

5 June 2019

Tax Practitioners Board
GPO Box 1620
SYDNEY NSW 2001

By email: tpbsubmissions@tpb.gov.au

Dear Sir/Madam

Exposure Draft TPB practice note TPB(PN) D40/2019 Letters of engagement

The Taxation Law Committee of the Business Law Section of the Law Council of Australia (the **Committee**) commends the Tax Practitioners Board (**TPB**) for publishing this Exposure Draft (**Draft**) to provide guidance to tax practitioners. However the Committee has identified some major concerns with the Draft and has several other suggestions for your consideration which are noted below.

Major Concerns

- 1) Cost disclosure by lawyers. There is no reference in the Draft to the obligation of legal practitioners, who are also tax practitioners, to comply with the provisions of the Legal Profession Uniform Law in relation to costs disclosures.
- 2) Not Mandatory (Paragraph 7). It is important and helpful for the TPB to provide guidance to tax practitioners on the TPB position regarding tax practitioner obligations under TASA and the Code of Conduct (**Code**). However, as indicated in paragraph 7 of the Draft, because engagement letters are not required under the Code, the extent to which "the existence and content of an engagement letter" can be taken into account by the TPB in determining whether a breach of the Code has occurred in any particular case may involve a question of law. Additionally, the terms of an engagement letter will usually include matters that are contractually binding between the practitioner and the client and also involve matters of law. Accordingly, in setting what appear to be prescriptive requirements, the Practice Note is dealing with matters that potentially fall outside the jurisdiction of the TPB. It is submitted that the Practice note should clearly state that the matters identified in the Practice Note for inclusion in engagement letters are not prescriptive requirements. We propose the following redraft of paragraph 7 to clarify and overcome this problem:

"Engagement letters are not a specific requirement of the Code of Professional Conduct (Code). However, the TPB is of the view that engagement letters are a relevant consideration in establishing the professional relationship between the practitioner and client/s. Depending upon the circumstances, the existence and

content of an engagement letter are matters which may be taken into account by the TPB when considering whether a tax practitioner has breached the Code. As such, the TPB strongly encourages the use of engagement letters as a means of avoiding uncertainty and misunderstandings and to assist in compliance with the Code. The recommendations and comments set out in this Practice Note identify the matters which the TPB considers should be taken into account when formulating an engagement letter. However, each case will depend on its own circumstances and the recommendations and comments below are not intended to be prescriptive.”

- 3) A Legal Document. Because a letter of engagement has important legal implications, the Draft should mention (preferably in paragraph 1) that it is desirable, particularly for those tax practitioners who are not members of a professional association, to obtain legal advice on the wording of their particular letter of engagement as it governs their relationship with their client.
- 4) Obligation Overstated. We believe that the following words in the second last sub-dot point on page 5 of the draft are not correct: – “*the tax practitioner’s responsibility to ensure that the taxation laws are complied with...*”. The Committee does not believe that tax practitioners have an obligation to ensure that the taxation laws are complied with. The taxpayer’s declaration requires the taxpayer to declare “that the information on this form is true and correct”. The tax agent’s declaration requires the agent to declare that the tax return has been prepared “in accordance with the information supplied by the taxpayer”. Under self-assessment, compliance with the taxation laws is the responsibility of the taxpayer and not the tax agent. Additionally, section 50 – 20 of the TASA only renders tax practitioners liable for making a false or misleading statement where the practitioner knew or was reckless. Code item 10 only obliges the practitioner “*to take reasonable care to ensure that taxation laws are applied correctly...*”. These obligations fall far short of the stated obligation “*to ensure that the taxation laws are complied with*”. The duty of the agent in Code item 10 is to take reasonable care, not to ensure (in any absolute sense).
- 5) Confidentiality. The third dot point on page 6 deals with confidentiality and there is a reference in paragraph 18 to an APESB publication. We note that from 1 January 2018 section 225 of APES 110 extends to situations in which a tax agent may be *ethically* compelled, after making relevant enquiries and following a prescribed framework, to make a disclosure to a regulatory authority, such as the ATO. This is despite the prohibition in Code Item 6 which only permits disclosure where there is a *legal* duty to do so. We believe this extension should also be accepted by the TPB and discussed in the Draft as well as in existing Information Sheets dealing with confidentiality. We say this because although the relevant professional accountancy bodies seem to have provided some guidance to their respective members, we do not believe that this apparent contradiction has been properly addressed by the TPB.

Other Suggestions

- 1) In accordance with paragraph 1 above, at the end of paragraph 10 of the Draft there should be a reference to the Legal Profession Uniform Law.

- 2) For completeness, we suggest additional references to code items 5 and 14 in paragraph 11 of the Draft.
- 3) At the bottom of page 5, line 4 of the fourth sub-dot point at the bottom of the page should be amended to read as follows:

"the information provided by the client to enable the tax practitioner to be satisfied that the..."

- 4) In the last dot point under paragraph 16 there is a reference to the trustees of a "settlement". Perhaps a more inclusive word than settlement would be "trust".
- 5) In line 1 of the third dot point under paragraph 17, the third last word should be "of" instead of "to".
- 6) In paragraph 18 there should be a reference to the Legal Profession Uniform Law which requires all legal practitioners to provide cost disclosure agreements as therein prescribed.

Should you wish to discuss further any aspects of the submission please do not hesitate to contact Clint Harding, Chair of the Taxation Committee (charding@abl.com.au or 02 9226 7236).

Yours sincerely,



Rebecca Maslen-Stannage
Chair, Business Law Section