



Article Summary

Are you being served? The new regime for tax agents

Focus and scope

In November 2008 the Australian Government introduced into Parliament the long awaited Tax Agent Services Bill 2008 (the Bill), the provisions of which are intended to provide a new statutory regime to govern the registration of tax practitioners, and provide oversight of the tax advice industry. The Bill follows the release of two exposure drafts and wide consultation with professional associations, practitioners and industry.

In this paper, Cynthia Coleman and Rodney Fisher provide an outline of the approach taken in the Bill, noting those areas where there has been a change in the legislative approach following previous submissions and consultation on the exposure drafts, and highlighting those areas of the Bill which may still prove contentious.

Background

The Tax Agent Services Bill 2008 proposes a new national scheme for registration and oversight of tax practitioners, including tax agents and BAS service providers. The Bill has two underlying themes; namely, consumer protection for taxpayers, and regulation of professionals providing tax-related services to the public. Its key features include the creation of a national Tax Practitioners Board (to replace the present State-based Tax Agents' Boards), a statutory body that will be independent of the Australian Taxation Office (ATO) and other bodies, with responsibility for registration and oversight of tax practitioners; extension of the definition of tax practitioner to a wider range of service providers, including tax agents and BAS service providers; registration requirements incorporating the "fit and proper person" test, with minimum education and experience requirements, and registration of "specialist" practitioners;

the introduction of a statutory Code of Professional Conduct governing ethical and professional standards for tax practitioners, with sanctions for breach of the code; and the provision of a safe harbour from certain administrative penalties for taxpayers who engage a tax practitioner.

The paper follows the legislative approach taken by the Bill, and discusses each of these key features in detail.

Impact

In the authors' opinion, the Bill addresses several concerns of the profession relating to prior legislation regulating tax agents, including establishment of a single national Board, independence of the Board from the ATO, professional registration requirements for BAS agents, and maintenance of professional standards both as to character and education. The Code of Conduct is a reflection of more recent concerns with ethical behaviour. The new definition of "tax services" and "BAS services" should meet their stated aim of being more flexible than the previous law in dealing with changed circumstances.

Some issues, however, remain controversial. These include the fact that lawyers do not need to be registered in order to provide tax or BAS services, and the operation of the safe harbour provisions.

Legislation, cases, rulings discussed

- Tax Agent Services Bill 2008 (Cth)
- Tax Agent Services (Consequential and Transitional Provisions) Bill 2008 (Cth) (ED)
- *Income Tax Assessment Act 1997* (Cth), s 995-1

- *Income Tax Assessment Act 1936* (Cth), s 251M, 263, 264
- *Crimes Act 1914* (Cth), s 4AA
- *Stasos v Tax Agents' Board of New South Wales* (1990) 21 ATR 974
- *Hughes and Vale Pty Ltd v State of NSW (No 2)* (1955) 93 CLR 127
- *Re Su and the Tax Agents' Board (SA)* (1982) 13 ATR 192
- *Re Shaheed and Tax Agents' Board of New South Wales* (2006) 64 ATR 1145
- *Shaheed v Tax Agents' Board of New South Wales (No 2)* [2008] FCA 763
- *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321
- *Walker v Hungerfords* (1987) 19 ATR 745
- *Doug Sim Enterprises Pty Ltd v Patrick Wan & Co* (1987) 19 ATR 758
- *Sacca v Adam and R Stuart Nominees Pty Ltd* (1983) 14 ATR 287
- *Jindi (Nominees) Pty Ltd v Dutney* (1993) 26 ATR 206.



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Are you being served? The new regime for tax agents

Despite a long gestation period and ongoing consultation, the *Tax Agent Services Bill 2008*, which contains provisions designed to regulate and control tax agent registration and the broader tax service and tax advice industry, is still generating discussion and controversy.

This article examines the development of the regulatory provisions through the Exposure Drafts in 2007 and 2008, and highlights concerns which remain with parts of the proposed regime.



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Introduction¹

In November 2008 the Government introduced into Parliament the long awaited Tax Agent Services Bill 2008 (**the Bill**), the provisions of which will provide the new statutory regime to govern the registration of tax practitioners, and provide oversight of the tax advice industry. The introduction of the Bill followed consultation with professional associations, practitioners and industry on the previous Exposure Draft legislation for the Tax Agent Services Bill 2008 (**2008 ED**), and related legislation, in May 2008. The release of the 2008 ED itself followed submissions and consultation which occurred after the release of the previous ED Tax Laws Amendment (Tax Agent Services) Bill 2007 (**2007 ED**).

This paper provides an outline of the approach taken in the Bill, noting those areas where there has been a change in the legislative approach following previous submissions and consultation on the 2007 ED and 2008 ED, and highlighting those areas of the Bill which may still prove contentious.

Outline of legislative approach

The rationale underlying the proposed regime is that, as an increasing proportion of individuals and businesses make use of tax agent services, there needs to be a regime to ensure that services provided

meet both ethical and professional standards. The new regime, replacing the existing State-based Tax Agents' Boards, would provide updated and comprehensive provisions applying to a wider range of service providers.

In general terms the key features in the Bill include:

- creation of a national Tax Practitioners Board with responsibility for registration and oversight of tax practitioners;
- a wider range of service providers encompassed within the definition of tax practitioner, including tax agents and extending to include BAS service providers;
- registration requirements incorporating the "fit and proper person" test, with minimum education and experience requirements, and registration of "specialist" practitioners;
- introduction of a statutory Code of Professional Conduct governing ethical and professional standards for tax practitioners, with sanctions for breach of the code; and
- providing a safe harbour from certain administrative penalties for taxpayers who engage a tax practitioner.

This paper follows this legislative approach, outlining and examining each of these above elements in the discussion that follows.

Tax Practitioners Board

In a central pillar of the new proposals, the Bill provides for the establishment, functions and powers of a central Tax Practitioners Board, replacing the State Tax Agents' Boards. While the State Boards operated under the same law, the independent administration and operation of each was seen as creating the potential for inconsistencies between States

in relation to registration, complaint procedures and disciplinary matters. Additionally, the State-based Boards had no requirement for accountability by way of reporting to Parliament, and there was concern that a perception had grown of a lack of independence of State Boards from the ATO. It is these issues which the Bill has sought to address.²

The Tax Practitioners Board is to be established as a statutory body within the Treasury portfolio, and will be vested with functions and powers to make it independent of the ATO and other bodies. The Board is to comprise a Chair and at least six members, with the Minister having responsibility for appointing the Board and the Chair.³ A Board member may also be removed by the Minister for offences nominated in the ED.⁴

Functions to be assigned to the Board under the Bill include:

- administering the system for registration of tax practitioners;
- investigating matters relating to registration and imposing sanctions for non-compliance with the Code of Professional Conduct;
- issuing guidelines to assist in achieving these functions;
- other functions as conferred; and
- anything incidental or conducive to performance of its functions.

To achieve these functions the Board would be granted power to do all things necessary or convenient in connection with the performance of the functions, with this wide grant of power intended to provide the Board with a degree of flexibility in the administration of the registration and oversight regime.⁵

The Board would be provided with administrative support made available by the Commissioner from within the ATO.⁶

A major concern in submissions on the 2007 ED had been the independence of the Tax Practitioners Board from the ATO. A significant shift in approach in the 2008 ED to address the independence concern had been the introduction of the new proposals in the Tax Agent Services Bill, as separate and distinct legislation, rather than introducing the proposals as amendments to the *Taxation Administration Act 1953 (TAA)*, which had been the approach adopted in the 2007 ED. In this way the Board, rather than the Commissioner, would have general administration of this separate statutory regime,⁷ which was seen as enhancing the independence of the Board.

Additionally the 2008 ED provided that the chair of the Board could not be an officer of the ATO.⁸

While the issue of independence of the Board from the ATO had been addressed by these amendments in the 2008 ED, submissions made in relation to the 2008 ED still expressed concern as to the independence of the Board. In particular, reservations were raised that administrative and secretariat support would be provided by the ATO, and that no statutory limit had been placed on the number of ATO officers who could be appointed to the Board at any time. These factors were seen as creating the potential for conflicts of interest which could, at worst, compromise the operational and functional independence of the Board.

Following these submissions, further changes have been made to the Bill introduced to provide practitioners and professional associations with a greater degree of reassurance that the Board will operate independently from the ATO.

While the Board would still rely on the ATO for administrative support, the new proposals attempt to ensure the requisite degree of decision making independence from the ATO by providing that the Board would be funded via a Special Account through the annual appropriation to the ATO. This would allow the Board's funding to be quarantined within the ATO's funding.⁹

The Board would sit within the ATO, as this is seen as an appropriate functional fit for the Board in its establishment phase, although the EM acknowledges that the service relationship between the Board and the ATO in terms of resourcing, technical support and legal support remains to be determined by agreements between the parties.¹⁰

The Government has also given an undertaking that the initial arrangement would be subject to a post-implementation review within three years of implementation. This review would include, among other matters, whether the governance arrangements remain appropriate and satisfactory, or whether the continued association with the ATO had impaired the independence of the Board in any way.¹¹

Such a review is not a statutory requirement, and would appear to represent a compromise to attempt to ensure independence from the ATO, without the cost and administrative obligations that would arise for the Government from establishing a separate new bureaucracy.

“the underlying concept of consumer protection rather than just administrative control has been maintained in the new Bill.”

Further changes to the statutory requirements for composition of the Board also seek to establish independence from the ATO.

While the 2008 ED precluded the Chair of the Board from being an ATO officer, the Bill goes further, precluding the Chair, or acting Chair, from holding any office or appointment under Commonwealth law, or being appointed or engaged under the *Public Service Act*.¹² While not having any legislative status, the EM suggests that it would be unusual for more than two ATO officers to be appointed to the Board,¹³ although there need be no ATO officers on the Board.

The Bill also places restrictions and obligations on Board members, and these had not been required by the 2008 ED. A restriction is proposed on outside employment for Board members, with full-time members requiring Ministerial approval for paid outside employment, and part-time members being permitted paid outside employment that would not conflict with, or have the potential to conflict with, the member's performance of duties on the Board.¹⁴

All Board members would be required to disclose any direct or indirect pecuniary interests that the member had or acquired

that would or may conflict with the performance of the Board's functions.¹⁵

These additional restrictions and obligations must be seen as acting to further enhance the perception of independence, and actual independence, of the Board, from both the ATO and other outside influences.

In addition to its role of registration of tax practitioners, the functions of the Board as outlined above include investigatory and punitive powers. The Board would be charged with investigating not only applications for registration, but also conduct of a practitioner that may breach the statutory regime, and other matters prescribed by legislation. The Board would have discretion as to the procedure

in an investigation, not be bound by the rules of evidence, and could require persons to attend and give evidence, with no privilege against self-incrimination.¹⁶

The powers of the Board in undertaking investigations have been strengthened in the Bill, with the addition of further powers not included in the 2008 ED. The Board would have legislative power to require the provision of information or the production of documents or things, with a failure to comply constituting an offence under the TAA.¹⁷ Additionally, the Board may retain the document or thing produced for the period necessary for the purposes of the investigation, although reasonable access must be allowed for the person who would otherwise have possession.¹⁸

This legislative access power must be seen as a strong power that the Board holds, and may be seen as akin to the access powers of the Commissioner.¹⁹

There had been some concern raised by the proposal in the 2008 ED to allow the Board a discretion in the procedure to follow in an investigation, with the suggestion that the statutory regime should provide a more formalised process, possibly by the use of formalised investigating subcommittees, with ATO

officers not able to serve on these.²⁰ While the Bill still provides that the Board has discretion as to how to undertake investigations, the EM leaves open the possibility that the Board may choose to publish guidelines on the conduct of investigations, for the information of members and tax practitioners.²¹

There is a limit on the time for an investigation, with the Board required to make a decision within six months after commencing the investigation, or a longer period if the Board considers it necessary. If a decision is not made within that time, then the Board is deemed to have decided to take no further action in relation to the investigation.²²

Practitioners subject to investigation must be advised by the Board, and following an investigation on registration the Board must make a decision as to registration. Outcomes of investigations into other matters may involve: no action by the Board; cancellation of registration; or the Board seeking a Federal Court pecuniary penalty or injunction.²³

Current and previous Board members are granted immunity from legal actions in connection with activities undertaken as members of the Board.²⁴

As noted above, State-based Boards lacked a requirement for accountability to Parliament, and this shortcoming has been remedied with the Bill requiring an annual report from the Chair of the Board to the responsible Minister for tabling in Parliament. Details of registered tax practitioners, and practitioners whose registration had been terminated, would be required to be available on the Board website.²⁵

It may be expected that this greater degree of transparency and accountability would assist in the perception of the Board as an entity separate and distinct from the ATO.

Scope of tax practitioner

The underlying concept of consumer protection rather than just administrative control has been maintained in the new Bill. Tax agents are required to be registered if they wish to provide tax agent services for a fee or be involved in other related issues.²⁶ This dates from the recommendations of the Ferguson Commission which led to the enactment of the original Federal legislation.²⁷

The Dictionary Div 90 of the Bill contains two key definitions.

Registered tax agents and BAS agents means entities that are registered under this Act as registered tax agents and entities that are registered under this Act as registered BAS agents.

There is currently no requirement for BAS providers to be registered.

A note to the definition provides that in most cases, an entity is taken not to be a registered tax agent if the entity is suspended from providing tax agent services under s 30-25.

Section 90-5 of the Bill deals with the meaning of tax agent service:

(1) A tax agent service is any service :

(a) that relates to:

(i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or

(ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise under a taxation law; or

(iii) representing an entity in their dealings with the Commissioner; and

(b) that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:

(i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law;

(ii) to claim entitlements that arise, or could arise, under a taxation law.

(2) A service specified in the regulations for the purposes of this subsection is not a tax agent service.

There is a similar definition of BAS service. In contrast to the former legislation which contained a list of services for which unregistered entities were prohibited from charging a fee, the definitions are intended to be wide in scope, express general principles and be flexible enough to encompass services which may arise in the future.²⁸ BAS agents are also required to be registered because they are now

an integral part of the tax system and registration will ensure that they will be subject to suitable ethical and professional standards.²⁹ BAS services only include services which deal with BAS provisions and involve representing an entity in their dealings with the Commissioner in relation to those provisions. Entering data, paying tax and record keeping are administrative duties and do not fall within the definition of BAS services.³⁰

Taxation law is defined with reference to the definition in subs 995-1(1) ITAA97. This is an expansive definition so the Bill contains a regulation-making power. This is to give Parliament flexibility to deal with changed circumstances and specify services which do not form part of "tax agent services". There is a similar provision for BAS services.³¹

Registration of tax agents

Individuals, which can include persons acting as the trustee of a trust, apply to the Board for registration.³² If the Board is satisfied that all the criteria for registration are met, registration must be granted.³³

Criteria for registration

For an individual, the criteria for registration are: the individual is aged 18 years or more; is a fit and proper person; and meets all the requirements prescribed by the regulations. These requirements include but are not limited to professional qualifications and experience.³⁴ Partnerships must have sufficient individuals who meet these criteria in order to provide competent services and carry out adequate supervision of unregistered employees. In addition, where a company is either a partner or a registered agent, each director of the company must be a fit and proper person, the company must not be under external administration, the company must not have been convicted of a serious taxation offence involving fraud or dishonesty in the previous five years and there must be sufficient individuals who can provide adequate services and supervision. The legislation does not prescribe any set formula for determining the number of registered individuals required by a company or a partnership to ensure it can provide adequate supervision.³⁵

This is an important issue because routine work is now often sent offshore for processing in an administrative centre.

It was not specifically dealt with in the previous legislation.

The Board has power under the regulations to set up a system to accredit professional associations for the purposes of recognising professional qualifications and experience that are relevant to the registration of individuals as registered tax agents and BAS agents.³⁶

Fit and proper person

When deciding whether to register an applicant as a tax agent, one criterion that the Board must be satisfied about is that the applicant is a "fit and proper" person. Proposed s 20-15 of the Bill lists criteria for determining whether an individual is a fit and proper person. Paragraph (a) says that Board must have regard to whether the individual is of good fame, integrity, and character. The concept of being a "fit and proper person" was also used in the previous legislation. There is no definition of what constitutes "fit and proper", but courts have discussed the concept and case law dealing with the previous legislation will remain relevant. "Fit and proper" are words which are traditionally used in relation to persons holding offices or vocations. Justice Hill in *Stasos v Tax Agents' Board of New South Wales*³⁷ extensively reviewed previous pronouncements on the issue, noting that the High Court stated in *Hughes and Vale Pty Ltd v State of NSW (No2)*:³⁸

But their very purpose is to give the widest scope for judgment and indeed for rejection. "Fit" (or "idoneus") with respect to an office is said to involve three things, honesty, knowledge and ability: "honesty to execute it truly without malice, affectation or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it - Coke...

When the question was whether a man was a fit and proper person... it was considered that ought not to be confined into an inquiry into his character and that it would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances...

His Honour continued:

To this catalogue of what must be described as basic attributes I would, with respect add "diligence" and in a case such as the present, "professionalism", by which I intend to include the putting of the interests of one's client before one's own self interest.

His Honour also cited Davies J in *Re Su and the Tax Agents' Board (SA)*³⁹ as to what is required of a person fit and proper to be registered or to retain registration.

The function of a tax agent is to prepare and lodge income tax returns for other persons. A person is a fit and proper person to handle the affairs of a client if he is a person of good reputation, has a proper knowledge of taxation laws, is able to prepare income tax returns competently and is able to deal competently with any queries which may be raised by officers of the Taxation Department. He should be a person of such reputation and ability that officers of the Taxation Department may proceed upon the footing that the taxation returns lodged by the agent have been prepared by him honestly and competently.

Davies J noted that certain convictions such as tax evasion are inconsistent with the role they perform. An agent may be convicted of offences which do not relate to character but still demonstrate that the agent lacks integrity and competence and neither clients nor officers of the Taxation Department could rely on returns prepared by him.

In *Su* the agent had failed to lodge his personal returns, was either late or never remitted group instalment deductions relating to his employees and had not disclosed his convictions in relation to these matters.

In *Stasos* the agent had understated his professional income and opened accounts in false names. He had not claimed a deduction for his fees in many returns lodged and was aware that his clients would not have the knowledge to realise it.

Hill J agreed with Davies J but stated that his Honour omitted to discuss the fact that where a person has demonstrated he is not a fit and proper person, he must satisfy the Tribunal that he appreciates the significance of his wrongdoing, that he regrets it and that he has rehabilitated himself and it is truly unlikely that there will be any future lapses. It is not sufficient merely to express contrition. The Tribunal must be satisfied on the balance of probabilities that he is contrite and will not deviate from the required high standards in the future.

In [2006] AATA 880, *Re Shaheed and Tax Agents' Board of New South Wales*⁴⁰ the applicant sought re-registration as a tax agent. One of the complaints against him was from a client, resident in Fiji who stated that the agent had not forwarded

his tax refund to him, and had pressured him to withdraw his complaint. The agent and three other men had flown to Fiji and pressured him to sign a document which stated he was withdrawing his complaint and that the withdrawal was made voluntarily and without coercion and threats.

Another complaint involved lack of proper supervision and control by the agent of his practice. He had over 15,000 clients and he was unable to deal with them himself, nor had he organised competent staff to do so. In addition he had not closed some of his branch offices, despite undertaking to do so, and the two he had closed still had his signage on the buildings. Senior Member M D Allen, referred to the decision of Toohey and Gaudron JJ in *Australian Broadcasting Tribunal v Bond*.⁴¹

The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which a person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.

The tax agent's appeal to the Federal court was dismissed.⁴²

Other criteria in the Bill proposed s 20-15 include:

- Whether an event described in s 20-45 has occurred during the previous five years;
- Whether the individual had the status of an undischarged bankrupt any time during the previous five years; and
- Whether the individual served a term of imprisonment, in whole or in part, at any time during the previous five years.

The Board has six months in which to decide whether or not to register an

applicant. If registration is granted it must be for a minimum of three years. The Board also has the power to impose conditions on the registration, relating to the subject area in which tax agent services can be provided.⁴³

Events which may affect continued registration or lead to termination of registration

Proposed s 20-45 of the Bill lists events which are relevant as to whether an applicant is a fit and proper person, and which also constitute grounds for terminating an agent's registration. These are:

"A statutory Code of Professional Conduct is to provide taxpayers with greater confidence that practitioners maintain appropriate ethical and professional standards."

- The agent is convicted of a serious taxation offence
- The agent is convicted of an offence involving fraud or dishonesty
- The agent is penalised for being a promoter of a tax exploitation scheme
- The agent is penalised for implementing a scheme which has been promoted with the support of a product ruling in a way which is very different from the facts set out in the ruling
- The agent becomes an undischarged bankrupt or goes into external administration
- The agent is sentenced to a term of imprisonment.

Registration is terminated also if the agent no longer meets tax practitioner requirements, or if there is a breach of a condition attached to the registration.⁴⁴ Registration is also terminated by death of the agent, or if the registration is surrendered in writing. Similar provisions apply to partnerships⁴⁵ and companies.⁴⁶ Termination also occurs if there is a breach of the Code of Professional Conduct.⁴⁷ The Board notifies the agent of the termination, the grounds for the termination, and

any period during which the agent is not eligible to apply for registration. Failure to do so does not invalidate the Board's decision.⁴⁸ The usual period of termination is a maximum of five years unless there are special circumstances such as: the agent surrendered the registration, became an undischarged bankrupt or went into external administration.⁴⁹

Civil penalties

Part 5 Div 50 of the Bill contains civil penalty provisions. The previous legislation imposed criminal penalties, but civil penalties are considered more appropriate for agents who are providing services when unregistered

or for engaging in serious misconduct when registered.⁵⁰ Often they are more appropriate than suspension or termination of registration when depriving agents of the ability to practice their profession is regarded as too draconian.⁵¹ It is nevertheless important for the amount of a civil penalty to constitute a significant deterrent. A "penalty unit" has the meaning given by s 4AA *Crimes Act (Cth)* 1914.⁵² Tax agents and BAS agents are liable for civil penalties if they provide tax agent or BAS agent services when they are unregistered.⁵³ They are also liable if they advertise that they will provide these services when they are unregistered.⁵⁴

Civil penalties are also imposed if a registered tax agent or BAS agent knowingly or recklessly makes false or misleading statements to the Commissioner.⁵⁵ Knowingly employing the services of deregistered entities⁵⁶ or signing declarations which have not been prepared personally or under the supervision of a registered agent also contravenes Div 50.⁵⁷ Similar provisions apply to partnerships, where all partners are treated as contravening the division unless they can prove on the balance of probabilities that they did not engage in the behaviour.⁵⁸ Companies are dealt with in the same section.

Where there is a contravention of a civil penalty provision, the Board may apply to the Federal court for an order that the relevant entity pay a civil penalty.⁵⁹

Exempt legal services

The Bill contains specific exemptions from civil penalties for legal practitioners who advertise or provide tax agent services to their clients. Legal entities can provide these services and charge a fee without the necessity of being registered as a tax agent or a BAS agent providing there is no prohibition under either a State or a Territory law from doing so. The Legal Profession acts of the States and Territories regard such services as ordinary legal services.⁶⁰ Legal practitioners are also exempt from the civil penalty regime where they are unregistered but prepare and lodge returns while acting for a trust or a deceased estate either as the legal personal representative or the trustee of the testamentary trust.⁶¹

This exemption is very controversial in Australia, because legal practitioners have no educational requirements imposed on them in relation to their tax expertise, but entities who wish to be registered as tax agents or BAS agents are subject to compulsory educational requirements as a condition of their registration.⁶² The professional accounting bodies made submissions in relation to this issue, but it was not addressed in the final Bill.⁶³

Liability of tax agents

Clients can sue their tax agent in either contract or negligence. In the case of a contractual dispute, the actual terms of the contract will be in issue. The most commonly reported cases involve the common law tort of negligence. The statutory negligence action under s 251M *ITAA36* is no longer available.

In *Walker v Hungerfords*⁶⁴ taxpayers successfully sued their former accountants at common law for breach of contract and professional negligence in preparing their tax returns. For eight years in succession there had been a taxable income which was too high as a result of an incorrect calculation relating to depreciation.

King CJ of the Supreme Court of South Australia stated at 19 ATR 747:

The very purpose of engaging tax advisors and accountants is to ensure that the returns are prepared upon a correct basis.

Any calculation submitted by the taxpayer to his tax expert is necessarily submitted upon the basis that its conformity with tax law and correct tax and accounting practice will be verified by the expert. The taxpayer and his staff, in the absence of agreement to the contrary, do not, by furnishing such information, assume responsibility for its conformity to tax law and practice. If a taxpayer were to be considered to be lacking in reasonable care for his own interests for that reason, much of the advantage of engaging experts would be lost. The taxpayer, as it seems to me, cannot be expected to exercise skill and knowledge in relation to such matters. He is entitled to rely upon the tax expert whom he has engaged to check any calculations submitted by him to ensure their conformity to tax law and practice and in that way to ensure that the tax returns are correct.

A contrasting decision is *Doug Sim Enterprises Pty Ltd v Patrick Wan & Co*⁶⁵. In this case a taxpayer unsuccessfully sued its former accountant for breach of contract and professional negligence in relation to its income tax return for a particular year. The accountant had advised the taxpayer to minimise tax by distributing money through a series of trusts. Four years later the Commissioner issued amended assessments disallowing the distributions and the taxpayer reached a compromise and settled. The Full Supreme Court of Queensland held that there was no basis for finding a breach of contract or negligence. The deeds of trust did authorise the distributions which had been made and there was no evidence that a reasonably competent chartered accountant who had been consulted at the time the taxpayer was advised to make the trust distributions would have advised that such a scheme should not have been adopted.

In *Sacca v Adam and R Stuart Nominees Pty Ltd*⁶⁶ an Italian migrant successfully sued a tax agent who failed to advise him of the existence of s 26AAA ITAA36 and the fact he would be liable to pay tax when property was bought and sold within a 12-month period. *Jindi (Nominees) Pty Ltd v Dutney*⁶⁷ involved the same issue. This did not require the agent to possess a high level of technical knowledge. A similar issue may arise in future in relation to the Capital Gains Tax discount.

Code of Professional Conduct

The State Tax Agents' Boards have been limited in the sanctions that they could apply, having the power to suspend or cancel a tax agent's registration. Oversight of professional and ethical standards had largely been left as a matter for professional bodies. By contrast, the new Bill incorporates a statutory Code of Professional Conduct, with failure to comply attracting sanctions. While the rationale underlying the statutory code is to provide taxpayers with greater confidence that practitioners maintain appropriate ethical and professional standards, there had been some concern following the 2008 ED that it is not appropriate to incorporate the Code in a legislative form.⁶⁸ However, the Code has remained part of the legislation in the Bill.

The Code in the 2008 ED has been significantly redrafted following a number of strong submissions on particular aspects of the Code proposed in the previous 2007 ED. The redrafted Code contains 14 elements grouped into five categories, comprising:

- honesty and integrity;
- independence;
- confidentiality;
- competence; and
- other responsibilities.

The Bill retains these categories, with some amendments. Key aspects of these categories are outlined below, along with some of the concerns raised in relation to the 2008 ED.

Honesty and integrity

The Code requires that tax practitioners act honestly and with integrity and comply with taxation laws in their personal affairs. Additionally, any money or property held from, or on behalf of, a client which is held on trust, must be accounted for to the client and should be held in a trust account.⁶⁹

Some concern had been raised, following the 2008 ED, as to how strictly this provision would be applied in the case of minor breaches. As an example, a tax practitioner who pays their personal tax liability late will have breached the code by failing to comply with taxation laws in their own affairs, although such

a breach would be seen as minor. The Bill retains this requirement in the Code, with the EM suggesting by way of an example that late lodgment of a tax return by a tax practitioner would constitute a breach of the Code.⁷⁰

Independence

The independence requirements relate to practitioners acting lawfully in the best interests of their clients, and having adequate arrangements in place to manage any conflict of interest which may arise in relation to tax practitioner activities.⁷¹

The requirement in the 2008 ED and the Bill for adequate arrangements to manage conflicts of interest represents a change in approach from the previous 2007 ED, which had required that conflicts of interest between clients, or between the practitioner and clients should not be allowed. The new proposal recognises that a prohibition on conflicts of interest would not always be practicable, and requires instead management of any such conflicts. The EM suggests that conflicts of interest should still be avoided unless there is evidence of informed consent of the parties, with a client waiver being sufficient to demonstrate compliance with the requirements of the Code.⁷²

Confidentiality

The confidentiality requirement suggests that practitioners should only disclose confidential information of a client in circumstances where there is a legal duty to do so, or the client has granted specific authority.⁷³

Competence

It is the elements of the Code relating to competence which have generated significant concern as expressed in the submissions to both the 2007 ED and the revised 2008 ED.

The Code requires that tax agent services provided by the practitioner, or on their behalf, be provided competently.⁷⁴ In relation to this aspect, a concern has been the level of supervision or control necessary to satisfy the Code when tax agent services are outsourced to a third party. This concern has been discussed earlier in relation to the use of unregistered contractors in outsourcing, with submissions suggesting that there be clarification of the extent to which outsourcing is sanctioned.⁷⁵

An additional concern in this area related to specialist advisers, and whether an adviser who is a specialist in a particular area would breach the Code by providing tax advice on a related area, as suggested by the EM.⁷⁶

The competency requirement in the Code requires that tax practitioners maintain knowledge and skills relevant to the tax agent services that they provide.⁷⁷

A further competency requirement is that tax practitioners "... 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."⁷⁸ This requirement is not as all encompassing as the requirement proposed in the 2007 ED, in that this requirement qualifies the circumstances under which the state of affairs of a client needs to be ascertained. The original requirement in the 2007 ED raised concerns that, at worst, the requirement may require an audit of the client's affairs.

While the new requirement is significantly modified from the earlier proposal, this element remains arguably one of the most controversial of the Code requirements. The EM explains that the focus of the requirement is on doing what is reasonable in the circumstances, and that the tax practitioner is not responsible for the veracity of the tax information provided by a client. However the EM then proposes that there may be circumstances where it would be considered reasonable to inquire further, in which case accepting a client's statement would fail to discharge the duty of the tax practitioner.⁷⁹

Submissions on this issue following the 2008 ED had suggested that there needed to be further clarification of the requirement, and that if the intention is that tax practitioners not be responsible for the veracity of tax information presented by a client, then the legislation itself should make this clear. However the Bill has adopted the same wording as in the 2008 ED.

The final element in the Code requirements for competence requires that the tax practitioner take reasonable care to ensure that the taxation laws are applied correctly to the circumstances in relation to which advice is being provided,⁸⁰ whether the circumstances be actual circumstances of a client, or hypothetical circumstances on which advice is sought.⁸¹ As explained in the

EM, this element does not demand that the tax practitioner determine the correct application of the law, but rather that the tax practitioner take reasonable care to ensure a correct interpretation and application of the law.⁸²

This component of the Code represents a change from the 2008 ED, which had required that a tax practitioner take all reasonable steps to ensure a correct application of the taxation law. It may appear that the new requirement for "reasonable care" is a less onerous requirement than the previous test of "all reasonable steps", as this latter requirement would appear to be more demanding as to what is required. It may be, however, that in practice the tests would not be significantly different, as it may be that taking reasonable care would require the tax practitioner to take all reasonable steps to apply the tax law correctly.

An issue raised in submissions on the 2008 ED on this element was that a reasonably arguable position (RAP) is accepted in other parts of taxation law, and that a RAP should be sufficient to satisfy this requirement for reasonable steps to correctly interpret and apply the law.⁸³ While the EM suggests that, in cases of uncertainty, reasonable care may involve seeking advice from the relevant authorities, or other practitioners, with the suggestion that clarification may be sought through a private ruling,⁸⁴ there is no specific inclusion of a RAP meeting this requirement. It would be expected, however, that if a tax practitioner had taken the steps canvassed in the EM to apply the tax law correctly to the circumstances, this would be equivalent to relying on a RAP.

Other responsibilities

The last of the categories in the statutory Code of Professional Conduct covers other responsibilities, which are seen to include:⁸⁵

- not knowingly obstructing the proper administration of taxation laws;
- advising clients as to their rights and obligations under taxation laws that are materially related to the tax agent services provided;
- maintaining professional indemnity insurance; and
- responding to requests and directions from the Board.

Sanctions

If satisfied that the Code had been breached, the Board would have a range of potential sanctions,⁸⁶ in contrast to the State Boards which were limited to suspending or cancelling registration. The graduated nature of the sanctions would allow the Board some discretion and flexibility in determining the appropriate sanction, if any, in given circumstances.

For trivial or immaterial breaches of the Code the Board has discretion to take no action. The minimum sanction available to the Board is to issue a written caution.

For more serious breaches the Board has the power to issue orders in relation to:⁸⁷

- completing a course of education or training;
- providing tax agent services under supervision of a registered tax practitioner; or
- providing only those tax agent services in the order.

The strongest sanctions available to the Board would be the suspension of registration⁸⁸ or termination of registration,⁸⁹ which presumably would be reserved for the most serious breaches of the Code.

Safe harbour provisions

In what must be seen as recognition of the burden placed on taxpayers by the self assessment system, the 2008 ED contained proposals to relieve from administrative penalty those taxpayers who have engaged a tax practitioner, and the penalty arises from actions of the tax practitioner. The provisions have not yet been introduced with the Bill, but are discussed in the EM, so the intention would appear to be that the provisions will be introduced.⁹⁰

The Exposure Draft Tax Agent Services (Consequential and Transitional Provisions) Bill 2008 proposed that if a taxpayer engaged a tax practitioner, and provided the tax practitioner with all relevant tax information, the taxpayer would not be liable for a penalty arising from:

- a tax shortfall; or
- late lodgment of a tax return or notice.

The relief from penalty for a taxpayer in these circumstances extended only to

carelessness by the tax practitioner, and would not extend to situations where the penalty arose from an intentional disregard of tax laws, or recklessness as to the operation of tax laws, either by the taxpayer or tax practitioner.

Conclusion

The Bill retains the two underlying themes of consumer protection for taxpayers, and regulation of professionals providing services to the public. It addresses several concerns of the profession relating to prior legislation regulating tax agents, viz establishment of a single national Board, independence of the Board from the ATO, professional registration requirements for BAS agents, and maintenance of professional standards both as to character and education. The Code of Conduct is a reflection of more recent concerns with ethical behaviour. The new definition of "tax services" and "BAS services" should meet their stated aim of being more flexible than the previous law in dealing with changed circumstances. The fact that lawyers do not need to be registered in order to provide tax or BAS services remains controversial and practitioners are still concerned as to the operation of the safe harbour provisions.

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This paper has been subject to peer review and satisfies the description of a refereed article in current Department of Education, Science and Training categories.

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Reference notes:

- 1 A previous version of this paper dealing with the 2007 ED was presented at the Eighth Tax Administration Conference, Atax, Sydney April 2008.
- 2 Explanatory Memorandum accompanying Tax Agent Services Bill 2008, at paras 5.7 – 5.10.
- 3 ED proposed ss 60-5, 60-10, 60-25.
- 4 Bill proposed s 60-60; offences include misbehaviour or physical or mental incapacity; bankruptcy; a full-time member is absent without leave for 14 consecutive days or 28 days in 12 months, or engages in unapproved outside employment, or a part-time member is absent for 3 consecutive meetings without leave, or engages in paid employment that creates a conflict.
- 5 Bill proposed ss 60-15, 60-20.
- 6 Bill proposed s 60-80.
- 7 2008 ED proposed s 1-15.
- 8 2008 ED proposed s 60-25.
- 9 EM accompanying Bill at para 5.30.
- 10 EM accompanying Bill at paras 5.31 – 5.32.
- 11 EM accompanying Bill at paras 5.33, 6.71.
- 12 Bill proposed ss 60-25, 60-70.
- 13 EM accompanying Bill at para 5.57.
- 14 Bill proposed s 60-45.
- 15 Bill proposed s 60-50.
- 16 Bill proposed ss 60-95 – 60-115.
- 17 Bill proposed s 60-100.
- 18 Bill proposed s 60-120.
- 19 Section 263, 264 ITAA36. Bill proposed s 70-50 provides that the legislation does not affect the law relating to legal professional privilege.
- 20 See Taxation Institute submission.
- 21 EM accompanying Bill at para 5.92 – 5.93.
- 22 Bill proposed s 60-125(7).
- 23 Bill proposed s 60-125.
- 24 Bill proposed s 70-25.
- 25 Bill proposed ss 60-130 – 60-140.
- 26 Bill proposed s 2-10.
- 27 Royal Commission on Taxation 1932-1934 (Ferguson Commission), Third Report para 1009.
- 28 EM accompanying Bill at paras 2.5, 2.11.
- 29 EM accompanying Bill at para 2.12.
- 30 EM accompanying Bill at para 2.41.
- 31 Bill proposes ss 90-5(2), 90-10(20) EM accompanying Bill 2.37.
- 32 Bill proposed ss 20-5, 20-20.
- 33 Bill proposed s 20-25.
- 34 Bill proposed s 20-5.
- 35 EM accompanying Bill at para 2.57.
- 36 Bill proposed s 20-10.
- 37 (1990) 21 ATR 984-5.
- 38 (1955) 93 CLR 127 at 156.
- 39 (1982) 13 ATR 192 at 195, cited at (1990) 21 ATR 985.
- 40 (2006) 64 ATR 1145.
- 41 (1990) 170 CLR 321 at 380, cited at (2006) 64 ATR 1147.
- 42 Shaheed and the Tax Agents' Board of New South Wales (No 2) [2008] FCA 763 (23 May 2008).
- 43 Bill proposed s 20-25.
- 44 Bill proposed s 40-5.
- 45 Bill proposed s 40-10.
- 46 Bill proposed s 40-15.
- 47 Bill proposed s 30-15.
- 48 Bill proposed s 40-20.
- 49 Bill proposed s 40-25.
- 50 EM accompanying Bill para 4.9.
- 51 EM accompanying Bill para 4.10.
- 52 Bill proposed ss 50-5(1) and (2) and 90-1(1). EM accompanying Bill para 4.21. It is currently \$110 per unit.
- 53 Bill proposed s 50-5.
- 54 Bill proposed s 50-10.
- 55 Bill proposed s 50-20.
- 56 Bill proposed s 50-25.
- 57 Bill proposed s 50-30.
- 58 Bill proposed ss 50-30(2) and 50-40(2).
- 59 Bill proposed s 50-35.
- 60 Bill proposed ss 50-5(1) to (4) and 50-10(1) to (4).
- 61 Bill proposed ss 50-5(3) and (4) and 50-10 (3) and (4).
- 62 Bill proposed ss 20-5(1)(b) and 20-10.
- 63 Submission of the Taxation Institute of Australia.
- 64 (1987) 19 ATR 745.
- 65 (1987) 19 ATR 758.
- 66 (1983) 14 ATR 287.
- 67 (1993) 26 ATR 206.
- 68 See Taxation Institute submission on 2008 ED.
- 69 Bill proposed ss 30-10(1), (2) & (3).
- 70 EM accompanying Bill at para 3.28.
- 71 Bill proposed ss 30-10(4) & (5).
- 72 EM accompanying Bill at para 3.34-3.36.
- 73 Bill proposed s 30-10(6).
- 74 Bill proposed s 30-10(7).
- 75 See Taxation Institute submission on 2008 ED.
- 76 EM accompanying Bill at para 3.40.
- 77 Bill proposed s 30-10(8).
- 78 Bill proposed s 30-10(9).
- 79 EM accompanying Bill at paras 3.52 – 3.54.
- 80 Bill proposed s 30-10(10).
- 81 EM accompanying Bill at para 3.55.
- 82 EM accompanying Bill at para 3.56.
- 83 See Taxation Institute submission.
- 84 EM accompanying Bill at paras 3.57 – 3.59.
- 85 Bill proposed ss 30-10(11), (12), (13) & (14).
- 86 Bill proposed s 30-15.
- 87 Bill proposed s 30-20.
- 88 Bill proposed s 30-25.
- 89 Bill proposed s 30-30.
- 90 EM accompanying Bill at para 1.24.