29 January 2024

Director, Tax Agent Regulation Unit
Personal, Indirect Tax and Charities Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: pwcresponse@treasury.gov.au

Dear Director

Enhancing the Tax Practitioners Board's sanctions regime

The Association of Chartered Certified Accountants, Australian Bookkeepers Association, Chartered Accountants Australia and New Zealand, CPA Australia, the Financial Advice Association of Australia, the Institute of Public Accountants, the Institute of Certified Bookkeepers, the National Tax & Accountants' Association, the SMSF Association, and The Tax Institute (**the Joint Bodies**) welcome the opportunity to provide feedback to the Treasury on the Consultation paper, Enhancing the Tax Practitioners Board's sanctions regime (**the Consultation Paper**), released on 10 December 2023.

The Joint Bodies support the proposition that the Tax Practitioners Board (**TPB**) should have a robust sanctions regime to deter misconduct and impose appropriate penalties proportionate to the level of wrongdoing. It is important for the tax profession to be held to the highest standard, a standard to which the vast majority of the profession already adheres. This will ensure that the community has confidence in the operation and administration of our taxation and superannuation system.

Fundamentally, we consider it important that any sanctions regime be built on the core principles of proportionality and fairness. That is, the TPB's powers should be proportionate to the wrongdoing, be flexible so as to allow for consideration of a tax practitioner's circumstances, and include a fair process. To give effect to these principles, the TPB's powers should comprise a wider range of graduated sanctions that allow the TPB to impose the appropriate sanction proportionate to the severity of the relevant contravention or misconduct. We have explored these core principles and their application in the context of the matters considered in the Consultation Paper in greater detail below.

In the Review of the TPB Final Report (2019), and the Government's response, it was acknowledged that a gap exists in the sanctions available to the TPB, particularly mid-range sanctions, which should be addressed. Further, it was identified that the TPB lacks interim powers that would allow it to respond more swiftly to curtail seriously egregious or harmful conduct with sufficient urgency.

The Joint Bodies are broadly supportive of these two observations and the Government's objectives to enhance the TPB's sanction powers to address these identified shortcomings.

Co-design and collective implementation

The Joint Bodies appreciate the extra time provided by Treasury in responding to the Consultation Paper, particularly in light of the holiday period that spanned part of the consultation period. Given the nature of the matters considered in the Consultation Paper and their impact on the tax profession, we consider it essential that there is an ongoing dialogue between the Government and the tax profession as these matters progress.

The Joint Bodies look forward to working with the Treasury and the TPB to tailor and fine-tune the design of the proposed sanctions as this body of work proceeds to the stages of design and drafting of the law. We also look forward to supporting the co-design of the legislative amendments through our close involvement in the Tax Practitioner Governance and Standards Forum (**TPGSF**) and other consultation forums. Good consultation will ensure that the TPB's powers are effective and operate as intended, based on the principles noted above.

From an implementation perspective, the Joint Bodies recommend an implementation timeline be determined at the outset. We also welcome the opportunity to be involved in the co-design process for the new sanctions with Treasury and the TPB, and opportunities to consult, educate and communicate with our members in a timely manner. This will assist in increasing our members' awareness of the impacts of these measures. It will also allow time for the Joint Bodies to properly integrate changes into our respective disciplinary, quality assurance and reporting processes, and support the tax profession with education on the changes.

A principle-based approach to designing the TPB sanctions regime

To inform our preliminary positions on the proposals in the Consultation Paper, the Joint Bodies have identified a set of key principles. We consider that the TPB's sanctions regime should be designed in accordance with these principles:

a. **Comprehensive and coherent** — the sanctions regime should offer a graduated range of sanctions suited to the regulated conduct and contemporary tax practice;

b. **Agile** — the sanctions regime should enable responsive regulation and enforcement;

c. **Effective** — regulatory sanctions should be a credible deterrent, but no greater than is necessary to achieve the aims of deterrence;[1]

d. **Proportionate and fitting** — the sanctions imposed should reflect the gravity of misconduct, as well as the purpose for which they are imposed;

e. **Clear and consistent** — the sanctions regime should be easily understood by those to whom it applies and the broader community, and be consistent in their application; and

f. **Fair and lawful** — the rules and the regulation must afford natural justice, including procedural fairness, and be authorised by law.

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[1] *Australian Securities Commission v Donovan* (1998) 28 ACSR 583, 608, cited in *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC Report 95) at [30.6]. Note that regulatory sanctions should also strive to remediate misconduct to reduce cases of recidivism.

These principles are adopted largely from, and are aligned with, those developed by the Australian Securities and Investments Commission (**ASIC**) Enforcement Review Taskforce, as set out in the Treasury's positions paper in 2017.

The last principle — fair and lawful — is an important aspect of any regulatory regime. It requires that the provisions and procedures must be made and implemented in accordance with law. We draw attention to this point in particular as one of the queries we have flagged in our submission is the need to ensure that any infringement notice regime is designed in a constitutionally valid manner if it is to proceed. This requires there to be a proper exercise of administrative/executive powers, without crossing over into the exercise of judicial power, in breach of the doctrine of separation of powers.

The sanctions regime reform proposals

The Consultation Paper contains the following proposals in relation to the TPB's enhanced sanctions regime:

- criminal penalties for parties who operate without being registered by the TPB;
- broader and increased civil penalties in the *Tax Agent Services Act 2009* (Cth) (**TASA**);
- an infringement notice scheme attached to the civil penalty regime;
- a new power to allow the TPB to enter into enforceable voluntary undertakings (**EVUs**) with tax practitioners; and
- a new power to allow the TPB to impose interim and contingent suspensions.

In Appendix A, we provide a summary of our preliminary views about each of the proposed sanction reforms based on an adapted version of Table 1 – Current State and Proposed Future State of Sanctions in the Consultation Paper.

Learnings from the financial services regulatory reforms

We note that the Australian Law Reform Commission (**ALRC**) has recently released its report on the financial services industry regulatory reforms in 2019 following the Royal Commission (**ALRC Report 141**).[2] The ALRC considers that those reforms made the legislation a complex, incoherent, confusing maze.[3]

ALRC Report 141 provides a cautionary tale for the work that we are about to embark on to reform the sanction and enforcement powers under the TASA. According to the ALRC:

> Complexity costs consumers not only in the expenses that are passed on by financial services providers, but by failing to protect them from misconduct.[4]

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[2] Australian Law Reform Commissions (**ALRC**), *Confronting Complexity: Reforming Corporations and Financial Services Legislation*, ALRC Report 141, 2023.

[3] ALRC, Media Release, 'ALRC recommends confronting complexity in corporations and financial services legislation', 18 January 2024: www.alrc.gov.au/wp-content/uploads/2024/01/FSL-Media-Release.pdf.

[4] ALRC Media Release, above.

ALRC Report 141 also states:

> The existing legislative framework is unnecessarily complex, and the tools used to build and maintain the framework — such as notional amendments, conditional exemptions, and proliferating legislative instruments — often create more problems than they aim to solve. Much legislation is unclear and incoherent, and the objective of an adaptive, efficient, and navigable legislative framework remains unrealised. These problems also combine significantly to undermine the substantive content and quality of the law. The ALRC's findings underscore those of the Financial Services Royal Commission: fundamental norms of behaviour are unclear, and the law should be simplified so that its intent can be met.[5]

It will be important to understand, learn from, and apply these learnings in the context of the current TASA reforms.

We look forward to engaging with you further in the next stage of this consultation process.

If you would like to discuss this submission, or to arrange a meeting with the Joint Bodies, please contact Chartered Accountants Australia and New Zealand's Senior Tax Advocate, Donna Bagnall, on (02) 9290 5761.

Yours faithfully,

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[5] ALRC Report 141, at [2.2], p. 47.

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Appendix A

Table 1: Current and proposed future state of TPB sanctions

Current state	Proposed future state

• Written cautions
• Orders (such as education directions, supervision orders and not taking on new clients)
• Suspension of registration
• Termination of registration
• (Where tax practitioners cannot reapply for registration after being terminated for up to 5 years)
• Court injunctions
• Civil penalties for:
  ○ Unregistered practitioners
  ○ Registered tax practitioners, including making false and misleading statements to the Commissioner of Taxation.
	• Written cautions
	• Orders (such as education directions supervision orders and not taking on new clients)
	• Suspension of registration
	• Termination of registration
	(Where tax practitioners cannot reapply for registration after being terminated for up to 5 years)
	• Court injunctions
	• **Civil penalties for:**
	  ○ Unregistered practitioners
	  ○ Registered tax practitioners, including making false and misleading statement to the Commissioner of Taxation and the TPB.
	  ○ **Breaches of the Code**
	• **Substantial increase in the civil penalty amount for individuals, companies, and new Significant Global Entities (for civil penalties and Code breaches)**
	• **Infringement notices:**
	  ○ **Infringement notices where multiple notices are issued for misconduct that contravenes multiple provisions of the Code**
	• **EVUs:**
	  ○ **EVUs where the undertakings are more onerous, proportionate to the wrongdoing**
	• **Interim and contingent suspensions**
	• **Criminal sanctions for unregistered practitioners**.

The Joint Bodies' preliminary views on the proposed new sanctions

Civil penalties for breaches of the Code

We do not support the general integration of civil penalties with the Code of Professional Conduct (**Code**) disciplinary regime for all matters. It is important to ensure that the current approach to civil penalties is followed. The current approach:

- expressly prohibits the relevant conduct in a civil penalty provision in order for the civil penalty to apply; and
- applies, as a matter of principle, to serious matters or conduct that falls well below professional and ethical standards — with other sanctions being used for lesser breaches.

We recommend the Treasury consider whether specific new civil penalty provision(s) relating to professional misconduct/serious impropriety, such as fraud or dishonesty, are appropriate and required.

We support the Treasury examining whether it would be appropriate for the TPB to have the power to impose a 'monetary penalty' as one of the available sanctions after an investigation, and a formal determination under Division 30 of the TASA. This power would sit within subsection 30-15(2) of the TASA.

Any such administrative penalty power should be limited to applying in respect of breaches of specific new civil penalty provisions that prohibit specified kinds of significant professional misconduct (consistent with the above principles).

Any power for the TPB to impose an administrative monetary penalty must be subject to natural justice requirements, including a 'show cause' notice, a right to be heard and a right of appeal (merits review).

For such a monetary penalty power, we would support the proposed maximum penalty of up to 12 penalty units for individuals or 60 penalty units for bodies corporate. We understand that this would be the maximum in total, not per contravention, though this may be in addition to other sanctions in more serious cases.

Our suggested alternative of a power to impose an administrative monetary penalty recognises that the TPB often will not have the resources nor time to apply for proceedings in the Federal Court against conduct alleged to have contravened one or more civil penalty provisions. Federal Court proceedings involve significant risks of escalating costs for both the Government, and tax practitioners in pursuing/defending such penalties. Alternative sanctions such as administrative monetary penalties should be considered to mitigate these costs and avoid undue pressure on the court system.

Substantial increase in the civil penalty amount (for civil penalty provision and Code breaches)

The proposed civil penalty maximum amounts are, in our view, unreasonable and in some cases equate to those penalties applicable for offences under the Australian Competition and Consumer Commission (**ACCC**) law and under the *Corporations Act 2001.* While in certain aspects, parallels and learnings may be drawn from what is appropriate in the context of other regulatory regimes, a nuanced approach is necessary here, given the unique role of the TPB and those whom it regulates.

The TASA civil penalties are proposed to be substantially increased and will equate to the promoter penalties, which apply to conduct that is among the most egregious tax practitioner behaviour. Transposing penalties of this amount across the whole ambit of the TASA does not recognise the spectrum of wrongdoing that can occur.

We consider that unreasonably high penalties, increasing risk and financial pressures, may:

- adversely impact tax practitioners' mental health, impeding their ability to provide adequate services, and affect the resilience of the profession overall, and its appeal as a profession for new entrants; and
- substantially increase the cost of professional indemnity insurance.

The 'companies' category of entity that the TPB regulates is a very broad band of entities, encompassing predominantly micro and small companies, various medium-sized companies, and some large corporates and multinational companies. We recommend that this category have at least two bands with proportionate civil penalty maximum amounts designated for each band.

The proposed increases in the maximum civil penalty amounts are 10-fold for individuals and 40-fold for companies, which, in our view, is excessive. We recommend that the maximum civil penalty amounts be increased by no more than five-fold for individuals, and no more than 10-fold for companies. This element could be revisited in the future depending on the impact of the changes over time and the extent to which they are effective in changing behaviours.

Regarding the proposed Significant Global Entity (**SGE**) category, we reiterate concerns raised by some of the Joint Bodies in relation to the promoter penalty provision amendments. Concerns, if repeated under the TASA, would include uncertainty, the use of 'aggregated turnover', and the apparent removal of defences available to other partnerships by imposing joint and several liability on all partners, regardless of knowledge or involvement.[6] Potential double penalty exposure as between the partners and the partnership should also be addressed.

Infringement notices

We do not support the proposed discretion to issue infringement notices for breaches of the civil penalty provisions applicable to registered tax practitioners.

We do not support the proposed discretion to issue infringement notices for general breaches of the Code by registered tax practitioners.

If infringement notices are utilised, we consider that:

- they should be used only in circumstances where an investigation is not needed to determine whether the relevant Code item has breached as it is readily identifiable (e.g. in respect of unregistered preparers — see below);
- the penalty must be proportionate to the extent of the wrongdoing); and
- a robust appeal process must be made available to ensure equitable outcomes are achieved.

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[6] Chartered Accountants Australia and New Zealand submission on the promoter penalty provision amendments: www.charteredaccountantsanz.com/news-and-analysis/advocacy/policy-submissions/submission-on-promoter-penalties-tpb-secrecy-and-whistleblowers.

The Commonwealth Attorney-General's Department stipulates that infringement notices are not appropriate for contraventions that cannot be determined by the clear automatic operation of law.

Infringement notices are appropriate only where an official can make a straightforward decision based on clear factual questions.[7] Otherwise, infringement notice regimes are more likely to involve the exercise of judicial power.[8] This may breach the doctrine of separation of powers, raising potential concerns of constitutional validity.[9]

The TASA civil penalty provisions for registered tax practitioners are mostly complex and fault-based, so they are generally not appropriate for infringement notices.

The Code is generally principle-based and requires more complex analysis and assessment to determine whether a contravention has occurred, and the appropriate penalty. Most Code contraventions are therefore not appropriate for infringement notices.

The tax practitioners who are subject to the TASA mostly operate in small and micro tax practices, and relatively few medium and large firms. In our view, the proposed infringement notice regime overall would likely have unreasonable impacts on tax practitioners, many of whom operate on low margins, under high-pressured conditions, in an environment of highly complex tax laws, and contentious interpretations and application. These realities should be borne in mind when considering the appropriate suite of sanctions and the value of penalties that may be attached to them.

The maximum proposed civil penalty of $782.5 million (soon to be $825 million) would be shown on infringement notices issued to tax practitioners who operate through a company.[10] This potentially large penalty may unduly pressure some tax practitioners into paying the infringement penalty amount rather than risking a higher amount by challenging the notice. It may also be a factor that could indicate that the infringement notice is not just a 'mere allegation' as is required, but rather operates as a penalty determination, affecting its validity.

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7 Commonwealth Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, at www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers

8 See ALRC Report 95, at [12.19], p 431.

9 The constitutional validity of ASIC's infringement notice regime has been seriously questioned by academic scholars, such as Margaret Hyland, Lecturer in Law, University of Western Sydney, New South Wales: http://classic.austlii.edu.au/au/journals/UNDAULawRw/2008/6.pdf. A key issue is that, in substance, there is no right of appeal or review of ASIC's decision to issue an infringement notice. ASIC's infringement notice regime has been considered by some to be an unlawful conferral of judicial power on ASIC as the administrator, i.e. unconstitutional as it offends the doctrine of separation of powers.

10 See ASIC's Infringement Notice Register, which contains links to infringement notices issued. The notices demonstrate the contents that infringement notices must contain, including a statement of the maximum civil penalty amount, and the fact that it is an alleged contravention, and acceptance is not an admission of guilt: https://asic.gov.au/online-services/search-asic-s-registers/additional-searches/infringement-notices-register/.

According to the Commonwealth Attorney-General's guidance, infringement notices cannot be published on a website until they are paid, as publication may coerce payment and make the notice more than a mere allegation.[11] However, even after they are paid, if they are published, they are not a good or true indicator of wrongdoing for the public as there would have been no finding of a contravention and the tax practitioner does not admit any fault or wrongdoing by paying the notice. Infringement notices may therefore be misleading if consumers believe they reflect that a tax practitioner had been found to be in breach of the TASA.

Any infringement notice regime would need to comply with the Attorney-General's criteria, i.e. used only for relatively minor contraventions, high volume technical breaches, likely to be unopposed, and where components are factual and clearly established.

Subject to our comments above regarding the proper use of infringement notices, we recommend that the Treasury consider whether the existing civil penalty provisions applicable to unregistered preparers may be suitable for an infringement notice regime. With the exception of one provision, they generally appear to be mostly fact-based strict contraventions that would satisfy the Attorney-General's criteria.

For any infringement notice in respect of unregistered preparers, consistent with our comments above regarding monetary penalty amounts, we would support the proposed monetary penalty amount being up to 12 penalty units for individuals and up to 60 penalty units for bodies corporate. While the proposed maximum infringement notice amount is substantially more than the infringement fine for many consumer law related offences, it seems, in our view, proportionate to the serious misconduct of providing taxation services while unregistered (operating outside of the regulatory system).

Comparable infringement penalty notice amounts of other consumer law regulators (for example, those issued by the Office of Fair Trading NSW in respect of real estate agents, auctioneers and builders) for offences seem to broadly range from around $250 for individuals up to around $3,000 for bodies corporate.

In our view, publication of infringement notices paid by unregistered preparers would be a good policy outcome. The notices would send a clear message to individuals and businesses not to operate while unregistered as the TPB is taking action. It would also send a message to consumers that the provider is not registered and should not be used by them as a tax practitioner (without first confirming whether they have since become registered).

Infringement notices (where multiple notices issued for misconduct contravening multiple provisions)

The power of the TPB to issue multiple notices to a registered tax practitioner for conduct allegedly breaching multiple provisions would amplify the concerns stated above.

Complexities here include the characteristically judicial process involved in determining whether multiple provisions have been contravened, and if so, the appropriate penalty, including applying the 'totality principle', capacity to pay, and analysing whether conduct was separate or part of a single course of conduct. Taking into account past wrongdoing in quantifying the penalty amount also involves the exercise of judicial power, rather than administrative powers. The infringement notice process would likely not have the nuance to take into account the above considerations.

[11] ALRC Report 95.

Any infringement notice regime, in particular where multiple infringement notices are issued at the same time for multiple breaches, would need to be administered based on guidelines that require the regulator to consider whether infringement notices are the appropriate enforcement mechanism in those circumstances.

Enforceable voluntary undertakings (less onerous, and more onerous)

The Joint Bodies broadly support the concept of EVUs as an effective regulatory tool to enhance standards and behaviour.

EVUs:

- provide a flexible approach tailoring a response to a specific situation;
- foster co-operation between the registered tax practitioner and the TPB; and; and
- satisfy the regulators' objective of public accountability, ensuring public confidence.

EVUs are one of the remedies available to ASIC for breaches of the *Corporations Act 2001*. We understand that ASIC generally regards them as an alternative to civil or other administrative action, such as suspension or termination of licences. However, they are not an appropriate substitute for criminal proceedings or matters involving deliberate misconduct or fraud.

While supporting EVUs, the Joint Bodies are of the view that they should still be subject to certain guidelines to be effective including, among other things:

- transparency between the TPB and the registered tax practitioner as to the breach and how and when an EVU is applied;
- proportionality, ensuring the EVU is proportionate to the severity of the breach; and
- consistency where a uniform approach across similar cases is applied as far as possible.

Monitoring EVUs and ensuring they are complied with could prove to be burdensome but a necessary part of the program. The addition of obligations for ongoing independent reviews of compliance with a EVU can be very expensive and should be limited to exceptional matters.

Currently, if a registered tax practitioner fails to comply with an order of the TPB, they contravene subsection 30-10(14) of the Code (failure to respond to requests and directions from the TPB). This leaves the TPB having to pursue enforcement through the available Code sanctions. An EVU encompassing an order of the TPB would ensure the TPB has alternative enforcement avenues available for their orders with more direct consequences for failing to comply with the order made or an agreed EVU.

Interim and contingent suspensions

The Joint Bodies broadly support the TPB being given a power to make interim and contingent suspensions, subject to careful design of constraints on the power (safeguards). The safeguards are discussed below.

The Joint Bodies consider that interim and contingent suspensions should not be limited to certain conduct or alleged breaches, as there is a range of behaviours that may warrant interim suspensions in the future, given the rapidly changing tax landscape in technology, reporting and payment systems, flexible working arrangements, and evolving tax practices.

Interim and contingent suspensions should be considered by the TPB only as a protective measure, and applied when a practitioner's behaviour poses an imminent risk to the public, consumers of the practitioner's services, or to the broader integrity of the profession.

Any approach needs to balance the protection of consumers and the public interest with the rights and risks of reputational damage to the practitioner if they are found not to have committed the alleged breach. Defining 'public interest' can be challenging and complex and will require careful consideration.

The relevant safeguards should include:

- 'show cause' notice issued before suspension;
- threshold level of contemporaneity of misconduct met — ongoing or likely to continue;
- threshold level of seriousness of misconduct met — warrants suspension or termination;
- threshold level of urgency met — imminent, significant harm, loss or damage;
- time limit on suspension period — other consumer protection regulators generally have a 60-day limit. We query the basis for a 90-day time limit for the TPB;
- right to be heard by the TPB when time limit has lapsed — as soon as practicable after suspension has been extended. Suspension may be extended for one further period of 60 days;
- right to an urgent merits review of the interim or contingent suspension in the event of any extension beyond the first 60 days;
- if the interim or contingent suspension is published – requirement for the TPB to issue a public announcement in the event that the practitioner is found not to have committed the alleged breach and the suspension is lifted. This should be published in a timely manner and as prominently as any public announcement of the imposition of the interim or contingent suspension; and
- consistent with other reviewable decisions such as terminations and suspensions, only the Board Conduct Committee (**BCC**) should be able to issue an interim or contingent suspension, and the power should be non-delegable.

Whenever a tax practitioner is terminated or suspended, clients of that practitioner will always be affected to some degree. This is because they will no longer have their tax agent to provide services and lodge returns and statements. An interim or contingent suspension recognises that this is a necessary inconvenience to ensure they are protected. A risk is that affected taxpayers may have urgent tax lodgments. In these cases, the TPB will need to engage with the Australian Taxation Office (**ATO**) who can put on hold the taxpayers' deadlines or recovery actions when interim or contingent suspensions are in place. This will ensure that taxpayers do not fail to meet their own tax obligations as a result of the imposition of an interim or contingent suspension.

Criminal sanctions for unregistered preparers

The Joint Bodies broadly support the proposal to re-introduce criminal sanctions for unregistered preparers, subject to careful design of the penalty provisions.

There is a place for criminal penalties for the most egregious conduct such as knowingly operating outside of the regulatory system. Criminal consequences should be expected to have some deterrent effect for unregistered preparers.

We recommend that the unregistered preparers provisions give the TPB a choice as to whether to prosecute an entity for a civil penalty provision breach, infringement notice, or for a criminal offence. This will provide appropriate flexibility for the TPB depending on the gravity of the conduct and the evidence available to the TPB. This is consistent with the policy of allowing the TPB a suite of sanctions dependent on the nature of the misconduct.

Criminal penalties should generally be more punitive than civil penalties and should be considered in the context of the maximum civil penalty units that are proposed to apply for breaches of the civil penalty provisions. We encourage further consideration of the need for flexibility and proportionality in respect of any penalties sought to be imposed.

Given the nature of this offence, we would recommend that at least 'intentional' behaviour is required, or some other aggravating factor present, such as knowingly disobeying a TPB notification that registration is required, to warrant a severe punishment such as imprisonment.

The appropriate intent threshold to attach to the proposed criminal offence should be, at a minimum, recklessness. In paragraph 112 of the ATO Miscellaneous Taxation Ruling MT 2008/1, recklessness indicates that the behaviour in question shows disregard of, or indifference to, a risk that is foreseeable by a reasonable person.

Intentional disregard, on the other hand, means that there must be actual knowledge, for example, that the statement made is false. To establish intentional disregard, the entity must understand the effect of the relevant legislation and how it operates with respect to the entity's affairs and make a deliberate choice to ignore the law.

To curb the activity of unregistered preparers, we consider that an appropriate fault threshold should be recklessness in the appropriate circumstances.[12]

A move to impose a criminal penalty on an individual will have Human Rights compliance implications for the TASA law design and for the TPB disciplinary process. The human rights obligations contained in the International Covenant on Civil and Political Rights (**ICCPR**) that must be met include:

- the right to be presumed innocent (article 14(2)), including the right to the criminal standard of proof; and
- the right not to be tried twice for the same offence (article 14(7)).

Note that a civil penalty provision, even if not stated to be a criminal offence, may nevertheless be considered to be 'criminal', if the penalty amount is extremely large, or if the Act permits criminal proceedings to be brought against the person for substantially the same conduct. In this case, the statement of compatibility should explain how this is consistent with the ICCPR.

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[12] We note that the Attorney-General's 'Guide to Framing Commonwealth Offences' states at [2.2.3]: 'The four standard fault elements of intention, knowledge, recklessness and negligence, have been carefully devised and codified in the Criminal Code. In almost all cases, Commonwealth criminal offences should use these fault elements, including relying on the Criminal Code's definition of those terms.'

It should be borne in mind that criminal proceedings will change the standard of proof for the TPB to 'beyond reasonable doubt', instead of 'on the balance of probabilities' which applies for civil proceedings.

It must also be determined who would have jurisdiction to prosecute the new criminal offences. We would expect that criminal matters would be referred to the Commonwealth Director of Public Prosecutions for action (as is typically the case for other federal regulators). Alternatively, the TPB could be given the statutory power to prosecute using powers similar those conferred on the ATO. Introduction of an additional agency into the TASA space could create more complexity. However, it could be preferable to giving an already stretched regulator responsibilities in the criminal prosecution field with different evidentiary rules and standard of proof. Doing so without appropriate resourcing could increase workload, create backlogs and exacerbate delays.

Once the prosecuting entity is chosen, it must be evaluated whether the agency has sufficient resources to handle future caseloads. There are currently significant delays in public prosecutions. Therefore, these new provisions are likely to add to the backlog. Also, there are scarce resources in both the ATO and TPB whereby they may not be able to pursue each matter. If either of these agencies are chosen as the appropriate agency to prosecute the matters, adequate funding and resourcing is necessary to ensure its successful operation.

The introduction of strict liability offences for certain minor offences could be beneficial. To be truly effective, a legislated standardised criteria of sanctions would need to be established. Standardised sanctions will ensure that less work is required to determine the appropriate sanction. It follows that there should be less reviews and appeals as a result.

A new TPB power or obligation that also should be considered is the power or duty to disclose unregistered preparers either on the TPB register of practitioners or on a separate unregistered preparers register. Doing so would ensure that these offenders are searchable by the public, enhancing transparency and instilling greater public confidence and assurance in the TPB and the tax profession. We understand that this is currently being considered by the Treasury in response to earlier submissions made by some of the Joint Bodies.