the difference between Code item 15 and 16 remains somewhat unclear.
- Whilst there has been an obvious effort to explain 'in connection with an arrangement', this still seems difficult to understand. It may be necessary to provide examples in order to provide greater clarity.
- Some of the points that we have raised above, we believe are also relevant for TPB(I) D52/2023.

Conclusion

The FAAA appreciates that the provisions with respect to disqualified entities are now law and that guidance is necessary to assist practitioners in meeting their obligations. We trust that our feedback above is helpful in the process of finalising this guidance.

Yours sincerely,



Phil Anderson

General Manager Policy, Advocacy & Standards
Financial Advice Association of Australia