



# Explanatory Paper TPB 01/2010

## Code of Professional Conduct

**This is a Tax Practitioners Board (Board) explanatory paper (TPB(EP)). It is intended as information only. It provides a detailed explanation of the Board's interpretation of the Code of Professional Conduct (Code) contained in Division 30 of the *Tax Agent Services Act 2009* (TASA), translating the provisions into practical principles that can be applied by the profession.**

This TPB(EP) is designed to assist tax practitioners, the relevant institutions, professional associations, potential registrants and the wider community to understand the factors that provide the basis for the Board's approach to the application of the TASA.

The principles, explanations and examples in this paper do not constitute legal advice and do not create additional legal obligations beyond those that are contained in the TASA.

### **Document History**

The Board released this TPB(EP) in the form of an information sheet as an exposure draft on 7 April 2010. The Board invited comments and submissions in relation to the information contained in it. The closing date for submissions was 6 June 2010. The Board has considered the submissions made and now publishes the following TPB(EP).

ISSUED: 16 December 2010



# EXPLANATORY PAPER

## CONTENTS

Professional conduct of tax agents and BAS agents.....2

What is the Code of Professional Conduct? .....7

Who does the Code apply to? .....7

What are the principles of the Code? .....7

(1) You must act honestly and with integrity .....9

(2) You must comply with the taxation laws in the conduct of your personal affairs.....10

(3) You must account for money or other property you receive on trust from or on behalf of your clients 12

(4) You must act lawfully in the best interests of your client .....14

(5) You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax agent or BAS agent.....17

(6) Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party .....20

(7) You must ensure that a tax agent service provided on your behalf is provided competently.....23

(8) You must maintain knowledge and skills relevant to the tax agent services you provide .....27

(9) You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing you are doing on behalf of the client.....28

(10) You must 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.....31

(11) You must not knowingly obstruct the proper administration of the taxation laws .....33

(12) You must 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 .....36

(13) You must maintain the professional indemnity insurance that the Board requires you to maintain ..38

(14) You must respond to requests and directions from the Board in a timely, responsible and reasonable manner .....39

What are the consequences if a tax agent or BAS agent fails to comply with the Code? .....40

Appendix 1 – Case examples .....44



# EXPLANATORY PAPER

*Jack v Tax Agents' Board of New South Wales* [1997] AATA 678

*Re Carbery and Associates Pty Ltd and Tax Agents Board of Queensland* [2001] AATA 107

*Sargent and Tax Agents' Board of Victoria* [2009] AATA 219

*Su and Tax Agents' Board of South Australia* [1982] AATA 127

*Re Cowlshaw and Ors and Tax Agents' Board of Queensland* [1999] AATA 412

*Toohey and Tax Agents' Board* [2009] AATA 142

*Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41

*Chan v Zacharia* (1984) 53 ALR 417

*Re Woods (No. 1) and Migration Agents Registration Authority* [2004] AATA 457

*Bolkiah (Prince Jefri) v KPMG (a firm)* [1999] 1 All ER 517

*Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* (ACN 113 114 832) (No 4) (2007) 241 ALR 705

*Re Collie and Deputy Commissioner of Taxation* (1997) 45 ALD 556

*Re Corrs Chambers Westgarth and Commissioner of Customs* (1998) 53 ALD 769

*Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517

*Su and Tax Agents' Board of South Australia* [1982] AATA 127

*Pappalardo v Tax Agents' Board of Victoria* [2003] AATA 990

*Leo Comino and Tax Agents Board of New South Wales* 2009 AATA 766

*Hawkins v Clayton* [1988] HCA 15; (1988) 164 CLR 539

*Martinazzo and Commissioner of Taxation* [2009] AATA 61

*Reeders v Federal Commissioner of Taxation* 2001 ATC 2334

*Hawkins v Clayton* [1988] HCA 15; (1988) 164 CLR 539

*Keitac Pty Ltd ATF McNamara Property Development Trust and Commissioner of Taxation* [2007] AATA 1206; (2007) 68 ATR 61

*Scanlan v Swan* 82 ATC 4402

*Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1991) 101 ALR 407

*Re Warne and Defence Force Retirement and Death Benefits Authority* (1989) 18 ALD 662

*Re Cowlshaw and Ors and Tax Agents' Board of Queensland* [1999] AATA 412

*Pappalardo v Tax Agents' Board of Victoria* [2003] AATA 990



# EXPLANATORY PAPER

## Purpose of explanatory paper

1. This explanatory paper is designed to provide assistance and explanation of general principles and matters relating to the Code of Professional Conduct (Code) that may be relevant to the professional practice of tax agents and Business Activity Statement (BAS) agents. The explanatory paper will also be relevant to the Tax Practitioners Board's (Board) powers to take certain actions under the *Tax Agent Services Act 2009* (TASA).
2. The object of the TASA is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct. The Code was created to assist in achieving this objective.
3. The Code is legislated and sets out the professional and ethical standards that registered agents are required to comply with. It outlines the duties that agents owe to their clients, the Board and other agents.
4. **This explanatory paper however, does not have the force of law and provides information and interpretative guidance only.** Therefore, it is not intended to determine or exhaust the positions or actions which may be taken by the Board in particular cases. Rather, this explanatory paper provides a decision making tool that may be referred to by the Board when considering Code of Conduct matters. It is also intended to assist agents in providing tax agent or BAS services.
5. **This paper provides the Board's view in relation to the meaning of the Code provisions. This paper does not create additional legal obligations beyond those which are contained in the TASA.** In particular, a finding by the Board that an agent has breached the Code **does not** itself give rise to a civil action against an agent by their client. Whether or not such an action arises is a matter for the client to determine in accordance with the general law.
6. In applying the Code to particular circumstances, the Board has an obligation to ensure that its decisions are soundly based and do not constitute an improper use of the Board's powers under the TASA. This obligation generally requires the Board to observe the rules of natural justice when making a decision, ensure that there is enough evidence or other material to justify a decision, exercise its power having regard to any relevant considerations and have regard to the individual merits of a particular case when exercising a discretionary power. In addition, the Board must exercise its powers in a manner that is not unreasonable.
7. The principles outlined and the case examples contained in this explanatory paper provide examples of how the concepts relevant to the principles of the Code have been applied in different contexts (primarily by the former State based Tax Agents' Boards). In this regard, the cases will remain useful and are instructive to the application of the TASA. The cases are intended to act as a guide to the meaning and application of the principles in the Code.



# EXPLANATORY PAPER

8. Registered tax agents and BAS agents that are members of professional bodies may have professional and ethical obligations imposed on them as members of those bodies.<sup>1</sup>
9. While other codes may present similar duties and requirements, the duties created by the TASA are, where applicable, required to be complied with in addition to these other obligations.

## Professional conduct of tax agents and BAS agents

10. The term 'professional conduct' refers to the way in which tax agents and BAS agents act while in their professional capacity. When providing services, it is expected that agents will display an appropriate, professional standard of behaviour beyond that which is expected of someone who is not acting in a professional capacity.
11. The Board has a range of options available to it under the TASA in making findings about the conduct of tax agents and BAS agents. The options open to the Board include:
  - imposing sanctions for breach of the Code;
  - applying for a civil penalty for breach of the civil penalty provisions;
  - terminating an agent's registration on the basis that the agent is no longer a fit and proper person to be a tax agent or BAS agent.

### Code of Conduct Provisions

12. The provisions of the Code are contained in section 30-10 of the TASA.
13. The Code establishes a set of ethical and professional standards to be observed by tax agents and BAS agents. These provisions apply only to conduct which occurs after the commencement of the TASA on 1 March 2010.
14. The Board may commence an investigation to determine whether there has, in fact, been a breach of the Code.<sup>2</sup> If the Board is satisfied, following an investigation, that there has been a breach of the Code, it may apply one or more of the sanctions set out in section 30-15 of the TASA.
15. For further details of the administrative sanctions that may be applied for a breach of the Code, refer to the section of this explanatory paper titled *'What are the consequences if a tax agent or BAS agent fails to comply with the Code?'* at page 39.

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<sup>1</sup> Examples of such ethical and professional standards may include APES 110 Code of Ethics for Professional Accountants and APES 220 Taxation Services. These standards apply to members of several accounting professional bodies including the Institute of Chartered Accountants in Australia, CPA Australia and the National Institute of Accountants.

<sup>2</sup> Section 60-95 of the TASA.



# EXPLANATORY PAPER

## Civil Penalty Provisions

16. A civil penalty is a pecuniary penalty that is imposed by a court exercising civil rather than criminal jurisdiction. State and Commonwealth government bodies can apply to the courts to have a pecuniary penalty imposed against an individual for breaching a civil penalty provision in some circumstances. Unlike criminal penalties, civil penalties do not include criminal convictions or imprisonment.
17. While the Code applies only to registered agents, the civil penalty provisions apply to unregistered persons or entities in addition to registered tax agents and BAS agents.<sup>3</sup>
18. The civil penalty provisions will only be able to be applied in relation to behaviour which occurs after commencement of the TASA on 1 March 2010.
19. If there is a breach of any of these civil penalty provisions, the Board has the option of applying to the Federal Court of Australia (Federal Court) for a civil penalty order to be granted against the tax agent or BAS agent.<sup>4</sup>
20. The Board also has the option of applying to the Federal Court for an injunction.<sup>5</sup> An injunction is a court order that requires a person to do, or refrain from doing, something. If an agent fails to comply with the terms of an injunction as specified in the court order, the agent may be guilty of contempt of court.
21. The Board may apply for an injunction as an alternative to seeking a civil penalty (in the case of a permanent injunction) or in combination with a civil penalty application (in the case of an interim injunction). An interim injunction will remain operative until the Federal Court makes its final determination

## Termination of registration

22. The Board may terminate the registration of a tax agent or BAS agent if the Board is satisfied that a tax agent or BAS agent no longer meets the 'fit and proper person' requirement for registration.
23. In determining whether a tax agent or BAS agent is a fit and proper person, the Board can examine the agent's previous conduct. The Board may consider actions or omissions that occurred prior to 1 March 2010 to the extent that the behaviour is relevant to the agent's present fitness and propriety.

## Application of the TASA

24. Some conduct by a tax agent or BAS agent that is covered by the civil penalty provisions could equally constitute a breach of the Code. Examples of this conduct may include:
  - signing false declarations;

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<sup>3</sup> Division 50 of the TASA.

<sup>4</sup> Subdivision 50-C of the TASA.

<sup>5</sup> Section 70-5 of the TASA.



# EXPLANATORY PAPER

- making false or misleading statements; or
- employing or using the services of a de-registered entity.

## What is the Code of Professional Conduct?

25. Section 30-10 of the TASA establishes the legislated Code for registered tax agents and BAS agents. The Code sets out the professional and ethical standards required of tax agents and BAS agents. This section also outlines the duties that agents owe their clients, the Board and other agents.

26. The Code consists of a list of core principles which are grouped into 5 categories:

- Honesty and integrity
- Independence
- Confidentiality
- Competence
- Other responsibilities

## Who does the Code apply to?

27. The Code applies to all registered tax agents and BAS agents.<sup>6</sup>

## What are the principles of the Code?

28. Section 30-10 of the TASA contains the Code consisting of the following 14 principles:

### ***Honesty and integrity***

- (1) You must act honestly and with integrity.
- (2) You must comply with the taxation laws in the conduct of your personal affairs.
- (3) If:

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<sup>6</sup> Section 30-5 of the TASA.



# EXPLANATORY PAPER

- (a) you receive money or other property from or on behalf of a client; and
  - (b) you hold the money or other property on trust;
- you must account to your client for the money or other property.

## ***Independence***

- (4) You must act lawfully in the best interests of your client.
- (5) You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax agent or BAS agent.

## ***Confidentiality***

- (6) Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission.

## ***Competence***

- (7) You must ensure that a tax agent service that you provide, or that is provided on your behalf, is provided competently.
- (8) You must maintain knowledge and skills relevant to the tax agent services that you provide.
- (9) You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing you are doing on behalf of a client.
- (10) You must 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.

## ***Other responsibilities***

- (11) You must not knowingly obstruct the proper administration of the taxation laws.
- (12) You must 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.
- (13) You must maintain the professional indemnity insurance that the Board requires you to maintain.





# EXPLANATORY PAPER

- (14) You must respond to requests and directions from the Board in a timely, responsible and reasonable manner.'

## (1) You must act honestly and with integrity

### What is 'acting honestly and with integrity'?

29. Honesty and integrity are terms which have their ordinary meanings.

30. The Macquarie Dictionary<sup>7</sup> defines each of the terms as follows:

#### *Honesty*

1. *the quality or fact of being honest; uprightness, probity or integrity;*
2. *truthfulness, sincerity or frankness;*
3. *freedom from deceit or fraud*

#### *Integrity*

1. *soundness of moral principle and character; uprightness, honesty"*

31. The principles of honesty and integrity impose an obligation on a person to ensure:

- straightforwardness;
- fair dealing;
- a commitment not to mislead or deceive; and
- truthfulness.<sup>8</sup>

32. The terms 'honesty' and 'integrity' are not defined in the TASA. Guidance can therefore be obtained from decisions of the courts. The following considerations have been used by the courts in determining when a person is acting with honesty and integrity:

- has the person acted with good morals and without depravity?<sup>9</sup>

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<sup>7</sup> *The Macquarie Dictionary*, [Multimedia], version 5.0.0.

<sup>8</sup> Accounting Professional and Ethical Standards Board, 'APES110 Code of Ethics for Professional Accountants' (2006) at [110.1]; Accounting Professional and Ethical Standards Board, 'APES220 Taxation Services' (2007) at [3.3]; International Ethics Standards Board for Accountants 'Code of Ethics for Professional Accountants' (2009) at [110].



# EXPLANATORY PAPER

- has the person acted properly and without deceit?<sup>10</sup>
- has the person acted without intent to gain an improper benefit or advantage for himself, herself or for another?<sup>11</sup>
- has the person acted with such carelessness as to demonstrate that no genuine attempt has been made to carry out the duties and obligations imposed on him or her by law?<sup>12</sup>
- is the person of such integrity that others may entrust their taxation affairs to that person's care?<sup>13</sup>
- is the person of such reputation and ability that officers of the ATO may assume that taxation returns lodged by the agent have been prepared by the agent honestly?<sup>14</sup>
- has the person, through their behaviour, displayed an inadequate sense of their obligations as a tax agent and/or an evident reluctance to ascertain and comply with those obligations?<sup>15</sup>
- has the person failed to make full disclosure of a matter in circumstances where that matter is relevant in assessing the suitability of that person to be registered, such as in the case of tax agents or legal practitioners?<sup>16</sup>
- does the person have a sufficient understanding of what is right and what is wrong so that they can be relied on to carry out their role or function as a tax agent or BAS agent?<sup>17</sup>
- the making of a false representation has also been held to be inconsistent with the integrity required for registration as a tax agent.<sup>18</sup>

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<sup>9</sup> *Australian Securities and Investments Commission v Vines* [2005] NSWSC 1349; *Commonwealth bank of Australia v Friedrich* 5 ACSR 115 at 196.

<sup>10</sup> *Hall and Ors v Poolman and Ors* [2007] NSWSC 1330 at [325].

<sup>11</sup> As above.

<sup>12</sup> As above.

<sup>13</sup> *Re Su and Tax Agents' Board of South Australia* 82 ATC 4284 at 4286.

<sup>14</sup> As above.

<sup>15</sup> *Re Fitzgibbon and Tax Agents' Board of Queensland* 93 ATC 2053.

<sup>16</sup> *Bouffiere v Tax Agents' Board of NSW* [2007] AATA 1978; *Re Davis* (1947) 75 CLR 409; *Re Kerin and Tax Agents' Board of South Australia* [2009] AATA 974.

<sup>17</sup> *Re Denton and Tax Agents' Board, South Australia* 83 ATC 4009 at 4014.

<sup>18</sup> As above; *Re Kerin and Tax Agents' Board of South Australia* [2009] AATA 974.



# EXPLANATORY PAPER

## (2) You must comply with the taxation laws in the conduct of your personal affairs

### What does 'taxation laws' mean?

33. The term 'taxation law' under the Code means:

- (a) 'any Act of which the Commissioner of Taxation has the general administration (including any part of an Act to the extent to which the Commissioner has the general administration of the Act);
- (b) any regulations under the Acts in paragraph (a) above; and
- (c) the *Tax Agent Services Act 2009* and the regulations made under that Act.<sup>19</sup>

34. The Commissioner of Taxation is responsible for the administration of a number of Acts and regulations concerning, among other things:

- income tax;
- indirect taxes (including GST, luxury car tax, wine equalisation tax);
- superannuation
- the Medicare levy;
- fringe benefits tax;
- franking tax;
- withholding taxes;
- petroleum resource rent tax;
- the administration or collection of the above taxes.

### What does 'personal affairs' mean?

35. The term 'personal affairs' refers to a tax agent's or BAS agent's personal taxation obligations, including timely lodgement of personal income tax returns and activity statements, payment of superannuation guarantee contributions and PAYG withholding and instalment payments.<sup>20</sup>

36. In the case of a company or partnership tax agent or BAS agent, the taxation obligations of the company or partnership mean the personal affairs of the company or partnership tax agent or BAS agent.

37. 'Personal affairs' also includes the affairs of the tax agent or BAS agent practice, for example, the agent's duties and obligations with regard to maintaining tax agent or BAS agent registration.<sup>21</sup>

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<sup>19</sup> Section 995-1 of the *Income Tax Assessment Act 1997*.

<sup>20</sup> Paragraph 3.28 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>21</sup> *Bar Association (NSW) v Cummins* (2001) 52 NSWLR 279 at 289; *Re John Jeremy William Wyborn and Tax Agents' Board of New South Wales* [2007] AATA 1492.



# EXPLANATORY PAPER

38. In particular, a partnership or company agent must ensure that **at all times** there is a sufficient number of individuals, being registered tax agents (in the case of a tax agent) or registered tax agents or BAS agents (in the case of a BAS agent) to provide tax agent or BAS services to a competent standard and to carry out supervisory arrangements.

39. In other words, the agent must have enough registered individuals:

- to ensure services are provided competently; and
- to exercise supervision over the services provided.

## **When is a registered tax agent or BAS agent complying with the taxation laws, in the conduct of their personal affairs?**

40. Some of the factors that may be considered in deciding whether a tax agent or BAS agent has complied with the taxation laws in their personal affairs are:

- whether the tax agent or BAS agent has properly complied with their personal taxation obligations, including the timely lodgement of the agent's personal income tax returns and activity statements;<sup>22</sup>
- whether the tax agent or BAS agent has properly complied with the taxation obligations of the tax agent or BAS agent practice.<sup>23</sup> This requires that the agent ensure timely performance of the agent's obligations concerning the maintenance of tax agent or BAS agent registration and communications with the Board;
- whether the agent has taken reasonable care in interpreting the law as it applies to their personal tax affairs.<sup>24</sup>

## **(3) You must account for money or other property you receive on trust from or on behalf of your clients**

### **What does 'account' mean?**

41. The Macquarie Dictionary<sup>25</sup> defines 'account' in this context, as follows:

*'Account*

...

*14. To render an account, especially of money*

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<sup>22</sup> Paragraph 3.28 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>23</sup> Paragraph 3.29 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>24</sup> Paragraph 3.27 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>25</sup> *The Macquarie Dictionary*, [Multimedia], version 5.0.0.



# EXPLANATORY PAPER

## 17. Account for

a. to give an explanation of...'

### **Under what circumstances will a registered tax agent or BAS agent hold money, received from or on behalf of a client, 'on trust'?**

42. Where money or other property has been received by a tax agent or BAS agent from a client, in circumstances that indicate the money or other property was to be held on behalf of the client and/or applied for some specific purpose and in accordance with certain terms, that money or other property may be held on trust for the benefit of the client.<sup>26</sup>
43. Examples of money received on trust may include, but are not limited to, the following:
- subject to the terms of a retainer, money held or received in advance by the agent for the purpose of settling or meeting liabilities;
  - client tax refunds; and
  - money paid to the agent for the purpose of seeking specialist advice.

### **What is a registered tax agent or BAS agent required to do to account for money received from or on behalf of a client on trust?**

44. To comply with this requirement of the Code, a tax agent or BAS agent is required to keep money or other property which the agent holds on trust for the client separate from the agent's personal money or other property
45. There is no Australia-wide scheme of legislation requiring tax agents or BAS agents to hold separate trust accounts. Some professional bodies have promulgated rules about how members are to deal with client funds but these are not industry-wide.<sup>27</sup>
46. The Board notes that the trust accounting arrangements, outlined in the *Code of Ethics for Professional Accountants*, while not binding on all tax agents and BAS agents, may provide some guidance on adequate arrangements that could be adopted by tax agents and BAS agents. Measures that the agent must adopt to ensure compliance with the Code include, but are not limited to:

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<sup>26</sup> *Cohen v Cohen* (1929) 42 CLR 91; *Walker v Corboy* (1990) 19 NSWLR 382 at [2] – [3]; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at [33] – [34]. See also APES 10 *Trust Money*, Accounting Professional and Ethical Standards Board and Paragraph 2.2, Guidance Notes GN3, *Operation of Trust Accounts*, Accounting Professional and Ethical Standards Board.

<sup>27</sup> These rules include Accounting Professional and Ethical Standards Board, '*APES110 Code of Ethics for Professional Accountants*' (2006) at [270.2]; APS 10 *Trust Accounts*; *Guidance Note GN3 'Operation of trust Accounts*' issued jointly by the Institute of Chartered Accountants in Australia, CPA Australia and the National Institute of Accountants; International Ethics Standards Board for Accountants '*Code of Ethics for Professional Accountants*' (2009) at [270.2]. APESB has recently issued an exposure draft APES 310 *Dealing with Client Monies* which will replace APS 10.



# EXPLANATORY PAPER

- keeping money and other property held on trust separate from the agent's personal or business assets;
- only applying the money or other property the agent holds on trust to the purpose for which it was intended and for which the agent has authority to do so;
- maintaining records of account such that the agent can account to entitled persons, on demand, for any money or other property held on trust;
- complying with all laws and regulations relating to the custody and accounting for such assets; and/ or
- only disbursing money or other property held on trust in accordance with express client instructions or as required by operation of law.<sup>28</sup>

## (4) You must act lawfully in the best interests of your client

### What does acting 'in the best interests of your clients' mean?

47. Acting 'in the best interests of your client' has been held to mean acting in a representative character in the exercise of the agent's responsibility to the client.<sup>29</sup> This requires an agent to advance and protect their client's interests to the best of their ability, in all circumstances.
48. An act or omission by a tax agent or BAS agent which is inconsistent with the obligation imposed by the Code will be in breach of this provision of the Code.
49. This duty is similar to the fiduciary duties owed by other professional advisors to clients, and is necessarily limited or circumscribed by the scope of the engagement between the agent and the client.<sup>30</sup>
50. While the Code of Conduct does not create a fiduciary duty between an agent and their client, in considering the meaning of 'acting in the best interests of your client', the Board considers that the nature of the duty between an agent and their client is similar to that between lawyers and their clients or other professional services providers and their clients and therefore the interpretation of these duties will provide an indication of how this obligation should be applied in the context of tax agents and BAS agents.
51. Given this, the following discussion of fiduciary duties should not be interpreted as meaning that the Code creates such a duty but rather the nature of these duties and what has been considered breaches of the duties will guide the Board in determining whether an agent has breached this Code obligation.

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<sup>28</sup> Case U122 87 ATC 731 at 734 per DP Thompson; Section 270 of the 'Code of Ethics for Professional Accountants APES 110, Accounting Professional and Ethical Standards Board.

<sup>29</sup> *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96 per Mason J.

<sup>30</sup> *Re Woods (No. 1) and Migration Agents Registration Authority* [2004] AATA 457 at [359].



# EXPLANATORY PAPER

52. Fiduciary duties generally require a person to act in good faith for the benefit of another and to avoid situations where their personal interests conflict with that duty.<sup>31</sup>
53. Some relationships are automatically considered to be a 'fiduciary relationship', for example the relationship between a solicitor and their client. The relationship between a tax agent or BAS agent and their client is not one of these relationships. However, despite this, tax agents and BAS agents are required by the Code to act in the best interest of the client.
54. The nature of the relationship between a client and their agent will be determined by reference to the circumstances of the case, the circumstances of the relationship, the terms of the engagement and the position of the client.
55. The relationship between an agent and client is not wholly contained within the contract between the agent and the client. This is because the Code creates positive obligations that agents must comply with in providing tax agent services to their clients. Therefore the duties owed by the agent to the client are not wholly contractual.
56. Characteristics of the relationship between an agent and their client that may be relevant to determining the scope of the duty are:
- the existence of 'a relationship of confidence'<sup>32</sup> and the agent's duty to maintain client confidence (principle 6 of the Code);<sup>33</sup>
  - an undertaking by the tax agent or BAS agent to perform a task or fulfil a duty in the interests of the client;<sup>34</sup>
  - dependency or vulnerability on the part of the client that causes them to rely on the tax agent or BAS agent for the taxation services provided by that agent;<sup>35</sup>
  - a reasonable expectation that the tax agent or BAS agent will act in the client's best interests.<sup>36</sup> While this duty may already exist under the common law, it also arises under a provision of the Code;
  - the objectives of the TASA<sup>37</sup>, which are to ensure that tax agent or BAS services are provided to the public in accordance with appropriate standards of professional and ethical conduct, and the Code prescribed under the TASA to achieve this purpose.<sup>38</sup>

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<sup>31</sup> *Butterworths Concise Australian Legal Dictionary, Second Edition, LexisNexis.*

<sup>32</sup> *Breen v Williams* (1996) 186 CLR 71; *Hospital Products Ltd v United States Surgical Corporation* (1994) 156 CLR 41 at 69.

<sup>33</sup> Subsection 30-10(6) of the TASA.

<sup>34</sup> *Breen v Williams* (1996) 186 CLR 71; *Australian Securities Commission v AS Nominees Ltd & Ample Funds Ltd* (1995) 62 FLR 504; *Hospital Products Ltd v United States Surgical Corporation* (1994) 156 CLR 41 at 72, 96-97; *Pavan v Gowshan & Associates Pty Ltd v Ratnam* (1996) 23 ACSR 214 at 224; *Townsend & Anor v Roussety & Co (WA) Pty Ltd & Anor* (2007) WASCA 40 at 124 -130.

<sup>35</sup> As above; *Hospital Products Ltd v United States Surgical Corporation* (1994) 156 CLR 41 at 142.

<sup>36</sup> *Australian Securities Commission v AS Nominees Ltd & Ample Funds Ltd* (1995) 62 FLR 504.

<sup>37</sup> Section 2-5 of the TASA.

<sup>38</sup> *Re Woods (No. 1) and Migration Agents Registration Authority* [2004] AATA 457 at [359].



# EXPLANATORY PAPER

57. This duty is designed to prevent tax agents or BAS agents from being influenced by personal and other interests when acting for clients and to prevent an agent from actually misusing the agent's position for the agent's personal advantage.<sup>39</sup>
58. The extent of the duty owed by the tax agent or BAS agent to the client is determined from the character of the relationship between the agent and the client.
59. The duty can be determined from the circumstances of the engagement, for example by a letter of engagement, report, advice or other communication between the agent and the client, the duties imposed by the TASA and any relevant course of conduct between the agent and the client.<sup>40</sup>
60. These duties impose the following obligations on the tax agents and BAS agents who owe them:
- a duty not to promote the agent's personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real and substantial possibility of a conflict between the agent's personal interests and those of the persons whom the agent is bound to protect;<sup>41</sup>
  - a duty not to use the agent's position to make a personal profit or gain unless authorised to do so by the agent's client and to account to the client for any such unauthorised profit or gain.<sup>42</sup> Accounting for any unauthorised gain will not operate as an excuse for the initial breach that gave rise to the gain.

## What does acting 'lawfully' in the best interests of your client mean?

61. Acting 'lawfully' in the best interests of a client requires a tax agent or BAS agent to act in a client's best interest but only to the extent that their actions are consistent with the law. That is, 'acting in the best interests of clients', is not a justification for a tax agent or BAS agent to contravene or disregard the law.

### Example

*Michael works in the hospitality industry. He engages Rahul, a registered tax agent, to prepare and lodge his income tax return. He instructs Rahul to claim a deduction for work clothing for the black trousers he is required to wear. Although Michael might believe it is in his best interest to reduce his taxable income, Rahul is aware that Michael cannot claim the cost of his work clothing as an allowable deduction because the trousers are not protective or specific to his occupation. Rahul advises Michael accordingly and must not act in accordance with Michael's instruction.<sup>43</sup>*

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<sup>39</sup> *Chan v Zacharia* (1984) 53 ALR 417 at 433 per Deane J.

<sup>40</sup> As above at 431 per Deane J.

<sup>41</sup> *Australian Securities Commission v AS Nominees Ltd & Ample Funds Ltd* (1995) 62 FLR 504.

<sup>42</sup> *Chan v Zacharia* (1984) 53 ALR 417 at 433 per Deane J; *Warman International Ltd v Dwyer* (1995) 128 ALR 201 at 209 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ.

<sup>43</sup> Example 3.5 from the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.





# EXPLANATORY PAPER

62. When acting for, or on behalf of, a client, the tax agent or BAS agent must only act where they are authorised to do so and if their actions are in accordance with or are sanctioned by the law.
63. There may also be examples of where the law overrides the duty of a tax agent or BAS agent to their client. For example, providing information or documents to the ATO following a notice pursuant to section 264 of the *Income Tax Assessment Act 1936* (ITAA 1936).<sup>44</sup> Another example may include providing information pursuant to a court order.

## **(5) You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax agent or BAS agent**

### **When will a conflict of interest arise?**

64. Tax agents and BAS agents must ensure adequate arrangements are in place to manage any conflicts of interest that may arise, wholly or partially, in relation to the provision of tax agent services.<sup>45</sup>
65. Essentially a conflict of interest will arise where the agent has a personal interest or has a duty to another person which is in conflict with the duty owed to a client. A conflict of interest may be an actual or perceived conflict and can arise before the agent accepts an engagement or at any time during the engagement.
66. A perceived conflict arises where there is a perception, by others, that the service or benefit will not be provided fairly or impartially. Tax agents and BAS agents have a duty to manage both actual and perceived conflicts of interests.
67. Examples of where a conflict of interest can arise include, but are not limited to:
- where the agent acts for both clients in a matter e.g. a husband and wife experiencing matrimonial issues. This may be both an actual conflict, in that the interests of each client conflict, and/or a perceived conflict, in that one of the clients believes that the agent is not providing, or may not provide, services fairly or impartially to him or her;
  - where an agent's personal interest is involved, e.g. where an agent is providing taxation advice in relation to the treatment of a particular transaction and the agent will or may benefit from the transaction occurring or not occurring; and
  - where an agent acts against a client, or a former client, having previously acted for that client in a related matter.

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<sup>44</sup> See further, Principle 6 below; Paragraph 3.37 of the Explanatory Memorandum of the *Tax Agent Services Bill 2008*.

<sup>45</sup> Paragraph 3.34 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.



# EXPLANATORY PAPER

## What are 'adequate arrangements for the management of conflicts of interest'?

68. The adequacy of a tax agent's or BAS agent's conflict management arrangements will depend upon:

- the nature, scale and complexity of the agent's business;
- the nature of the services provided by the agent; and
- any information the agent obtains that is relevant to the actual or potential conflict of interest.<sup>46</sup>

69. In addition to generally anticipating potential conflict situations before they arise, three mechanisms that tax agents or BAS agents may use to manage conflicts of interest are:

- controlling conflicts of interest;
- avoiding conflicts of interest; and
- disclosing conflicts of interest.<sup>47</sup>

70. Further, where a conflict arises or is likely to arise before an engagement commences or tax agent services are provided, the tax agent or BAS agent will need to determine the appropriate course of action to deal with the conflict before the engagement commences.

71. Whilst many conflicts of interest can be managed by a combination of internal controls and disclosures, some conflicts cannot be managed in these ways and in such cases the agent should avoid the conflict or refrain from providing tax agent services in those circumstances.

### *Controlling conflicts of interest*

72. To control conflicts of interest, a tax agent or BAS agent should:

- identify the conflicts of interest relating to the tax agent or BAS agent practice;
- assess and evaluate those conflicts; and
- decide upon, and implement, an appropriate response to those conflicts.<sup>48</sup>

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<sup>46</sup> Paragraph 3.36 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>47</sup> Regulatory Guide 181 Licensing: Managing conflicts of interest (2004) ASIC at RG 181.20 (this regulatory guide considers conflict management procedures in the context of paragraph 912A (1) (aa) of the *Corporations Act 2001* which is expressed in similar terms to the requirement under subsection 30-10 (5) of the *Tax Agent Services Act 2009* and may provide useful guidance on an approach to be adopted with respect to this obligation under the Code).

<sup>48</sup> As above at RG 181.28.



# EXPLANATORY PAPER

## *Avoiding conflicts of interest*

73. In some circumstances, regardless of the arrangements put in place, the agent will not be able to adequately manage the conflict of interest and therefore should not perform the services for the client.<sup>49</sup>

74. Again, the agent should have regard to the factors listed above concerning the adequacy of conflict management arrangements in determining whether, in all the circumstances, the agent will be able to manage the conflict.

## *Disclosing conflicts of interest*

75. Disclosure about conflicts of interest should:

- be timely, obvious, specific and meaningful to the client;
- occur before or when the tax agent service is provided, but in any case, at a time that allows the client a reasonable time to assess its effect; and
- refer to the specific service to which the conflict relates.<sup>50</sup>

76. Examples of adequate and effective conflict management arrangements may include, but are not limited to, the following:

- continuous disclosure of any conflicts;
- informed written consent of the client or clients involved in the conflict of interest, specifically authorising disclosure of the conflict of interest to the other parties involved in the conflict. This may be in the form of a signed waiver or other authorisation; and/or
- maintenance of appropriate records and documentation detailing the conflict management policies and procedures of an agent and recording what action has been taken in relation to any conflicts of interest.
- 'ethical walls' – a form of physical and intellectual separation between the management of the affairs of the clients involved in an actual or potential conflict of interest. This may include:
  - the physical separation of various departments in order to insulate them from each other;

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<sup>49</sup> Paragraph 3.35 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>50</sup> Regulatory Guide 181 Licensing: Managing conflicts of interest (2004) ASIC at RG 181.52; see also Conflicts of Interest, Agenda item 2, International Ethics Standards Board for Accountants, June 23-24, 2010.



# EXPLANATORY PAPER

- an ongoing educational programme to emphasise the importance of not improperly or inadvertently breaching duties to a client;
- strict and carefully defined procedures for dealing with situations where it is considered that action may need to be taken to avoid a risk of a breach of duty, in addition to the maintenance of proper records when this action is taken;
- monitoring of compliance with the procedures; and
- disciplinary sanctions where there has been a breach of any internal procedures.<sup>51</sup>

77. For such measures to be effectively implemented, these should be established as a systemic part of the tax agent or BAS agent practice in relation to situations giving rise to potential conflicts of interest.<sup>52</sup>

## (6) Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party

78. Subject to paragraph 91 of this Explanatory Paper, this provision of the Code imposes a duty on tax agents and BAS agents to not disclose any information held by the tax agent or BAS agent concerning the client's affairs to third parties.

79. In the absence of client authorisation or a legal duty to disclose, **any** disclosure of information relating to the affairs of a client will be a breach of this provision of the Code. This would include disclosure of client information to an offshore entity engaged by a tax agent or BAS agent to provide certain services to the agent. Where relevant information is to be disclosed to offshore or onshore entities by a tax agent or BAS agent, an agent should obtain client permission, such as in a letter of engagement, report, advice or other communication with the client.

80. A tax agent or BAS agent may be liable for any unauthorised disclosure of client information held by the agent and may be subject to sanction under the TASA.<sup>53</sup>

81. In addition to this principle, the *Privacy Act 1988* sets out a number of National Privacy Principles (NPPs) which govern the collection, use, storage and disclosure of personal information and other conduct by organisations.<sup>54</sup> The *Privacy Act 1988* requires that organisations which are subject to the NPPs, observe these standards.

82. Tax agents and BAS agents should seek their own advice about whether the provisions of the *Privacy Act 1988* apply to them. Whether or not a tax agent or BAS agent is legally required to comply with the NPPs, they should be regarded as a benchmark for good information handling procedures that may be appropriately adapted depending on the particular circumstances of the agent.

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<sup>51</sup> Paragraph 3.36 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>52</sup> As above.

<sup>53</sup> Section 30-15 of the TASA.

<sup>54</sup> 'Organisations' is defined in section 6C of the *Privacy Act 1988* and excludes certain small businesses and small business operators; see further section 6D of the *Privacy Act 1988*.



# EXPLANATORY PAPER

## What is 'information relating to a client's affairs'?

83. The phrase 'information relating to a client's affairs' is not defined in the TASA. Therefore, this phrase should be interpreted consistently with the ordinary meanings of the words contained in the phrase.

84. The Macquarie Dictionary<sup>55</sup> provides the following definitions in relation to this phrase:

*'Relate...*

*3. to have reference (to)*

*4. to have some relation (to)*

*Affair*

*1. Anything done or to be done; that which requires action or effort; business; concern*

*2. (plural) matters of interest or concern; particular doings or interest;*

*...*

*4. thing, matter*

*5. a private or personal concern; a special function, business or duty'*

85. In this context, the phrase 'information relating to a client's affairs' means information in 'relation, connection, reference or regard' to the 'activities, business or concerns' of the tax agent's or BAS agent's client.<sup>56</sup>

86. The terms of this provision of the Code do not require that the information relating to the client's affairs actually be provided to the tax agent or BAS agent by the client themselves.

87. To be protected under this principle, it is only necessary that the information relates to the affairs of a client.<sup>57</sup>

88. When employment changes or a new client is engaged, the tax agent or BAS agent is entitled to use prior professional experience to assist a client. However, the tax agent or BAS agent should not use or disclose any confidential information either acquired or received as a result of a professional or

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<sup>55</sup> *The Macquarie Dictionary*, [Multimedia], version 5.0.0.

<sup>56</sup> *Johns v Connor* (1992) 27 ALD 25 at 34-35; *Re Collie and Deputy Commissioner of Taxation* (1997) 45 ALD 556 at 563-564; *Re Allrange Tree Farms Pty Ltd and Deputy Commissioner of Taxation* (2004) 84 ALD 238 at 243.

<sup>57</sup> *Re Collie and Deputy Commissioner of Taxation* (1997) 45 ALD 556; *Re Corrs Chambers Westgarth and Commissioner of Customs* (1998) 53 ALD 769.



# EXPLANATORY PAPER

business relationship.<sup>58</sup> The tax agent's or BAS agent's duty not to disclose any information relating to a client's affairs continues beyond the term of the engagement with the client.<sup>59</sup>

## What is the meaning of 'third party'?

89. A 'third party' is any person other than the client to whom the information relates.<sup>60</sup>

90. A third party may be situated within or outside the firm or organisation that employs the tax agent or BAS agent.

## Under what circumstances can a tax agent or BAS agent disclose information relating to a client's affairs?

91. A tax agent or BAS agent may disclose information relating to a client's affairs to a third party, **only if**:

- disclosure is authorised by the client; or
- there is a legal duty to disclose.<sup>61</sup>

92. Examples of where there is a legal duty to disclose information relating to a client's affairs include:

- providing information to the Tax Practitioners Board under a notice issued pursuant to section 60-100 of the TASA.
- providing information to a court or tribunal pursuant to a direction, order, or other court process, to provide that information.
- providing information or documents to the ATO under a notice pursuant to section 264 of the *Income Tax Assessment Act 1936* (ITAA 1936).<sup>62</sup> This requirement is subject to that material being properly withheld by the tax agent or BAS agent under legal professional privilege.
- providing information or documents to the ATO pursuant to section 353-10 of Schedule 1 to the *Taxation Administration Act 1953* concerning indirect taxation laws (including GST).

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<sup>58</sup> Paragraph 140.6, APES 110 *Code of Ethics for Professional Accountants*, 2006.

<sup>59</sup> *Bolkiah (Prince Jefri) v KPMG (a firm)* [1999] 1 All ER 517; *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at 47-48 (considering *Prince Jefri*).

<sup>60</sup> Section 22 of the *Acts Interpretation Act 1901*.

<sup>61</sup> Paragraph 3.37 of the Explanatory Memorandum of the *Tax Agent Services Bill 2008*; *Crowley and Others v Murphy* (1981) 34 ALR 496; *Parry-Jones v Law Society* [1969] 1 Ch. 1; [1968] 2 W.L.R. 397.

<sup>62</sup> *Smorgon v Australia & New Zealand Banking Group Ltd* (1976) CLR 475.



# EXPLANATORY PAPER

## (7) You must ensure that a tax agent service provided on your behalf is provided competently

### What does 'competently' mean?

93. A tax agent or BAS agent should be a person of such competence and integrity that others may entrust their taxation affairs to the agent's care. The agent should be a person of such reputation and ability that officers of the Commissioner of Taxation may proceed upon the footing that the taxation returns lodged by the agent have been prepared honestly and competently.<sup>63</sup>

94. The Macquarie Dictionary<sup>64</sup> provides the following definition of 'competent':

*'Competent*

*1. properly qualified; capable;*

*2. fitting, suitable, or sufficient for the purpose; adequate'*

95. Competence, with respect to tax agents and BAS agents, can therefore be defined as a state of being capable, fitting, suitable or sufficient to provide a tax agent service.

96. A tax agent or BAS agent will be competent if the agent possesses such skill, ability and knowledge required to perform a tax agent service that clients may entrust their taxation affairs to the agent's care and officers of the ATO may rely upon client returns or other documents prepared by the agent.<sup>65</sup>

97. The maintenance of competence by a tax agent or BAS agent requires a continuing awareness and understanding of technical, legal and business developments relevant to the tax agent services provided by the agent.<sup>66</sup>

98. The assurance of competence by a tax agent or BAS agent, in the provision of a tax agent service, requires the agent:

- to act diligently in accordance with applicable technical and professional standards when providing a tax agent service;<sup>67</sup>

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<sup>63</sup> *Re Su and Tax Agent's Board of South Australia* 82 ATC 4284 at 4286.

<sup>64</sup> *The Macquarie Dictionary*, [Multimedia], version 5.0.0.

<sup>65</sup> As above.

<sup>66</sup> Accounting Professional and Ethical Standards Board, '*APES110 Code of Ethics for Professional Accountants*' (2006) at [130.3]; *Stasos v Tax Agents' Board* (1990) 90 ATC 4950.

<sup>67</sup> While the Board acknowledges that a lack of diligence may not always correspond with a lack of competence, diligence may, nonetheless, be an ingredient of competence.



# EXPLANATORY PAPER

- to maintain knowledge and skills at the level required to ensure that a client is provided with an appropriate standard of tax agent services,<sup>68</sup> and
- to exercise reasonable care in the provision of a tax agent service.<sup>69</sup>

99. The Macquarie Dictionary<sup>70</sup> provides the following definition of 'diligent':

*'Diligent'*

1. *constant and persistent in an effort to accomplish something;*
2. *pursued with persevering attention'*

100. Acting diligently requires a tax agent or BAS agent to act in accordance with the terms of the client engagement carefully, thoroughly and on a timely basis.<sup>71</sup>

101. Circumstances that suggest a lack of competence include, but are not limited to:

- providing tax agent services relating to an area of the taxation laws in which the tax agent or BAS agent is not properly qualified, capable or suitable, without first obtaining the necessary support of a third party expert;<sup>72</sup>
- not providing clients with a means of communicating with the agent or otherwise remaining inaccessible to clients;<sup>73</sup>
- causing inappropriate delay in the lodgement of client tax returns and other documents;<sup>74</sup>
- causing inappropriate delay in forwarding on client tax refunds from the ATO;<sup>75</sup>
- performance of work of a quality such that it needs to be redone;<sup>76</sup>

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<sup>68</sup> Refer to the discussion of subsection 30-10(8) of the TASA below for further details; also see *Comino and Tax Agents' Board of NSW* [2009] AATA 766.

<sup>69</sup> Refer to the discussion of subsections 30-10(9) and (10) of the TASA below for further details.

<sup>70</sup> *The Macquarie Dictionary*, [Multimedia], version 5.0.0.

<sup>71</sup> Accounting Professional and Ethical Standards Board, *'APES110 Code of Ethics for Professional Accountants'* (2006) at [130.4].

<sup>72</sup> Explanatory Memorandum to the *Tax Agent Services Bill 2008* at Example 3.32.

<sup>73</sup> *Case U122 87 ATC 731 at 736; Pappalardo v Tax Agents' Board of Victoria* 2003 ATC 2207.

<sup>74</sup> As above.

<sup>75</sup> As above.

<sup>76</sup> *Re Modini and Tax Agents' Board of Queensland* (2007) 98 ALD 466 at 475.





# EXPLANATORY PAPER

- failing to lodge the tax agent's or BAS agent's own income tax returns or otherwise failing to adequately manage the tax agent's or BAS agent's personal taxation affairs or those of the tax agent or BAS agent practice.<sup>77</sup>

## What is a tax agent or BAS agent required to do to ensure that services are provided competently?

102. There are a number of steps a tax agent or BAS agent may take to ensure that tax agent services are provided competently. These include, but are not limited to:

- maintaining adequate knowledge, skill and resources in the area/s the agent provides services;
- not accepting an engagement or providing services where the agent has insufficient knowledge and skill to complete the engagement or provide those services competently unless the agent is able obtain such knowledge and skill, without delay and cost to the client; and
- not accepting an engagement or providing services where this would breach a condition that has been imposed on the agent's registration.<sup>78</sup>

103. If a tax agent or BAS agent has only a narrow, specialised area of expertise, this requirement would require that the provision of tax agent services outside of this area of expertise only occur where the agent has taken steps to obtain necessary knowledge and skills.<sup>79</sup>

104. To ensure competent provision of services, actions a tax agent or BAS agent can take may include, but are not limited to:

- setting out and agreeing in a letter of engagement with the client the scope and cost of the services to be provided to clearly outline what services are to be performed as part of the engagement based on the needs of the client and the skills, qualification and experience of the agent;
- obtaining expert advice and assistance;
- obtaining knowledge and skill through private study and research; and/or
- informing the client of the likely delay and cost to acquire the requisite knowledge and skill to provide the service competently and obtaining the client's voluntary consent to the tax agent or BAS agent providing the service.<sup>80</sup>

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<sup>77</sup> *Case U122 87 ATC 731 at 735; Carbery & Associates v Tax Agents' Board of Queensland* 2001 ATC 2025 at 2033; *Pappalardo v Tax Agents' Board of Victoria* 2003 ATC 2207 at 2211; *Re Su and Tax Agent's Board of South Australia* 82 ATC 4284; *Comino and Tax Agents' Board of NSW* [2009] AATA 766.

<sup>78</sup> *Stasos v Tax Agents' Board* (1990) 90 ATC 4950; *Comino and Tax Agents' Board of NSW* [2009] AATA 766.

<sup>79</sup> Paragraph 3.40 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>80</sup> Paragraph 3.41 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.



# EXPLANATORY PAPER

## **What measures can a tax agent or BAS agent adopt to ensure that a tax agent service provided on their behalf is provided competently?**

105. A tax agent or BAS agent is accountable for a tax agent service that is provided on the agent's behalf.
106. In the case of an individual tax agent or BAS agent, an individual working under the supervision and control of that agent is permitted to provide relevant tax agent services on behalf of that tax agent or BAS agent. In the case of a company or partnership tax agent, an individual working under the supervision and control of a registered tax agent who is an individual is permitted to provide relevant tax agent services on behalf of the company or partnership tax agent.<sup>81</sup>
107. Where those tax agent services are provided on behalf of the tax agent or BAS agent by any other person or entity, the tax agent or BAS agent is still required to ensure that those services are provided competently.
108. Importantly, if an entity not permitted under the TASA to provide tax agent services on behalf of a tax agent or BAS agent does, in fact, provide those services, the tax agent or BAS agent may be liable to a civil penalty for allowing this to occur. This may also constitute a breach of the Code to the extent that the agent has not complied with a taxation law and has not acted honestly and with integrity.
109. To ensure that a service provided on behalf of a tax agent or BAS agent is provided competently, the agent must ensure that the provider of the service including any subcontractor, has the appropriate skills and experience, that adequate supervision and review arrangements are in place or that other appropriate steps are taken to ensure the accuracy of any services provided.<sup>82</sup>
110. This does not necessarily require the tax agent or BAS agent to independently verify the technical accuracy of material prepared by a third party expert on the agent's behalf.
111. The level of supervision will depend upon a range of factors including:
- the educational qualifications and extent of experience of the provider of the service;
  - the nature of the actual service being provided; and
  - any structures or processes in place within an organisation (for example, supervisory arrangements or quality assurance procedures) to facilitate the competent provision of tax agent services.<sup>83</sup>
112. The matters that could be considered relevant in determining the adequacy of the level of supervision and control that is being undertaken by a tax agent or BAS agent, may include, but are not limited to:

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<sup>81</sup> Section 50-30 of the TASA.

<sup>82</sup> Paragraph 3.42 and 3.43 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*; Subsection 50-30(5) of the *Tax Agent Services Act 2009*.

<sup>83</sup> Paragraph 3.44 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.



# EXPLANATORY PAPER

- whether the tax agent or BAS agent has identified the knowledge and skills required of an entity to competently provide a tax agent service on the agent's behalf and has assured that the entity providing the tax agent service both possesses and maintains the knowledge and skills;<sup>84</sup>
- the physical proximity of the relevant tax agent or BAS agent to the person carrying out the work on the agent's behalf;<sup>85</sup>
- the level and depth of personal physical or other oversight undertaken by the tax agent or BAS agent over the provision of tax agent services on the agents' behalf,<sup>86</sup> and
- the undertaking of ongoing, periodic review of the tax agent services provided on the tax agent's or BAS agent's behalf, rather than only undertaking final review of services performed.<sup>87</sup>

## (8) You must maintain knowledge and skills relevant to the tax agent services you provide

### What is a tax agent or BAS agent required to do to maintain relevant knowledge and skills?

113. A tax agent or BAS agent must maintain knowledge and skills in the areas of the taxation laws and tax administration relating to the tax agent services provided by the agent. In relation to the provision of a tax agent service, the maintenance of competence by a tax agent or BAS agent requires continuing awareness, understanding and up-to-date knowledge of relevant technical, legal and business developments.<sup>88</sup>
114. Compliance with this requirement may require a tax agent or BAS agent to undergo continuing professional education (CPE).<sup>89</sup> Fifteen structured hours per annum of CPE is considered by the Board to be an indicative minimum standard for the purpose of this principle.
115. The Board will issue further guidance on the level of CPE required in due course.

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<sup>84</sup> Subsection 30-10(8) of the TASA. This is also analogous to the obligations imposed on financial services licensees pursuant to 'Regulatory Guide 104: Licensing: Meeting the general obligations', ASIC 2007.

<sup>85</sup> *Re McGowan and Tax Agents' Board of Queensland* 96 ATC 2056 at [5]; *Scott v Tax Agent's Board of Queensland* 2001 ATC 2218 at 2254; *Re S & T Income Tax Aid Specialists Pty Ltd and Christopher Forward and Tax Agents' Board of New South Wales* 87 ATC 2001.

<sup>86</sup> *Re S & T Income Tax Aid Specialists Pty Ltd and Christopher Forward and Tax Agents' Board of New South Wales* 87 ATC 2001 at 2006; *Scott v Tax Agent's Board of Queensland* 2001 ATC 2218 at 2254.

<sup>87</sup> *Re McGowan and Tax Agents' Board of Queensland* 96 ATC 2056 at [5]; *Re S & T Income Tax Aid Specialists Pty Ltd and Christopher Forward and Tax Agents' Board of New South Wales* 87 ATC 2001 at 2006; *Scott v Tax Agent's Board of Queensland* 2001 ATC 2218 at 2254.

<sup>88</sup> *Comino and Tax Agents' Board of NSW* [2009] AATA 766.

<sup>89</sup> Paragraph 3.45 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.



# EXPLANATORY PAPER

116. CPE may be considered to be further education intended for the systematic maintenance, improvement and broadening of knowledge and skills, and the development or personal qualities necessary for execution of professional and technical duties throughout the individual's working life.<sup>90</sup>
117. CPE is not restricted to courses offered by recognised tax agent associations, recognised BAS agent associations or registered tax agents or BAS agents and may include face-to-face training courses, distance learning and online courses.<sup>91</sup> CPE is not limited by physical proximity.

## **(9) You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing you are doing on behalf of the client**

### **Under what circumstances is a tax or BAS agent required to comply with this principle?**

118. A tax agent or BAS agent is required to comply with this principle if the agent is acting on behalf of a client in relation to a taxation law. This includes, for example, preparing and lodging a return on behalf of a client.<sup>92</sup>

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<sup>90</sup> International Ethics Standards Board for Accountants 'Approaches to continuing professional development (CPD) measurement (2008) at [1.2.1].

<sup>91</sup> Paragraph 3.46 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>92</sup> Paragraph 3.48 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.



# EXPLANATORY PAPER

**NOTE:**

Section 995-1 of the *Income Tax Assessment Act 1997* provides that a 'taxation law' means:

- (a) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or
- (b) regulations under such an Act (including such a part of the Act); or
- (c) the *Tax Agent Services Act 2009* or regulations made under that Act.

The Commissioner of Taxation is responsible for the administration of a number of Acts and regulations concerning:

- income tax;
- indirect taxes (including GST, luxury car tax, wine equalisation tax)
- superannuation
- the Medicare levy;
- fringe benefits tax;
- franking tax;
- withholding taxes;
- petroleum resource rent tax;
- the administration or collection of the above taxes;
- product grants or benefits mentioned in section 8 of the *Product Grants and Benefits Administration Act 2000* or the administration or payment of the product grants and benefits; and
- net fuel amount, or the administration, collection or payment of a net fuel amount.

## What are a tax agent's or BAS agent's obligations under this principle?

119. A tax agent or BAS agent is only required to take reasonable care in ascertaining the client's state of affairs to the extent that the state of those affairs is relevant to a statement the agent is making or a thing the agent is doing on behalf of a client. Therefore, the requirement to take reasonable care is necessarily limited by the scope of the engagement between the tax agent or BAS agent and the client.<sup>93</sup>

## What does 'reasonable care' mean for tax agents and BAS agents?

120. The standard of 'reasonable care' generally required of a tax agent or BAS agent is that of a competent and reasonable person, possessing the skills, qualifications and experience that are required to become a registered tax agent or BAS agent.<sup>94</sup>

121. If, however, a tax agent or BAS agent specialises in any particular areas of the taxation laws, the standard of 'reasonable care' required is that of a competent and reasonable person professing to have the skills relevant to the area of specialisation.<sup>95</sup>

<sup>93</sup> Paragraph 3.49 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>94</sup> *Voli v Inglewood Shire Council* [1963] HCA 15; (1963) 110 CLR 74 at 84; *Hawkins v Clayton* [1988] HCA 15; (1988) 164 CLR 539; *Scott v Tax Agent's Board of Queensland* 2001 ATC 2218.

<sup>95</sup> *Martinazzo and Commissioner of Taxation* [2009] AATA 61.



# EXPLANATORY PAPER

122. 'Reasonable care' means what is reasonable in the circumstances. This will depend upon a range of factors, including the scope of the tax agent services being provided and the client's level of professional knowledge and experience.<sup>96</sup>

## What is 'reasonable care in ascertaining a client's state of affairs'?

123. It is considered that 'more is expected of a [tax or BAS] agent than a taxpayer completing his or her own return'.<sup>97</sup> This higher standard of care is a reflection of a tax agent's or BAS agent's 'knowledge, education, experience and skill'.<sup>98</sup>
124. It should be noted at the outset that this requirement under the Code does not create a requirement that a tax agent or BAS agent effectively 'audits' all of the agent's clients before providing tax agent services to avoid breaching the Code.<sup>99</sup>
125. Rather, this requirement is a duty of tax agents and BAS agents to take care beyond placing complete reliance on the accounts prepared, or work done, by a person without considering their level of knowledge and/or understanding of the taxation laws and the correctness of their work to ensure that the information upon which the provision of the tax agent's services is based is accurate.<sup>100</sup>
126. In most cases, this will require that a tax agent or BAS agent ask the client appropriate questions, based on the agent's professional knowledge and experience, to ascertain the accurate factual basis upon which the tax agent services are provided and, where appropriate, to obtain supporting documents and records evidencing these facts.<sup>101</sup>
127. The requirement to take reasonable care relates to the services that are to be provided and is therefore subject to the agreed scope of the engagement with the client. A tax agent or BAS agent would not be required to make further enquiries and it would be reasonable to rely on information or advice, if the scope of the tax agent services excludes the examination of information provided by the client or requires the tax agent or BAS agent to rely on the information or advice of another expert.<sup>102</sup> (These observations must also be considered in light of other paragraphs in this section and with the obligations under the TASA, which must be complied with.)

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<sup>96</sup> *Hawkins v Clayton* [1988] HCA 15; (1988) 164 CLR 539; *Martinazzo and Commissioner of Taxation* [2009] AATA 61.

<sup>97</sup> *Re Sparks and Federal Commissioner of Taxation* [2000] AATA 28; *Reeders v Federal Commissioner of Taxation* 2001 ATC 2334 at 2336; *Martinazzo and Commissioner of Taxation* [2009] AATA 61.

<sup>98</sup> As above; *Re Arnett and Federal Commissioner of Taxation* 39 ATR 1095; *Re Keitac Pty Ltd ATF the McNamara Property Development Trust and Commissioner of Taxation* [2007] AATA 1206 at [39] – [45].

<sup>99</sup> Paragraph 3.54 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>100</sup> *Walker v Hungerfords* (1987) 49 SASR 93; Miscellaneous Taxation Ruling MT 2008/1.

<sup>101</sup> Paragraph 3.52 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*; *Reeders v Federal Commissioner of Taxation* 2001 ATC 2334 at 2337.

<sup>102</sup> Paragraph 3.50 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*; *Re Keitac Pty Ltd ATF the McNamara Property Development Trust and Commissioner of Taxation* [2007] AATA 1206.



# EXPLANATORY PAPER

128. Taking reasonable care will in many cases require that a tax agent or BAS agent ask questions based on their professional knowledge and experience in seeking information.<sup>103</sup> Where there are grounds to doubt the information provided by a client, the tax agent or BAS agent must take positive steps and make reasonable enquiries to satisfy themselves as to the completeness and/or accuracy of that information.<sup>104</sup>
129. Where a statement provided by a client seems plausible and is consistent with previously established statements and the agent has no basis on which to doubt the client's reliability or the veracity of the information supplied, the tax agent or BAS agent may discharge their responsibility by accepting the statement provided by the client without further checking.<sup>105</sup>
130. However, if the information supplied by a client seems implausible or inconsistent with a previous pattern of claim or statement, further enquiries would be required.<sup>106</sup>
131. Again, whilst there is no requirement to audit, examine or review books and records or other source documents supplied by a client, a tax agent or BAS agent does not discharge their responsibility in such a case by simply accepting what they have been told.<sup>107</sup>
132. Where information has been provided by a suitable, independent, third party expert and there is no prior experience to the contrary, it may be reasonable for a tax agent or BAS agent to rely on that information without further checking or enquiries.

## (10) You must 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

### What are the obligations of a tax agent or BAS agent under this principle?

133. This principle requires a tax agent or BAS agent to take reasonable care to ensure the correct interpretation and application of the taxation laws to the circumstances in relation to which clients seek advice.<sup>108</sup> These circumstances may be the actual circumstances of the client or hypothetical circumstances provided by the client.<sup>109</sup>

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<sup>103</sup> Paragraph 3.52 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>104</sup> Paragraphs 3.52 to 3.54 and Example 3.12 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>105</sup> See Example 3.14 and Paragraph 3.53 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>106</sup> Paragraph 3.54 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>107</sup> Paragraph 3.54 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>108</sup> Paragraph 3.56 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>109</sup> Paragraph 3.55 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.





# EXPLANATORY PAPER

134. This principle **does not** require agents to determine the correct application of the law; rather it requires agents to take reasonable care to ensure the correct interpretation and application of the law in the circumstances.<sup>110</sup>

**NOTE:**

Section 995-1 of the *Income Tax Assessment Act 1997* provides that a 'taxation law' means:

- (d) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or
- (e) regulations under such an Act (including such a part of the Act); or
- (f) the *Tax Agent Services Act 2009* or regulations made under that Act.

The Commissioner of Taxation is responsible for the administration of a number of Acts and regulations concerning:

- income tax;
- indirect taxes (including GST, luxury car tax, wine equalisation tax)
- superannuation
- the Medicare levy;
- fringe benefits tax;
- franking tax;
- withholding taxes;
- petroleum resource rent tax;
- the administration or collection of the above taxes;
- product grants or benefits mentioned in section 8 of the *Product Grants and Benefits Administration Act 2000* or the administration or payment of the product grants and benefits; and
- net fuel amount, or the administration, collection or payment of a net fuel amount.

## What is 'reasonable care' for the purposes of this principle?

135. It is considered that 'more is expected of a [tax or BAS] agent than a taxpayer completing his or her own return'.<sup>111</sup> This higher standard of care is a reflection of a tax agent's or BAS agent's 'knowledge, education, experience and skill'.<sup>112</sup>
136. For the purposes of this principle, taking 'reasonable care' in ensuring the taxation laws are applied correctly means giving appropriately serious attention to complying with the obligations imposed under a taxation law at a standard that could be expected of a reasonable person in the agent's position.<sup>113</sup>

<sup>110</sup> Paragraph 3.56 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>111</sup> *Re Sparks and Federal Commissioner of Taxation* [2000] AATA 28; *Reeders v Federal Commissioner of Taxation* 2001 ATC 2334 at 2336; *Martinazzo and Commissioner of Taxation* [2009] AATA 61.

<sup>112</sup> As above; *Re Arnett and Federal Commissioner of Taxation* 39 ATR 1095; *Re Keitac Pty Ltd ATF the McNamara Property Development Trust and Commissioner of Taxation* [2007] AATA 1206 at [39] – [45].

<sup>113</sup> *Re Martinazzo and Commissioner of Taxation* [2009] AATA 61 at [67].





# EXPLANATORY PAPER

137. Where a tax agent or BAS agent is uncertain about how a taxation law applies to a particular set of circumstances, taking reasonable care may include seeking clarification from relevant authorities and sources such as:

- legislation and related extrinsic material (for example, explanatory memoranda);
- relevant case law;
- rulings and determinations issued by the Commissioner on the topic;
- the Commissioner's instructions in documents such as income tax returns, BAS returns, fact sheets and practice statements;
- information published or provided by a recognised professional association or other regulatory agency; or
- information or relevant commentaries published by other experts, registered agents or specialists.<sup>114</sup>

138. In consulting relevant authorities and sources, the tax agent or BAS agent may choose to seek assistance from another appropriately qualified person who has the ability and resources to provide advice on taxation laws.<sup>115</sup>

## (11) You must not knowingly obstruct the proper administration of the taxation laws

### What are a tax agent's or BAS agent's obligations under this principle?

139. A tax agent or BAS agent must not knowingly obstruct the proper administration of the taxation laws.

140. A tax agent or BAS agent does not breach this requirement by relying on the agent's or the client's rights to withhold documents or to not provide information. Examples of such rights may include legal professional privilege or the ATO accountant's concession set out in the published 'Guidelines to Accessing Professional Accounting Advisor's Papers'.<sup>116</sup>

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<sup>114</sup> Paragraph 3.57 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>115</sup> In order to demonstrate to the Board that reasonable care has been taken through consulting, or seeking the assistance of, appropriately qualified parties, a tax agent or BAS agent will be required to provide some written or documentary record of such a request.

<sup>116</sup> Paragraph 3.61 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.



# EXPLANATORY PAPER

## What does 'knowingly obstruct' mean?

141. The word obstruction is defined by reference to its ordinary meaning.<sup>117</sup>

142. The Macquarie Dictionary<sup>118</sup> defines the relevant terms as follows:

### *Obstruct*

2. *to interrupt, make difficult, or oppose the passage, progress, course, etc., of*

### *Obstruction*

1. *something that obstructs; an obstacle or hindrance*
2. *the act of obstructing*

143. The test for determining whether an act or omission constitutes an obstruction is a test of reasonableness - that is, in doing the act or making the omission, has the person acted reasonably?<sup>119</sup>

144. This is a question of fact to be answered with respect to the specific circumstances of a particular case.<sup>120</sup> The word 'knowingly' requires that the tax agent or BAS agent had actual knowledge, as opposed to constructive knowledge, of the obstruction caused by the agent's conduct.<sup>121</sup>

145. In determining whether this test is satisfied, the following considerations are relevant:

- a temporary denial of access on reasonable grounds may fall short of being an obstruction.<sup>122</sup>
- denial of documents for an indefinite period may constitute an obstruction.<sup>123</sup>
- a positive act of obstruction by a person, from whom access to inspection of documents or other information is sought, is not necessarily a requirement in establishing that there has been an obstruction.<sup>124</sup>

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<sup>117</sup> *Jenkins v Allied Ironfounders Ltd* (1970) 1 WLR 304 at 315; *Scanlan v Swan* 82 ATC 4402 at 4405.

<sup>118</sup> *The Macquarie Dictionary*, [Multimedia], version 5.0.0.

<sup>119</sup> *Scanlan v Swan* 82 ATC 4402 at 4405.

<sup>120</sup> *O'Reilly v Commissioners of the State Bank of Victoria* 83 ATC 4156 at 4163.

<sup>121</sup> *Re Secretary, Department of Family and Community Services and Jonauskas* (2001) 65 ALD 553.

<sup>122</sup> *Scanlan v Swan* 82 ATC 4402 at 4405.

<sup>123</sup> *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1991) 101 ALR 407 at 414.

<sup>124</sup> *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1991) 101 ALR 407 at 415.



# EXPLANATORY PAPER

- actions essentially negative in character, for example withholding specific information, or knowledge of the means to access that information, from the Board or the Commissioner may be considered an obstruction.<sup>125</sup>
- an act or omission that causes delay may be considered an obstruction where it can be established that the delay sought was for other than a genuine and reasonable purpose.<sup>126</sup>
- repeated failure by a person to keep appointments or supply information may be considered an obstruction.<sup>127</sup>
- repeated failure by a person to respond adequately to formal requests for information may be considered an obstruction. This will include excessive or repeated delays in responding, not replying to the request for information, giving information that is not relevant or does not address the issues in the request and/or supplying inadequate information.<sup>128</sup>

## What does 'proper administration of' the taxation laws mean?

146. The phrase 'proper administration of' is not defined in the legislation and so adopts its ordinary meaning.
147. The Commissioner has primary responsibility for the general administration of the taxation laws.<sup>129</sup>
148. The Board is, however, responsible for the general administration of the TASA.<sup>130</sup> The TASA is a taxation law.<sup>131</sup>
149. The proper administration of the taxation laws includes performing the statutory duties and functions as required by the taxation laws.
150. An agent will breach the Code where the agent knowingly obstructs the Commissioner or the Board, or officers properly acting on behalf of the Commissioner or the Board in performing their respective statutory duties and functions as required by the taxation laws.

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<sup>125</sup> *O'Reilly v Commissioners of the State Bank of Victoria* 83 ATC 4156 at 4163.

<sup>126</sup> *Scanlan v Swan* 82 ATC 4402 at 4405.

<sup>127</sup> Paragraph 74 of the ATO Practice Statement PS LA 2006/8 *Remission of shortfall interest charge and general interest charge for shortfall periods* (PS LA 2006/8).

<sup>128</sup> As above.

<sup>129</sup> Section 8 of the ITAA 1936; section 1-7 of the ITAA 1997; section 34 of the *Taxation Administration Act 1953*; section 356-5 of Schedule 1 to the *Taxation Administration Act 1953*.

<sup>130</sup> Section 1-15 of the TASA.

<sup>131</sup> Section 995-1 of the ITAA 1997.



# EXPLANATORY PAPER

## **(12) You must 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**

### **What are a tax agent's or BAS agent's obligations under this principle?**

151. A tax agent or BAS agent is required to advise the agent's clients of the client's rights and obligations under the taxation laws that are materially related to the tax agent services that the agent provides to that client.<sup>132</sup>
152. In this context, the phrase 'related to' will carry its ordinary meaning of 'associated with', 'connected with' or 'linked with'.<sup>133</sup>
153. For a client's rights and obligations to be materially related to the tax agent services provided, a connection between the rights and obligations and the tax agent services is required. This connection must be substantial, rather than so tenuous that it is immaterial or can be ignored.<sup>134</sup>
154. Whether a client's rights and obligations are materially related to a tax agent service in any given case will vary according to the nature of the services provided to the client.

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<sup>132</sup> Paragraph 3.62 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>133</sup> *Re Nabalco Pty Ltd and Collector of Customs* (1993) 32 ALD 771; *Collector of Customs v The Western Australian Government Railways Commission (Westrail)* (1995) 39 ALD 21.

<sup>134</sup> *Re Warne and Defence Force Retirement and death Benefits Authority* (1989) 18 ALD 662; *International Development and Construction Pty Ltd v North Sydney Council* [2005] NSWLEC 691.



# EXPLANATORY PAPER

**NOTE:**

Section 995-1 of the *Income Tax Assessment Act 1997* provides that a 'taxation law' means:

- (g) an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or
- (h) regulations under such an Act (including such a part of the Act); or
- (i) the *Tax Agent Services Act 2009* or regulations made under that Act.

The Commissioner of Taxation is responsible for the administration of a number of Acts and regulations concerning:

- income tax;
- indirect taxes (including GST, luxury car tax, wine equalisation tax)
- superannuation
- the Medicare levy;
- fringe benefits tax;
- franking tax;
- withholding taxes;
- petroleum resource rent tax;
- the administration or collection of the above taxes;
- product grants or benefits mentioned in section 8 of the *Product Grants and Benefits Administration Act 2000* or the administration or payment of the product grants and benefits; and
- net fuel amount, or the administration, collection or payment of a net fuel amount.

155. The tax agent's or BAS agent's obligations under this principle only extend to services within the scope of engagement between the tax agent or BAS agent and the client.<sup>135</sup>

156. These rights and obligations could be referred to in a letter of engagement, report, advice or other communication with the client and may include, but are not limited to, providing advice on:

- the nature of self-assessment, including the Commissioner's ability to amend an assessment within a certain time after the original assessment, impose penalties and issue rulings on which clients may rely;
- the client's obligation to keep proper records and the consequences of not doing so;<sup>136</sup>
- that the responsibility for the accuracy and completeness of the particulars and information required to comply with the taxation laws rests with the client;
- the application of the safe harbour provisions contained in the *Taxation Administration Act 1953* and

<sup>135</sup> Paragraph 3.64 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*; *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204 at 213 per Mahoney J.

<sup>136</sup> 'Taxpayers' Charter- What you need to know', Australian Taxation Office, June 2010.



# EXPLANATORY PAPER

- where necessary, the rights or options available to clients, including how to seek a private ruling and how to object or appeal against adverse decisions made by the Commissioner.<sup>137</sup>

157. Any letter of engagement, report, advice or other significant communication with the client should be in writing.

## (13) You must maintain the professional indemnity insurance that the Board requires you to maintain

### What are a tax agent's or BAS agent's obligations under this principle?

158. Tax agents and BAS agents are potentially liable to clients for the agent's own professional negligence as well as the negligence of those providing services on the agent's behalf.<sup>138</sup>
159. A tax agent or BAS agent must maintain appropriate professional indemnity insurance, if required by the Board.<sup>139</sup>
160. If a tax agent or BAS agent does not have professional indemnity insurance which the Board has required, the Board may under subsection 20-30(3) of the TASA issue the tax agent or BAS agent with a notice requiring the agent to maintain professional indemnity insurance as specified in the notice.
161. This notice may include requirements as to the level and essential terms of the insurance policy.<sup>140</sup>
162. If the tax agent or BAS agent does not maintain the professional indemnity insurance that the Board requires the agent to maintain, the agent is likely to have breached the Code.<sup>141</sup>
163. The Board requires that all registered tax agents and BAS agents, who are not exempted, have appropriate professional indemnity insurance coverage from 1 July 2011.<sup>142</sup>

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<sup>137</sup> Paragraph 3.63 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>138</sup> *Scott v Tax Agents' Board of Queensland* [2001] AATA 435 at [180] – [183].

<sup>139</sup> Subsections 20-30(3) and 30-10(13) of the TASA.

<sup>140</sup> Paragraph 2.77 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>141</sup> Paragraphs 2.77 and 3.65 to 3.66 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>142</sup> Tax Practitioners Board Media Release 'Agents to have Professional Indemnity Insurance from 1 July 2011', 25 February 2010.



# EXPLANATORY PAPER

## (14) You must respond to requests and directions from the Board in a timely, responsible and reasonable manner

### What are a tax agent's or BAS agent's obligations under this principle?

- 164. If a tax agent or BAS agent receives a request or direction from the Board, the agent must respond to that request in a timely, responsible and reasonable manner.
- 165. Claiming legal professional privilege or other legal rights on behalf of a client will not be considered an unreasonable response to a direction of the Board.<sup>143</sup>

### What does 'timely, responsible and reasonable' mean?

- 166. These terms are not defined in the legislation and should therefore take on their ordinary meanings.
- 167. The Macquarie Dictionary<sup>144</sup> relevantly defines these terms as follows:

#### *Timely*

- 1. *Occurring at a suitable time*

#### *Responsible*

...

- 2. *Having a capacity for moral decisions and therefore accountable; capable of rational thought or action*
- 3. *able to discharge obligations or pay debts*
- 4. *reliable in business or other dealings; showing reliability*

#### *Reasonable*

- 1. *Endowed with reason*
- 2. *agreeable to reason or sound judgment*
- 3. *not exceeding the limit prescribed by reason, not excessive*

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<sup>143</sup> Paragraph 3.68 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>144</sup> *The Macquarie Dictionary*, [Multimedia], version 5.0.0.



# EXPLANATORY PAPER

## 4. moderate'

168. Examples of failures to respond to a Board request or direction in a timely, responsible and reasonable manner may include:

- failing to provide written responses to Board correspondence within the time period specified for the response;<sup>145</sup>
- making arrangements with the Board to provide information and subsequently failing to provide that information in accordance with the arrangement;<sup>146</sup>
- providing responses to Board requests and/or directions that are false or misleading.<sup>147</sup>

## What are the consequences if a tax agent or BAS agent fails to comply with the Code?

169. As detailed in paragraphs 10 to 24 of this Explanatory Paper, conduct that constitutes a breach of the Code may also be relevant to a determination of whether a tax agent or BAS agent is a fit and proper person or whether the civil penalty provisions will apply to the agent's conduct.

## What are the specific sanctions provided for a breach of the Code?

170. A tax agent or BAS agent is required to comply with all the obligations set out in the Code. If, following an investigation, the Board is satisfied that a tax agent or BAS agent has failed to comply with any of the principles of the Code, it may impose one or more of the following administrative sanctions on the agent:

- a written caution;
- an order requiring the tax agent or BAS agent to take one or more actions including, but not limited to, the following:<sup>148</sup>
  - completing a course of education or training specified in the order by the Board;
  - providing services (for which the tax agent or BAS agent is registered) only under the supervision of another tax agent or BAS agent that has been specified in the order; and/or

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<sup>145</sup> *Morrissey v Tax Agents' Board of Queensland* 2004 ATC 2309; *Cowlshaw & Ors v Tax Agents' Board of Queensland* [1999] AATA 412 at [9]; *Pappalardo v Tax Agents' Board of Victoria* [2003] AATA 990 at [30].

<sup>146</sup> As above.

<sup>147</sup> As above.

<sup>148</sup> Section 30-20 of the TASA.





# EXPLANATORY PAPER

- providing only those services specified in the order;
- suspension of registration; and/or
- termination of registration.<sup>149</sup>

171. The severity of any sanction imposed by the Board will depend upon the Board's consideration of the nature and extent of the breach and the individual circumstances of each case.<sup>150</sup>

172. If the Board imposes a sanction, other than a caution, on a registered tax agent or BAS agent, details of the sanction will be included on the register of registered and deregistered tax agents and BAS agents.<sup>151</sup>

## What is the effect of an order?

173. An order is a direction from the Board requiring a tax agent or BAS agent to take one or more actions.<sup>152</sup>

174. If the Board decides to make an order, it will notify the tax agent or BAS agent in writing of the order. The order may specify, as appropriate:

- the period of time within which the tax agent or BAS agent must complete the requirements specified in the order; and/or
- the period of time during which the order applies.<sup>153</sup>

## What is the effect of a suspension of a tax agent's or BAS agent's registration?

175. If a tax agent's or BAS agent's registration is suspended, the tax agent or BAS agent must not provide tax agent services for the period of that suspension.<sup>154</sup>

176. If the tax agent or BAS agent does provide tax agent services during a period of suspension, the Board may do one or more of the following:

- impose further administrative sanctions;

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<sup>149</sup> Section 30-15 of the TASA.

<sup>150</sup> Paragraphs 3.71 to 3.73 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>151</sup> Regulation 12 of the *Tax Agent Services Regulations 2009*.

<sup>152</sup> Subsection 30-20(1) of the TASA.

<sup>153</sup> Subsection 30-20(2) of the TASA.

<sup>154</sup> Subsection 30-25(2) of the TASA.



# EXPLANATORY PAPER

- apply to the Federal Court for a civil penalty order; and/or
- apply to the Federal Court for an injunction to restrain the tax agent or BAS agent from continuing to provide tax agent services.<sup>155</sup>

## What period of suspension may the Board impose?

177. The Board may determine the period of suspension as it sees fit.<sup>156</sup>
178. If a tax agent's or BAS agent's registration is already suspended when the Board suspends that agent's registration, the Board may extend the agent's original suspension for a further period. In this case, the further period of suspension commences at the end of the original suspension period.<sup>157</sup>

## Can a tax agent or BAS agent apply for renewal of registration during a suspension period?

179. If a tax agent's or BAS agent's registration is due to expire during the period for which the agent is under suspension, the agent is still permitted to apply for registration or renewal of registration despite the fact that the agent is under suspension.<sup>158</sup>

## What is the effect of a termination of a tax agent's or BAS agent's registration?

180. If the Board decides to terminate a tax agent's or BAS agent's registration, the agent will receive a written notice, which will include:
- the Board's decision to terminate the agent's registration;
  - the reasons for the decision;
  - details of any period during which the agent is prohibited from applying for registration; and
  - the agent's rights of review.<sup>159</sup>

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<sup>155</sup> Sections 30-15, 50-5, 50-10, 50-15, 70-5 and Subdivision 50-C of the TASA; paragraph 3.77 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

<sup>156</sup> Subsection 30-25(1) of the TASA.

<sup>157</sup> Subsection 30-25(3) of the TASA.

<sup>158</sup> Subsection 30-25(4) of the TASA.

<sup>159</sup> Section 40-20 of the *Tax Agent Services Act 2009*.



# EXPLANATORY PAPER

**Is the Board required to notify a tax agent or BAS agent of a decision to impose a sanction on that agent?**

181. If the Board decides to impose a sanction on a tax agent or BAS agent for a breach of the Code, the Board is required to provide that agent with notification of that decision in writing.<sup>160</sup>

**Is a Board decision to impose an administrative sanction subject to review?**

182. If the Board makes a decision to impose an administrative sanction, the tax agent or BAS agent may apply to the Administrative Appeals Tribunal (AAT) for a review of that decision.<sup>161</sup>

## Need more information?

For further information, refer to the Board's website at [www.tpb.gov.au](http://www.tpb.gov.au).

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<sup>160</sup> Subsections 30-20(2), 30-25(1) and 40-20(1) and paragraphs 60-125(8) (c) and (d) of the TASA.

<sup>161</sup> Paragraphs 70-10(e), (f) and (g) of the TASA.



# EXPLANATORY PAPER

## Appendix 1 – Case examples

The following cases provide examples of how the concepts contained within the principles of the Code of Professional Conduct (the Code) have been applied, primarily in former state Tax Agents' Board cases and also in cases arising in different contexts that deal with the same concepts.

Many of the Tax Agents' Board cases deal with whether or not an applicant is a 'fit and proper person' to be registered as a tax agent under the former registration provisions in the ITAA 1936. In this regard, the cases will remain applicable to the application of the TASA. The cases are intended to act as a guide to the meaning and application of the principles in the Code. In considering whether or not there has been a breach of the Code, the Board will make a determination based on the specific facts and circumstances of each case that it considers.

The cases have been divided into categories based on the principles of the Code to which they apply.

### 1. You must act honestly and with integrity

#### ***Jack v Tax Agents' Board of New South Wales [1997] AATA 678***

##### **Summary**

- Fitness and propriety of applicant for tax agent registration considered in relation to:
  - threats of violence made to former employee and clients; and
  - preparation of income tax returns for a fee while unregistered.

**Keywords:** *fit and proper; good fame, integrity and character; application for registration; threats to employee and clients; relationship with the Commissioner.*

##### **Outline of relevant facts**

This case concerned a refusal to register on the basis of fitness and propriety. During litigation against a former employee, the applicant threatened the former employee about money he 'owed' the applicant for the loss of clients. Later the applicant visited a former client seeking payment of an account for work performed. Subsequently the applicant and his associates proceeded to threaten the client in relation to the money 'owed' to the applicant. The Administrative Appeals Tribunal (Tribunal) affirmed the board's decision.



# EXPLANATORY PAPER

## **Relevant principle/s established or confirmed by the case**

- It is possible for a person to render themselves not fit and proper on the basis of certain behaviour that is so in breach of particular conventions that it would be detrimental for any professional body to have that person as a member.
- This is so even if their professional integrity is not in question.
- The inability of an agent to competently represent clients in dealings with the Commissioner and in any objections proceedings is sufficient to render a person not fit and proper to be registered as a tax agent.

## ***Re Carbery and Associates Pty Ltd and Tax Agents Board of Queensland [2001] AATA 107***

### **Summary**

- Fitness and propriety of applicant for tax agent re-registration considered in relation to:
  - convictions for failure to lodge personal income tax returns;
  - failure to respond to board correspondence;
  - failure to advise clients of new contact details;
  - failure to disclose conviction on re-registration application;
  - client complaints; and
  - relevance of personal circumstances.

**Keywords:** *fit and proper; good fame, integrity and character; honesty; application for re-registration; personal income tax affairs; failure to respond to Board correspondences; relationship with the Board and Commissioner; failure to advise of contact details; client complaints; personal issues.*

### **Outline of relevant facts**

The case concerned a refusal to re-register on the basis that the nominee of the applicant was not a fit and proper person and that the executive officer was not of good fame, integrity and character. The board's decision was based on the individual's conduct which included failure to file client returns, convictions for failing to lodge income tax returns, making false statements to the board, failure to respond to board correspondence and a number of client complaints. The Tribunal affirmed the board's decision.



# EXPLANATORY PAPER

## **Relevant principle/s established or confirmed by the case**

- Making false or misleading statements to the board, failing to provide written explanations on request from the board and tendering false evidence before the Tribunal are matters that raise serious doubts about the honesty of an agent.

## ***Sargent and Tax Agents' Board of Victoria [2009] AATA 219***

### **Summary**

- Fitness and propriety of registered tax agent considered in relation to:
- conviction and imprisonment for matters unrelated to registration as a tax agent;
- public protection rationale of legislation;
- standards and reputation of profession; and
- agent's insight into significance of misconduct or wrongdoing.

**Keywords:** *fit and proper; good fame, integrity and character; cancellation of registration; misconduct or wrongdoing arising outside of professional practice; public protection rationale; standards and reputation of profession; insight into significance of conduct.*

### **Outline of relevant facts**

In this case the Tribunal affirmed the state board's decision to cancel a tax agent's registration on bases including fitness and propriety and misconduct. The decision was based on the conviction of the tax agent on a number of criminal charges involving stalking and child pornography, for which the applicant was sentenced to a term of imprisonment and ordered to pay a fine, in addition to complying with further orders. At the date of the Tribunal hearing, the tax agent had paid the fine and completed the term of imprisonment, along with a majority of the orders.

## **Relevant principle/s established or confirmed by the case**

- In considering whether a person is fit and proper, a board may have regard to conduct not directly connected with their practice as a tax agent.
- Akin to the legal profession, public interest and trust are integral to the functioning of the tax agent profession.
- Where fitness and propriety or misconduct is in issue, the board must weigh the public interest in the tax agent continuing in practice against the public interest in protecting clients from repetition of the relevant conduct.



# EXPLANATORY PAPER

## 2. You must comply with the taxation laws in the conduct of your personal affairs

### *Su and Tax Agents' Board of South Australia [1982] AATA 127*

#### Summary

- Fitness and propriety of registered tax agent considered in relation to:
  - convictions and fines relating to considerable delays and failure to lodge personal income tax returns;
  - failure to remit group tax instalments in his capacity as an employer;
  - failure to furnish return of company of which he was director; and
  - failure to disclose convictions in annual notices to the board.

**Keywords:** *fit and proper; cancellation of registration; convictions; personal income tax affairs; relationship with the Board and Commissioner.*

#### Outline of relevant facts

This case concerned a cancellation of registration on the basis that the agent was not a fit and proper person. The agent conducted a large practice that, due to difficulties encountered, had to be scaled back. The applicant was convicted on two separate occasions of failing to lodge personal income tax returns and failing to remit withholding tax deductions collected from employees.

In addition to his convictions for failing to remit withholding tax, the agent was also late in remitting withholding tax on several occasions. In the annual returns lodged with the board, the agent failed to disclose the previous convictions. The agent was struck off the register of liquidators and fined in relation to his role in liquidating a private company. The board determined to cancel the agent's registration on the basis of this conduct.

#### Relevant principle/s established or confirmed by the case

The Tribunal substituted its own decision to cancel on different grounds to those of the board and noted the following with respect to meeting tax obligations:

- The failure of a tax agent to comply with their own taxation obligations is relevant to fitness and propriety as it may result in adverse treatment of the clients of that agent and the Commissioner will have reduced confidence in the competence with which those returns were prepared.



# EXPLANATORY PAPER

- Certain offences are so inconsistent with performing the role of a tax agent that conviction for these offences will render a person not fit and proper to be a registered tax agent. The Tribunal highlighted offences involving tax evasion to be an example of such an offence.

## ***Re Cowlshaw and Ors and Tax Agents' Board of Queensland [1999] AATA 412***

### **Summary**

- Fitness and propriety of registered tax agents considered in relation to:
  - the excessive claiming of deductions on behalf of clients;
  - failure to respond to ATO telephone calls and correspondences;
  - failure to act on substantiation requests by the ATO despite being granted extensions of time;
  - failure to respond to board correspondence;
  - failure to file clients' income tax returns
  - failure to pass on ATO correspondences to clients;
  - shifting of blame for delays by agents on to clients; and
  - staff and client complaints regarding failure to pass on refunds.

**Keywords:** *fit and proper; excessive claiming of deductions; failure to respond to Board and ATO correspondences; relationship with the Board and Commissioner; failure and delay in filing clients' income tax returns; misrepresentations to clients; failure to pass on ATO correspondences; failure to pass on tax refunds; shifting of blame onto clients and staff.*

### **Outline of relevant facts**

This case concerned a suspension of registration on the basis that the agents were not fit and proper persons to be registered. The Commissioner had commenced investigating the returns lodged by the tax agents on the basis that deduction claims made in these returns were higher than would otherwise have been expected for that type of return. The Commissioner placed the tax agents on a tax agents' program and required them to provide substantiation of a specific number of claims for deductions. The tax agents failed to cooperate with the Commissioner through repeatedly failing to respond to telephone calls, correspondence and directions to provide substantiation of claims for deductions in client returns.

In addition, the tax agents had failed to file client returns, failed to respond to client correspondence, had lied to clients about the status of their returns, failed to pass on correspondence from the Commissioner to their clients and failed to respond to correspondence from the board. One of the tax agents had given money to his clients to "keep his clients quiet, to stop them from complaining to any official body." The tax agents also attempted to blame clients and staff for the delay in filing their returns and responding to Commissioner requests for information.

The Tribunal extended the suspension periods applied to the tax agents.





# EXPLANATORY PAPER

## **Relevant principle/s established or confirmed by the case**

- A lack of cooperation with the Commissioner's officers and failure to treat the board with proper respect were considered to amount to a serious breach of the proper conduct of a tax agent business.
- The following matters may be considered to be misconduct as a tax agent such that an agent engaged in this conduct will not be a fit and proper person to prepare income tax returns or transact business on behalf of taxpayers in income tax matters:
  - failing to file tax returns within a reasonable time or in some cases at all;
  - failing to respond to telephone calls and correspondence;
  - failing to pass on correspondence from the Commissioner to clients;
  - misleading clients by informing them that returns had been filed with the Commissioner when they had not;
  - blaming clients for delays;
  - blaming staff for delays; and
  - providing money to clients to keep them quiet and to stop them from complaining to any official body.

## ***Toohy and Tax Agents' Board [2009] AATA 142***

### **Summary**

- Fitness and propriety of applicant for tax agent re-registration considered in relation to:
  - failure to lodge personal tax returns;
  - failure to respond to board requests to lodge outstanding returns,
  - applicant's conduct of case before the Tribunal;
  - public protection rationale of legislation; and
  - personal circumstances (e.g. depression, financial and marital difficulties).

**Keywords:** *fit and proper; personal income tax affairs; failure to respond to Board correspondences; relationship with the Board and Commissioner; conduct of case before the Tribunal; public protection rationale; personal issues.*

### **Outline of relevant facts**

This case involved an application to review a decision by a state board to refuse the applicant's re-registration. The finding on fitness and propriety was generally based on his failure to lodge personal tax returns and returns for three family entities for which he was responsible within the required timeframe for a period of years spanning 1992 to 2006. The lapses in lodgements generally ranged from three weeks to approximately 11 years. The Tribunal affirmed the board's decision to refuse re-registration.



# EXPLANATORY PAPER

## **Relevant principle/s established or confirmed by the case**

- A failure to lodge income tax returns on time constitutes a significant factor when evaluating an applicant's fitness and propriety to be registered in view of a clear public interest in tax agents upholding the standards applicable to the preparation and lodgement of returns.
- Communications between the applicant and the Commissioner may afford a relevant consideration in determining whether the applicant is fit and proper for registration.
- Delay or failure to lodge tax returns during the period of a stay granted by the Tribunal or whilst the applicant's case is being considered by the Tribunal or Federal Court is indicative of a lack of appreciation by the applicant of the significance of their omissions and therefore calls into question their fitness and propriety for registration.
- The giving of priority to clients' income tax matters does not to any degree absolve a tax agent from their obligations in respect of their personal tax affairs. Conversely, such a justification manifests personal disorganisation and/or a disregard for the regulatory and legal framework within which tax agents operate.

## **4. You must act lawfully in the best interests of your client**

### ***Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41***

#### **Summary**

- In relation to a manufacturer and distributor the High Court considered whether a fiduciary relationship existed and whether the manufacturer had breached their duty to the distributor.

**Keywords:** *fiduciary duty; fiduciary relationship; breach; disadvantage or vulnerability; reliance; distributorship agreement; importation of fiduciary duties into commercial transactions; relevance of terms of contract to existence of fiduciary relationship.*

#### **Outline of relevant facts**

Hospital Products Ltd (the Appellant) had entered into a distributorship agreement with the USSC (the respondent) under which the Appellant was to be the sole distributor of the respondent's products in Australia. The Appellant subsequently proceeded to produce copies of the respondent's products and filled orders for the respondent's products with the copies.

In this case, the High Court had cause to consider whether the Appellant owed a fiduciary duty to the respondent and whether that duty had been breached. As the relationship of manufacturer and



# EXPLANATORY PAPER

distributor was not an established fiduciary relationship, the High Court looked at the elements of a fiduciary relationship.

## **Relevant principle/s established or confirmed by the case**

- The critical feature of a fiduciary relationship is that the fiduciary undertakes to act on behalf of, or in the interests of, another person in the exercise of a power or discretion which will affect the interests of that other person in a practical or legal sense. [per Mason J]
- Underlying the concept of fiduciary obligation is the notion that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes that party to place reliance upon the other. This requires equitable protection, which acts upon the conscience of that other person. [per Dawson J]

## **Chan v Zacharia (1984) 53 ALR 417**

### **Summary**

- In relation to the dissolution of a partnership one of the issues considered by the High Court was whether a fiduciary relationship existed and whether the fiduciary duty had been breached.

**Keywords:** *fiduciary relationship; fiduciary duty; breach; partnership; dissolution; assets; constructive trust.*

### **Outline of relevant facts**

Both parties were doctors who were operating a medical practice in partnership with each other. The partnership was dissolved and, in the process of accounting for the assets of the partnership, a dispute arose in relation to the lease, specifically an option to renew, held by the partnership. The partners could not agree on if, when or how the option was to be exercised.

During this time, the appellant engaged in separate negotiations with the owner of the leased property which resulted in the owner offering the lease to the appellant individually and not for the partnership. The respondent brought an action against the appellant claiming, among other things, that the appellant had breached his fiduciary duty to the respondent as a partner.

## **Relevant principle/s established or confirmed by the case**

In considering the nature of fiduciary duties, the High Court held:

- The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instrument or not, but also from the course of dealing actually pursued by the firm'.



# EXPLANATORY PAPER

- The objective of this rule is to preclude the fiduciary from both being swayed by considerations of personal interest and actually misusing the fiduciary's position for personal advantage.
- The statement of the rule provided by Deane J, with whom Gibbs CJ, Brennan and Dawson JJ agreed, was:
  - A person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain:
    - (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between the fiduciary duty and the fiduciary's personal interest in the pursuit or possible receipt of such a benefit or gain; or
    - (ii) which was obtained or received by use or by reason of the person's fiduciary position or their opportunity or knowledge resulting from it.

## ***Re Woods (No. 1) and Migration Agents Registration Authority [2004] AATA 457***

### **Summary**

- In relation to their registration with the Migration Agent Registration Authority (MARA) a migration agent's fitness and propriety was considered in light of: misconduct in the Legal Practice Tribunal and whether this conduct also breached the MARA Code of Conduct.
- The AAT affirmed MARA's decision and found that the agent was not a person of integrity or was not a fit and proper person to give immigration assistance and had not complied with the MARA Code of Conduct. The AAT stated also that the standards of conduct required of migration agents were no less than the standards of conduct owed by lawyers.

**Keywords: *migration agent; breach of Code of Conduct; conflict of interest; vulnerability; fit and proper person; standard of conduct.***

### **Outline of relevant facts**

Woods was a solicitor and migration agent that, in the course of acting for the client in obtaining a visa to enter Australia, entered into a business arrangement with that client whereby a company part owned by Woods, was a shareholder in a business acquired by the client.

In undertaking this transaction, Woods and his associates engaged in conduct that amounted to misconduct in the Legal Practice Tribunal. The question before MARA was whether this conduct could support a determination that Woods was not a fit and proper person to be a migration agent.

### **Relevant principle/s established or confirmed by the case**

- As to whether the duty of a migration agent to their clients was any different to that of a lawyer to their clients, the Tribunal held that the standard of conduct of migration agents are no less



# EXPLANATORY PAPER

than the standard of conduct owed by lawyers. Here the Tribunal had regard to the objectives of the Act, the intention of Parliament as evident by the Minister's speech upon introduction of the Act, the numerous decisions of superior courts referring to the vulnerability of migration applicants and the duty generally of a professional seeking reward and, not insignificantly, the prescription of a Code of Conduct applicable to migration agents.

- The Tribunal did not consider it was sufficient for the applicant to submit that a lower standard of conduct ought to be expected of migration agents given the limited nature of the training and qualifications required compared to that of lawyers.

## 5. You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax agent or BAS agent

### *Bolkiah (Prince Jefri) v KPMG (a firm) [1999] 1 All ER 517*

#### Summary

- In relation to litigation, the use of Chinese walls within an accounting firm was considered and whether the actions of the accounting firm were enough to discharge their duty not to allow a conflict of interest to arise between the interests of multiple clients.

**Keywords:** *accountant; conflict of interest; information barriers; Chinese walls; consent.*

#### Outline of relevant facts

The defendant, KPMG, was an accounting firm that had been acting for BIA, the investment agency responsible for managing the general reserve fund of the Government of Brunei as auditors. The plaintiff had been the chairman of BIA until 1998. The plaintiff had engaged the defendant to provide litigation support services for 18 months from 1996 to 1998, during which time the defendant was entrusted with and acquired large amounts of confidential information concerning the assets and income of the plaintiff.

In 1998, the plaintiff was dismissed from his position of chairman at BIA and the Government of Brunei commenced an investigation into the affairs of BIA relating to the period that the plaintiff was the chairman. The Government engaged the defendant to assist in this investigation. The defendant did not consider that there was an unmanaged conflict of interest by agreeing to assist in the investigation as the defendant had established information barriers, referred to as 'Chinese walls' within those parts of the firm assisting with the BIA investigation.

The plaintiff's consent to assist in the investigation of BIA was never sought by the defendant. The plaintiff sought an injunction restraining the defendant from assisting with the investigation.



# EXPLANATORY PAPER

A key question for the House of Lords was whether the arrangements put in place by the defendant were sufficient to discharge their duty to not allow a conflict of interest to arise between the interests of multiple clients.

## **Relevant principle/s established or confirmed by the case**

- A person cannot, without the consent of both clients, act for one client while their partner is acting for another with a conflicting interest. The person's disqualification has nothing to do with the confidentiality of the client information. It is based on the inescapable conflict of interest which is inherent in the situation
- The court should grant an injunction restraining the defendant acting for the second client unless it is satisfied on the basis of clear and convincing evidence that effective measures have been taken to ensure that no disclosure will occur.
- A 'Chinese wall' will ordinarily involve a combination of the following:
  - the physical separation of various departments in order to insulate them from each other;
  - an ongoing educational programme to emphasise the importance of not improperly or inadvertently breaching duties to a client;
  - strict and carefully defined procedures for dealing with situations where it is considered that action may need to be taken that might create a risk of a breach of duty, in addition to the maintenance of proper records when this action is taken;
  - monitoring of compliance with the procedures; and
  - disciplinary sanctions where there has been a breach of any internal procedures.
- To be effective, these measures need to be 'an established part of the organisational structure of the firm, not created ad hoc and dependant on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work.'

## ***Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (ACN 113 114 832) (No 4) (2007) 241 ALR 705***

### **Summary**

- In relation to an allegation that Citigroup had breached the *Corporations Act 2001*, the Federal Court considered whether a fiduciary relationship existed between Citigroup and Toll and then whether Citigroup failed to manage a conflict of interest. The Court also considered whether a fiduciary relationship could be contracted out of.

**Keywords: *fiduciary relationship; fiduciary duty; Corporations Act 2001; conflict of interest; Chinese walls.***



# EXPLANATORY PAPER

## Outline of relevant facts

This case involved allegations by ASIC that Citigroup had breached its fiduciary relationship with Toll Holdings, a client, as Citigroup had profited from trading in shares in Patrick, the company for which Toll Holdings was making a takeover bid.

ASIC also alleged that Citigroup had failed to establish adequate arrangements for the management of conflicts of interest pursuant to section 912A (1) (aa) of the *Corporations Act 2001*.

In dismissing the application from ASIC, the Federal Court commented on the requirement to establish adequate arrangements for the management of conflicts of interest.

## Relevant principle/s established or confirmed by the case

- The requirement to establish adequate arrangements for the 'management' of conflicts of interest indicates that this requirement does not necessarily require that those subject to it eliminate conflicts of interest.
- Whether the given conflict management arrangements employed by an entity are adequate will be a question of fact to be determined on the basis of the circumstances of a particular case.
- In relation to ethical walls generally, this form of conflict management, to be adequate, will need to be an established part of the organisational structure of the business as opposed to an 'ad hoc' arrangement.

## 6. Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party

### *Re Collie and Deputy Commissioner of Taxation (1997) 45 ALD 556*

#### Summary

- In relation to a Freedom of Information application, the AAT considered whether certain documents should not be disclosed because they revealed information respecting the affairs of another person.

**Keywords:** *freedom of information; exemption; affairs of a person; Income Tax Assessment Act 1936.*

## Outline of relevant facts

This case involved an application to the Tribunal for review of a decision by the Tax Office to refuse access (in whole or part) to certain documents requested under the *Freedom of Information Act 1982* in the course of proceedings for recovery of amounts owing by the applicant.



# EXPLANATORY PAPER

The refusal of the request was based on a number of grounds for exemption contained in that Act, including that certain documents revealed information “respecting the affairs of another person” under section 16 (2) of the *Income Tax Assessment Act 1936*. In substituting the original decision, the Tribunal held that certain information fell within the non-disclosure provision in subsection 16 (2) and was thereby exempt.

## **Relevant principle/s established or confirmed by the case**

In applying subsection 16(2) to the information requested by the applicant, the Tribunal set out a number of guiding principles on the interpretation of the phrase “respecting the affairs of another person” in the context of that provision.

These principles are as follows:

- To respect the affairs of another person, it is not necessary that information be capable of identifying the person.
- The “affairs” of a person are to receive a broad interpretation. The ordinary meaning of “affairs” extends to the activities, business or concerns of a person.
- The interpretation of “affairs” is not affected by the status of the person, i.e. whether the affairs of an individual or corporate entity are under consideration.
- To be “respecting” the affairs of a person, information must, in a general sense, be in “relation, connection, reference (or) regard” to such affairs.

## ***Re Corrs Chambers Westgarth and Commissioner of Customs (1998) 53 ALD 769***

### **Summary**

- In relation to a Freedom of Information application, the AAT considered whether certain documents should not be disclosed because they revealed information respecting the affairs of another person

**Keywords:** *freedom of information; exemption; affairs of a person; Income Tax Assessment Act 1936.*

### **Outline of relevant facts**

This case related to a request for access under the *Freedom of Information Act 1982* to documents prepared and compiled as part of a taxation review of a corporate group and its subsidiaries. The documents comprised copies of correspondence with unrelated third parties, a private ruling in relation to an unrelated third party and a note regarding a tax agent’s request for advice concerning an unrelated third party.





# EXPLANATORY PAPER

The Commissioner refused access on the basis that they were exempted under that Act, in particular as they were “respecting the affairs of another person” pursuant to subsection 16(2) of the *Income Tax Assessment Act 1936*. The applicant applied to the Tribunal for review of the decision. The Tribunal varied the original decision in respect of certain documents, but otherwise held that the remaining were exempt under the ground contained in subsection 16(2).

## **Relevant principle/s established or confirmed by the case**

As in *Collie*, the case of *Corrs* highlighted a number of principles on the interpretation of the term “respecting the affairs of another person” under subsection 16(2) of the *Income Tax Assessment Act 1936*.

These principles are as follows:

- The “affairs” of a person need not be their taxation affairs, but may include the personal, professional or business concerns of the person.
- The relevant test for determining whether information should be protected on the basis that it respects the affairs of another person is whether or not the recipient or a person viewing the information would know more about the other person if the information were disclosed.
- In relation to both an individual or corporate entity, “matters” may include, for example, the amount the person earns, how the person makes money, interactions between the person and others and the relations of a corporation with its employees and the public.
- Information may fall within the scope of subsection 16(2) even if it is not identifying information or information respecting an identifiable person.

## ***Prince Jefri Bolkiah v KPMG (a firm) [1999] 1 All ER 517***

### **Summary**

- In relation to litigation, the use of Chinese walls within an accounting firm was considered and whether the actions of the accounting firm were enough to discharge their duty not to allow a conflict of interest to arise between the interests of multiple clients.

**Keywords: *accountant; duty of confidentiality; conflict of interest; information barriers; Chinese walls; consent.***



# EXPLANATORY PAPER

## **Outline of relevant facts**

This case related to confidential information about the assets and financial affairs of the former chairman of an investment agency (plaintiff), which were acquired and held by a firm of accountants retained to provide litigation support services in the course of private litigation in which the plaintiff was engaged whilst he was the chairman of an investment agency. Following the plaintiff's dismissal, the client of the investment agency (the Brunei government) commenced an investigation into the conduct of the affairs of the agency and for that purpose sought to engage the same firm of accountants previously retained by the plaintiff.

The firm accepted the retainer and, on account of the confidential information held, erected an information barrier around the department providing the service on behalf of the government. This barrier entailed arrangements to ensure that nobody in possession of the confidential information could undertake work on the investigation and steps to avoid the risk of that information later becoming available to the staff assigned to the investigation. However, the firm neither informed nor sought the consent of the plaintiff prior to accepting the assignment.

The firm submitted that a voluntary undertaking not to disclose or use information acquired in the course of the previous litigation work was sufficient to protect the plaintiff's interests. The plaintiff successfully appealed against a discharge of an injunction to restrain the firm from continuing the work on the basis that the firm had not discharged its duty to preserve the confidentiality of the information.

## **Relevant principle/s established or confirmed by the case**

The case of Prince Jefri establishes a number of principles relevant to the scope of the duty of confidentiality owed by accountants to their clients, in particular the measures required to be adopted to protect against disclosure of confidential information.

These principles are as follows:

- Akin to a solicitor's professional obligation, an accountant owes a duty to a former client to maintain the confidentiality of information acquired during the course of the professional relationship, which continues beyond the termination of that relationship.
- To comply with the duty, an accountant must actively preserve the confidentiality of the information and it is not sufficient merely to take reasonable steps to do so.
- The duty of confidentiality extends to an obligation not to misuse confidential information.
- Where an accountant is in receipt of confidential information, they must take effective measures to ensure not only against deliberate disclosure but that there was no risk of the information being unwittingly, inadvertently or negligently disclosed to other persons.



# EXPLANATORY PAPER

- A risk of subsequent disclosure may arise where, for example, the accountant later accepts instructions to act for another client with an adverse interest in a matter to which the confidential information is, or may be, relevant.
- Where confidential information is held by a section/department within a firm, it will be presumed (in the absence of cogent evidence to the contrary) that the information was being imparted across the firm.
- To eliminate the risk of disclosure of confidential information within sections of a firm, the firm must implement special measures as part of its broad organisational arrangements (as opposed to ad hoc measures).
- The principles of confidentiality apply equally to all forms of employment that involve confidential relationships between persons and clients with whom they do business.
- Following the termination of a professional relationship, the duty of confidentiality requires that there be no risk of disclosure (not merely an insubstantial one). However, to warrant restraint a risk must be a “real one, and not merely fanciful or theoretical.”

## 7. You must ensure that a tax agent service provided on your behalf is provided competently

### ***Su and Tax Agents’ Board of South Australia [1982] AATA 127***

#### **Summary**

- Fitness and propriety of registered tax agent considered in relation to:
  - convictions and fines relating to considerable delays and failure to lodge personal income tax returns;
  - failure to remit group tax instalments in his capacity as an employer;
  - failure to furnish return of company of which he was director; and
  - failure to disclose convictions in annual notices to the board.

**Keywords:** *fit and proper;\_cancellation of registration; convictions; personal income tax affairs; relationship with the Board and Commissioner.*

#### **Outline of relevant facts**

Refer to the facts outlined above under the case summaries for Principle 2 of the Code.



# EXPLANATORY PAPER

## Relevant principle/s established or confirmed by the case

- While particular acts or omissions by a tax agent may not be enough, viewed separately, to warrant removal from the register, it is possible for multiple less serious matters, if sufficient in number, to provide a basis for a board to determine that a tax agent was not fit and proper.
- In addition, the failure of a tax agent to comply with their own taxation obligations is relevant to fitness and propriety as it may result in adverse treatment of the clients of that agent and the Commissioner will have reduced confidence in the competence with which those returns were prepared.
- Certain offences are so inconsistent with performing the role of a tax agent that conviction for these offences will render a person not fit and proper to be a registered tax agent. The Tribunal highlighted offences involving tax evasion to be an example of such an offence.
- In relation to the failure to accurately complete the annual returns to the Board, someone incapable of accurately completing a simple yet important notice “is not a person of sufficient competence and integrity to hold the privilege of acting for clients in the preparation and lodgement of their income tax returns.”

## ***Pappalardo v Tax Agents' Board of Victoria [2003] AATA 990***

### Summary

- Fitness and propriety of registered tax agent considered in relation to:
  - failure to lodge personal income tax returns;
  - failure to adequately respond to board correspondence; and
  - lack of contrition and agent's submission of confused and misleading evidence to the Tribunal.

**Keywords:** *fit and proper; cancellation of registration; personal income tax affairs; failure to respond to Board correspondences; relationship with the Board and Commissioner; lack of contrition; submission of confused and misleading evidence.*

### Outline of relevant facts

This case involved an application to the Tribunal for review of a decision by a state board to cancel the tax agent's registration on the basis that he was not a fit and proper person to remain registered under Part VIIA of the ITAA 1936.

The board's finding on fitness and propriety was based on a number of matters, including his conviction of serious taxation offences for failing to lodge personal income tax returns for five consecutive years, his failure to respond (or adequately respond) to correspondences from the board and clients, his giving of confused and misleading evidence in relation to his non-lodgement of returns and his lack of contrition. The Board considered that the agent's behaviour created doubt



# EXPLANATORY PAPER

as to their ability to manage their affairs and showed disregard for the law and their obligations. The Board also considered that a person who is competent would have appreciated the importance of responding to a regulatory authority.

These matters were considered by the Tribunal to demonstrate a lack of competence and a failure to appreciate the obligations required to be adhered to, to maintain registration as a tax agent.

The Tribunal affirmed the board's decision to cancel the applicant's registration.

## **Relevant principle/s established or confirmed by the case**

- The inability of a tax agent to manage their own tax affairs (such as timely and accurate lodgement of tax returns) indicates a lack of competence and/or disregard for the law and hence reflects adversely on their fitness and propriety to perform the functions of a tax agent.
- A failure to comply with a timeframe specified in a final notice provides a strong indication that the tax agent is not a fit and proper person to be registered.
- Inaccurate or misleading statements/submissions to a board or the Tribunal can in some circumstances reflect an inability to clearly think about the relevant issues and consequently may be relevant to evaluating competence and fitness and propriety in general.
- Failure to return board and client correspondences reflects adversely on fitness and propriety to be registered as it demonstrates a serious neglect of the business of a tax agent and a lack of appreciation of the significance of completely and promptly responding to requests from a regulatory authority.
- The display of contrition or insight by a person into the implications of their wrongdoing such that it can be established that there will be no recurrence of the conduct in future is relevant in determining whether they are fit and proper to exercise the functions of a tax agent.

## **8. You must maintain knowledge and skills relevant to the tax agent services you provide**

### ***Leo Comino and Tax Agents Board of New South Wales 2009 AATA 766***

#### **Summary**

- Fitness and propriety of applicant for tax agent re-registration considered in relation to:
  - failure to lodge quarterly BAS;
  - prior convictions for failure to lodge income tax returns; and
  - failure to lodge personal tax returns;



# EXPLANATORY PAPER

**Keywords:** *fit and proper; personal income tax affairs; whether special circumstances exist; meaning of 'special circumstances'; diligence and professionalism.*

## **Outline of relevant facts**

This was a review by the Tribunal of a decision by the Tax Agents' Board of NSW to refuse an agent's application for re-registration on the ground that the agent was not fit and proper person to prepare income tax returns. The Tribunal affirmed the board's decision to refuse the application.

Among the other facts in this case, the applicant had five previous convictions for failure to lodge quarterly BAS's in 2006 and 2007. The applicant also had two prior convictions for failing to lodge income tax returns and was late in lodging his personal income tax returns in four different tax years.

## **Relevant principle/s established or confirmed by the case**

- It is essential that a tax agent keep up to date with the changes in the income tax laws.
- Maintaining this knowledge requires a level of diligence and professionalism.
- Given the importance of a tax agent maintaining knowledge and skills in the areas within which they provide tax agent services, an admission by an agent that they are unable to keep abreast of these changes reflects adversely on the agent's fitness to provide those services competently.
- At [34] the Tribunal said:
  - "Mr Comino acknowledged that he had experienced problems with the introduction of the GST and that this had been a factor in the late lodgement of business activity statements. Given the importance of tax agents keeping up to date with the relevant law in order to fulfil their responsibilities in properly advising clients, Mr Comino's acknowledgement, while a frank admission, does not give the Tribunal confidence in his ability to keep abreast of changes in the law, especially since the problems with business activity statements occurred in 2006/7, and the introduction of GST took place in 2000."



# EXPLANATORY PAPER

## 9. You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing that you are doing on behalf of the client

***Hawkins v Clayton [1988] HCA 15; (1988) 164 CLR 539***

### **Summary**

- The High Court considered whether the legal firm had breached its duty of care to the executor of a testatrix estate for their failure to take positive steps to inform the executor of the contents of the will, a document which only the solicitor was aware of.

**Keywords:** *solicitor; duty of care; standard of care; reasonable care; damages.*

### **Outline of relevant facts**

This case involved an appeal from a decision of the New South Wales Court of Appeal to dismiss an action for breach of an alleged contract and a duty of care owed by a firm of solicitors (respondent) to the appellant as executor of a testatrix's estate. The action arose following a failure by the respondent to take positive steps to locate and disclose to the executor the existence of the will of the testatrix during a period of more than six years after her death. The failure resulted in such losses as the deterioration of the house property (being the principal asset in the estate) and the loss of rent and income that might have otherwise been derived from the house.

The High Court allowed the appeal on the basis that the respondent had, as a matter of fact, breached its duty of care to the appellant in failing to take such positive steps to avoid the damage.

In arriving at its decision, the Court placed particular emphasis on the responsibility undertaken by the respondent for the custodianship of the testatrix's will after her death and the foreseeability of a risk of damage if the respondent simply retained the will.

### **Relevant principle/s established or confirmed by the case**

- The general standard of care owed by a professional to a client is that of "due care, skill and diligence." This does not require an extraordinary degree of skill and competence, but rather, that the professional exercise the competence and skill that is "usual" among qualified and careful persons in the practice of the profession.
- Reasonable care means what is reasonable in the circumstances. This will depend on a range of factors including the scope of the services provided and the client's level of professional knowledge and experience.



# EXPLANATORY PAPER

## ***Martinazzo and Commissioner of Taxation [2009] AATA 61***

### **Summary**

- In relation to an administrative penalty imposed by the Commissioner of Taxation, the Tribunal considered whether the tax agent's client's false and misleading statement to the Commissioner was caused by a failure to take reasonable care on the part of the agent.

**Keywords:** *tax agent; penalty; standard of care; failure to take reasonable care; knowledge, education, experience and skill of agent.*

### **Outline of relevant facts**

This case concerned the question of whether amounts purportedly paid to the Applicant as "advances in the nature of loans" were in fact income and should have been reported as such in his tax return. The ATO had imposed an administrative penalty under the *Tax Administration Act 1953* for making a false and misleading statement to the Commissioner. The amount of that penalty was determined by whether the shortfall in tax was caused by a failure to take "reasonable care to comply with a taxation law" on the part of the taxpayer or the registered tax agent.

The matter went on appeal to the AAT. In this case the Tribunal found that the agent should clearly have included the amounts in assessable income.

On this and other grounds the decision to impose the penalty was therefore affirmed.

### **Relevant principle/s established or confirmed by the case**

- To take reasonable care, in the context of making a statement to the Commissioner, means giving appropriate serious attention to complying with the obligations imposed under a taxation law. It requires an entity to take the same care in fulfilling their tax obligations that could be expected of a reasonable ordinary person in their shoes.
- The standard of care is measured objectively (the actual intentions of the entity are not relevant) but takes into account subjective factors such as the entity's knowledge, education, experience and skill.
- A professional person with specialist tax knowledge will be subject to a higher standard of care that reflects the level of knowledge and experience a reasonable person in their circumstances will possess.
- The appropriate benchmark is the level of care that would be expected of an ordinary and competent practitioner practising in that field and having the same level of expertise.





# EXPLANATORY PAPER

## *Reeders v Federal Commissioner of Taxation 2001 ATC 2334*

### Summary

- In relation to a disallowed claimed deduction and penalty imposed by the Commissioner of Taxation, the Tribunal considered whether the taxpayer entity and tax agent had demonstrated reasonable care in relation to the claim.

**Keywords:** Claimed deduction; penalty; reasonable care; knowledge, education, experience and skill of agent.

### Outline of relevant facts

In this case the Commissioner had disallowed a claimed deduction for self education expenses, being the cost of obtaining a pilot's licence. The Commissioner also imposed a penalty under s226G of the ITAA 1936 which allowed a penalty to be imposed where the tax shortfall had been caused by the failure of the taxpayer or of a registered tax agent to take reasonable care to comply with the Act or the regulations and the taxpayer was therefore liable to pay the penalty.

In this case the taxpayer objected to the penalty and the case came before the AAT sitting as the Small Taxation Claims Tribunal.

The taxpayer had consulted an accountant before lodging the claim for the deduction and the tax agent had made some inquiries before advising that the deduction was allowable. One of the questions before the Tribunal was whether there was any indication of a want of care by the tax agent.

### Relevant principle/s established or confirmed by the case

- More might be expected of a tax agent than a taxpayer completing his or her own return.
- The tax agent must act reasonably having regard to the agent's knowledge, education, experience and skill.
- Making reasonable inquiries of a client to determine the nature of certain claims for deductions made by the client and the basis on which those claims were being made would be considered taking reasonable steps to ascertain a client's state of affairs.



# EXPLANATORY PAPER

## 10. You must 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

*Hawkins v Clayton* [1988] HCA 15; (1988) 164 CLR 539

### Summary

- The High Court considered whether the legal firm had breached its duty of care to the executor of a testatrix estate for their failure to take positive steps to inform the executor of the contents of the will, a document which only the solicitor was aware of.

Keywords: *solicitor; duty of care; standard of care; reasonable care; damages.*

### Outline of relevant facts

Refer to the facts outlined above under the case summaries for Principle 9 of the Code.

### Relevant principle/s established or confirmed by the case

Whilst *Hawkins* provides direct authority for the content of a solicitor's duty to their client, a number of principles on the standard of care required to be exercised by professionals generally can be distilled from the case.

These principles are as follows:

- The general standard of care owed by a professional to a client is that of "due care, skill and diligence." This does not require an extraordinary degree of skill and competence, but rather, that the professional exercise the competence and skill that is "usual" among qualified and careful persons in the practice of the profession.
- Depending on the circumstances of the case, a duty of care may extend beyond a mere obligation to take reasonable care in performing a function which, in the absence of such care, might cause loss to the client.
- Circumstances that are relevant in determining the scope of a duty and whether an obligation to take positive and prompt steps should be imposed include the following:
  - the nature of the work undertaken;
  - the assumption of active responsibility by the person undertaking the work for the matter for which the steps are required;
  - the general nature and contents of the agreement between the parties;
  - the purpose for the undertaking accepted by the person;



# EXPLANATORY PAPER

- the nature of the foreseeable consequences arising from a failure to take the steps; and
  - contemporary community standards (particularly where liability for a breach would unduly outweigh the risk that a person undertaking the work could reasonably be expected to bear).
- The standard of care owed by a person performing professional work to a client extends beyond that contained in the express or implied terms of their agreement.

## ***Keitac Pty Ltd ATF McNamara Property Development Trust and Commissioner of Taxation [2007] AATA 1206; (2007) 68 ATR 61***

### **Summary**

- In relation to a penalty imposed by the Commissioner of Taxation for an input tax credit in a BAS, the Tribunal considered whether the tax agent and accountant had taken reasonable care, when acting for their client.

**Keywords:** *tax agent; input tax credit penalty; whether penalty was lawfully imposed; whether penalty should be remitted; standard of care; reasonable care.*

### **Outline of relevant facts**

*Keitac* involved an application to the Tribunal for review of an assessment by the Commissioner of Taxation of a penalty for failure to take reasonable care to comply with a taxation law.

The matter arose in relation to a purchase of land, in respect of which the applicant as purchaser engaged accountants and tax agents to prepare the BAS. Following the preparation of a draft contract which had been viewed and advised on by the accountants, a condition was mistakenly inserted (of which the applicant was unaware) which disentitled it from an input tax credit. The accountants then requested the “key terms” of the contract and the applicant only provided the first page (without the condition). As the accountants had provided earlier advice on the contract, they thought it unnecessary to request the remainder before attesting to it. As a result, a credit was claimed in relation to the purchase.

The applicant successfully claimed for a reduction of the penalty on the basis of a lack of reasonable care by the accountants and tax agents.

### **Relevant principle/s established or confirmed by the case**

*Keitac* established the following principles on the interpretation of “reasonable care” in the context of work undertaken by accountants and tax agents:



# EXPLANATORY PAPER

- The greater the value of a transaction, the higher the standard of care that may be required, in particular, the level of enquiries required in following up the provision of information by a client.
- “Reasonable care” imposes an obligation on an accountant or tax agent to follow up or pursue ostensibly inadequate responses to requests for information.

## 11. You must not knowingly obstruct the proper administration of the taxation laws

### ***Scanlan v Swan* 82 ATC 4402**

#### **Summary**

- In relation to a conviction for obstructing or hindering an officer in the discharge of their duties under the ITAA 1936, the District Court considered whether a temporary denial of access on reasonable grounds constitutes an obstruction.

**Keywords: *Income Tax Assessment Act 1936; obstruction; temporary denial of access; reasonable grounds; reliance on common law right.***

#### **Outline of relevant facts**

This case related to an appeal to the District Court of Queensland from a conviction of the appellant in the Magistrates Court of the offence under section 232 of the ITAA 1936 of obstructing or hindering an officer in the discharge of their duties under that Act or the *Income Tax Regulations 1936*.

The conviction arose after two officers of the Commissioner sought access to documents in the appellant’s business premises in the course of an interview with the appellant pursuant to section 263 of the ITAA 1936, which facilitates full and free access to all buildings, places, books, documents and other papers (and the making of copies) for the purposes of that Act. As one of the officers attempted to have access to a file on the appellant’s desk, the appellant placed his hand on the file to prevent access by the officer.

The appellant argued against the finding in relation to section 232 on the basis that he was exercising a common law right, being the right to obtain legal advice. The District Court allowed the appeal and set aside the conviction and other orders made by the magistrate.



# EXPLANATORY PAPER

## Relevant principle/s established or confirmed by the case

The District Court summarised the following principles on the meaning of the word “obstruct” in the context of the exercise by officers of their statutory duties and powers:

- “Obstruction” is a word of common and everyday usage in the English language. Therefore, an obstruction” in a given case is not capable of specific definition but must be measured in accordance with relevant tests.
- A temporary denial of access, on reasonable grounds, will not amount to an obstruction.
- What constitutes a temporary denial of access and reasonable grounds must be determined according to all the circumstances of the case.
- The assessment of whether something amounts to an obstruction is one of reasonableness.
- In general, a short delay for the purpose of obtaining legal advice may be considered a reasonable ground. However, this result may not be reached in every single case and all will depend on the relevant circumstances.
- Reliance on a common law right is a relevant factor in determining whether a person has acted reasonably. This does not require the assertion of a common law right before the issue of reasonableness can be raised and considered.
- Conversely however, there may be reasonable grounds not involving the assertion of a common law right. By the same token, the assertion of a common law right may, in some circumstances, be considered unreasonable and amount to an obstruction (e.g. where a person claiming a right to obtain legal advice is “spurious and unreasonable” and their conduct in asserting the right is “truly obstructive”).

## ***Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots (1991)*** **101 ALR 407**

### Summary

- In relation to convictions under the *Industrial Relations Act 1988* for hindering or obstructing officers from carrying out an inspection of certain records, the Federal court considered the meanings of ‘hinder’ and ‘obstruct’.

**Keywords:** *industrial law; inspection and interview by authorised officer of organisation; whether deferral of decision to allow inspection amounts to hindrance or obstruction; temporary denial of access.*



# EXPLANATORY PAPER

## Outline of relevant facts

This case related to an appeal to the Federal Court from a decision of a single judge convicting the appellant of two offences under section 306(a) of the *Industrial Relations Act 1988* of hindering or obstructing two authorised officers of the respondent from carrying out an inspection of certain records for the purpose of ensuring observance of certain awards in accordance with that Act.

The conviction arose after the officers who attended the appellant's premises were told by an officer of the appellant that their "application" to enter and inspect the records would be considered but that no response would be granted that day.

The Federal Court dismissed the appeal on the basis that the appellant's action amounted to a hindrance or obstruction within the terms of the Act.

## Relevant principle/s established or confirmed by the case

The Federal Court outlined the following principles on the meanings of "hinder" and "obstruct" in the context of the administration of a statutory function:

- An obligation to not hinder or obstruct an officer's exercise of their powers of access does not imply a general positive duty to provide assistance to exercise the power.
- A person's action/s may amount to an obstruction even if no positive conduct is involved.
- A temporary refusal of access may amount to an obstruction in circumstances where it is apparent that access will be denied for an indefinite period or where no indication is given of when the officer/s will be informed whether or not access will be granted.
- The possibility that a person may need to obtain legal advice before permitting access may not be raised as an excuse for an obstruction if the relevant statute does not provide a right to defer access pending legal advice or if the person does not claim professional privilege.

## **12. You must 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**

***Re Warne and Defence Force Retirement and Death Benefits Authority (1989) 18 ALD 662***

### Summary

- In relation to a determination of eligibility for an invalidity benefit the Tribunal considered the phrase 'materially aggravated'.



# EXPLANATORY PAPER

**Keywords:** *invalidity benefit; materially connected; whether condition was not materially aggravated by service.*

## **Outline of relevant facts**

This case involved consideration of section 28 (1) of the *Defence Force Retirement and Death Benefits Act 1973*. Specifically, this case considered the meaning of the words 'materially aggravated'. In the context of the TASA it provides an example of the interpretation of when something is 'materially' connected with something else.

## **Relevant principle/s established or confirmed by the case**

- For something to be 'materially' connected with something else, a connection is required between those things that is of substance rather than being so tenuous as to be immaterial or ignored.

## **14. You must respond to requests and directions from the Board in a timely, responsible and reasonable manner**

***Re Cowlshaw and Ors and Tax Agents' Board of Queensland [1999] AATA 412***

### **Summary**

- Fitness and propriety of registered tax agents considered in relation to:
  - the excessive claiming of deductions on behalf of clients;
  - failure to respond to ATO telephone calls and correspondences;
  - failure to act on substantiation requests by the ATO despite being granted extensions of time;
  - failure to respond to board correspondence;
  - failure to file clients' income tax returns;
  - failure to pass on ATO correspondences to clients;
  - shifting of blame for delays by agents on to clients; and
  - staff and client complaints regarding failure to pass on refunds.

**Keywords:** *fit and proper; excessive claiming of deductions; failure to respond to Board and ATO correspondences; relationship with the Board and Commissioner; failure and delay in filing clients' income tax returns; misrepresentations to clients; failure to pass on ATO correspondences; failure to pass on tax refunds; shifting of blame onto clients and staff.*



# EXPLANATORY PAPER

## Outline of relevant facts

Refer to the facts outlined above under the case summaries for Principle 2 of the Code.

## Relevant principle/s established or confirmed by the case

- A lack of cooperation with the Commissioner officers and failure to treat the board with proper respect amount to a serious breach of the proper conduct of a tax agent business.
- The following matters may be considered to be misconduct as a tax agent such that an agent engaged in this conduct will not be a fit and proper person to prepare income tax returns or transact business on behalf of taxpayers in income tax matters;
  - failing to file tax returns within a reasonable time or in some cases at all;
  - failing to respond to telephone calls and correspondence;
  - failing to pass on correspondence from the Commissioner to clients;
  - misleading clients by informing them that returns had been filed with the Commissioner when they had not;
  - blaming clients for delays;
  - blaming staff for delays; and
  - providing money to clients to keep them quiet and to stop them from complaining to any official body.

## ***Pappalardo v Tax Agents' Board of Victoria [2003] AATA 990***

### Summary

- Fitness and propriety of registered tax agent considered in relation to:
  - failure to lodge personal income tax returns;
  - failure to adequately respond to board correspondence; and
  - lack of contrition and agent's submission of confused and misleading evidence to the Tribunal.

**Keywords:** *fit and proper; cancellation of registration; personal income tax affairs; failure to respond to Board correspondences; relationship with the Board and Commissioner; lack of contrition; submission of confused and misleading evidence.*

## Outline of relevant facts

Refer to the facts outlined above under the case summaries for Principle 7 of the Code.





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## **Relevant principle/s established or confirmed by the case**

- Inaccurate or misleading statements/submissions to a board or the Tribunal can in circumstances reflect an inability to clearly think about the relevant issues and consequently may be relevant to evaluating competence and fitness and propriety in general.
- Failure to return board and client correspondences reflects adversely on fitness and propriety to be registered as it demonstrates a serious neglect of the business of a tax agent and a lack of appreciation of the significance of completely and promptly responding to requests from a regulatory authority.