
Tax Agent Registration and Regulation: A Cross-Tasman Contrast

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Australia has recently introduced a detailed and prescriptive legislative regime for the registration and regulation of tax agents. By contrast, the New Zealand regime for the registration of tax agents has a minimal legislative component. This article examines the divergent approaches taken in each country, and proffers some suggestions as to the development of these differences. The article outlines the legislative approaches to the regulation of tax agents in Australia under the Tax Agent Services Act 2009, and in New Zealand under s 34B Tax Administration Act 1994. The Australian legislation and associated regulations give responsibility for the registration and regulation of tax practitioners to the newly created Tax Practitioners Board, with prescriptive conditions to be met for registration as a tax practitioner, a code of professional conduct by which practitioners must abide, and a range of sanctions for failure to meet these conditions. In New Zealand, the responsibility for the operation of the system rests with the Commissioner of Inland Revenue, who has a discretion as to the listing of an agent, or removal of an agent from the list. Given such divergent legislative approaches, the article examines the possible reasons for the development of these different approaches.

1.0 INTRODUCTION

In early 2009, Australia enacted the Tax Agent Services Act 2009 (Australia) to establish the Tax Practitioners Board, and to provide for the registration and regulation of tax and Business Activity Statement (BAS) agents. This legislative regime represents the culmination of a process which began in 1992 when a working party was established to review the regulatory arrangements and professional standards for tax agents. Of more recent times, Exposure Draft Bills had been released for consultation in 2007 and 2008, with the Tax Agent Services Bill finally being introduced in November 2008. In addition to the main legislation, the regulatory regime comprises transitional provisions² and regulations.³

In addition to the wide and protracted industry consultation, the Bill was referred to the Australian Senate Committee on Economics, which invited further submissions and held public hearings. By contrast, the regulatory regime for tax agents in New Zealand is based on one legislative provision, and

¹ The author would like to acknowledge the assistance of Cynthia Coleman in the preparation of this article.

² Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009 (Australia; Act No 114, 2009).

³ Tax Agent Services Regulations 2009 (Australia).

is managed within Inland Revenue. The table in the Appendix provides an overview of the differences between the Australian and New Zealand regimes.

This article examines this vast disparity in approaches to the extent of regulation of tax agents and the provision of tax services on each side of the Tasman. In particular, the article analyses the development of the detailed and prescriptive approach in Australia, which markedly contrasts with the approach in New Zealand.

2.0 DEVELOPMENT OF THE AUSTRALIAN REGIME

Australia has a long history of regulating the provision of tax services to the taxpaying community. The Ferguson Commission in the 1930s recommended that:⁴

“In our opinion registration of tax agents would be in the best interests both of the taxpayer and [of] the [taxation] Departments. It would be an assurance to both that a person authorized to act on behalf of a taxpayer is reputable and competent. It would prevent exploitation of the taxpayer by unscrupulous persons who may ultimately involve him in serious trouble, and, perhaps, penalties. It would also enable the departments to deal effectively with such persons.”

The imposition of income tax in the early years of Australia’s federation was historically a power exercised at the State level and, accordingly, it was the States which took responsibility for the registration of those who provided taxation services. At the time the Ferguson Commission recommendation was made in 1934, Queensland had enacted legislation to regulate tax agents in 1922; South Australia had done so in 1924; and New South Wales had tried to do so in 1928, using the Queensland act as a model, but this had not been approved by Parliament.

The Income Tax Assessment Act 1936 (Australia) saw a common income tax code applying across all States. Part VIIA of the Income Tax Assessment Act 1936 (ITAA 1936 (Australia)),⁵ along with Part 9 of the Income Tax Regulations 1936 (Australia), provided for the registration of tax agents, and those provisions regulated the registration of tax agents until the enactment of the new legislation in 2009.

Even with the introduction of a Federal income tax, with one set of provisions governing the registration of tax agents on a national basis, and the demise of State income taxes, the registration of tax agents continued to be a matter regulated at the State level. The Ferguson Commission had recommended that, when Australian Commonwealth legislation was enacted, the existing State boards continue and function under the federal system. Each State had its own Tax Agents’ Board, which dealt with the registration of agents and the renewal, suspension or cancellation of that registration.⁶ The Minister appointed three members to each Board, with one member being an Australian Taxation Office (ATO) officer.⁷ The former legislation provided that registration was available for individuals,

⁴ Royal Commission on Taxation 1932-1934, *Third Report of the Royal Commission on Taxation*, (Canberra, 1934), Section LI: Various Matters Relating to Administration, p 164, para 1009. The Royal Commission was chaired by DG Ferguson, and is also known as the Ferguson Commission.

⁵ Comprising ss 251A-251P ITAA 1936 (Australia); inserted by s 26 ITAA 1943 (Australia; Act No 10, 1943).

⁶ The former s 251C ITAA 1936 (Australia). Note that New South Wales administered the Australian Capital Territory and South Australia administered the Northern Territory.

⁷ The former s 251D ITAA 1936 (Australia).

partnerships and companies, although when a partnership or a company was registered as a tax agent, the entity was required to specify an individual as its nominee.⁸

From the outset, it had been clear that the underlying policy relating to the regulation of tax agents was consumer protection and not just administrative control. Taxpayers and the ATO both benefit when people with professional qualifications, relevant experience and possessing a good character assist in the preparation of annual tax returns.

The ATO is aware of the important role of tax agents in the administration of tax legislation,⁹ and assists agents in promoting voluntary compliance and ensuring that taxpayers meet their administrative obligations, including lodgement of annual returns and correct record-keeping. The ATO is also conscious of the risk to revenue when a tax agent is either incompetent or deliberately, either with or without the conscious co-operation of their clients, disregards their legal obligations such as claiming deductions when no expenditure has been incurred, or actively promoting legally dubious investment schemes. Legislation imposing civil penalties on promoters of tax exploitation schemes applied from 6 April 2006.¹⁰

With a number of separate State bodies administering the same federal legislation, there were always going to be difficulties in ensuring uniformity and consistency of decisions between the State Boards. As the State bodies adopted separate administrative processes and interpretations in relation to the registration and handling of complaints and disciplinary issues, inconsistencies were seen to develop between State jurisdictions.

Additionally, while the same resources were allocated to each State, different jurisdictions had diverse workloads, suggesting a mis-allocation of resources. A further shortcoming was seen in the lack of a reporting requirement from the State Boards.¹¹

Despite the concerns as to the deficiencies in the system, the path to a new regime proved long and arduous, with the initial announcement of new tax agent registration and regulation being made in 1998, with a proposed implementation in 1999.¹² Key aspects of the current regime are outlined in the next section, with differences from the previous regime being highlighted, and the rationale for the approach adopted being analysed.

3.0 THE CURRENT AUSTRALIAN REGIME

Following several years of consultation and a number of Exposure Drafts, the new regime for the registration and regulation of tax agents and BAS providers was enacted as the Tax Agent Services Act

⁸ The former ss 251KA and 251KC ITAA 1936 (Australia).

⁹ In recent years, approximately 74 percent of individuals and 95 percent of businesses in Australia have used a tax agent to prepare and lodge their tax returns: Australian Taxation Office, *Compliance Program 2006-07*, (Canberra, 2006), Section 3: Intermediaries, p 73.

¹⁰ Division 290, Schedule 1 to the Taxation Administration Act 1953 (Australia).

¹¹ Parliament of the Commonwealth of Australia, *Tax Agent Services Bill 2008: Explanatory Memorandum*, (Canberra, 2008), Ch 1: New Legislative Regime for the Provision of Tax Agent Services.

¹² See n 11.

2009 (Australia).¹³ The legislation is both detailed and prescriptive, and is accompanied by transitional measures and supported by regulations.¹⁴

While the previous provisions had been contained within one part of the ITAA 1936 (Australia), the new regime was enshrined in separate legislation not under the control of the Australian Commissioner of Taxation, following concerns expressed during the consultation process as to the importance of ensuring the independence of the controlling body from ATO influence and control.¹⁵

The key elements in the new legislation include:¹⁶

- Establishment of a national Tax Practitioners Board to replace the previous State Tax Agents Boards;
- Registration and regulation of the providers of tax agent services and BAS services;
- A legislated Code of Professional Conduct governing tax practitioners;
- Replacement of criminal penalties for certain misconduct with civil penalties and injunctions.

The discussion in this article examines these elements of the legislation.

3.1 Tax Practitioners Board

In a significant divergence from the previous State-based registration system, the lynchpin proposal in the Act is the creation of a new, national Tax Practitioners Board¹⁷ which replaced all of the existing State Tax Agents' Boards. The legislation provides that the new national body has responsibility for:

- Administering the system for registration of tax practitioners;
- Investigating applications for registration, and imposing sanctions for misconduct where necessary; and
- Other functions incidental to these responsibilities or as prescribed in the regulations.¹⁸

As noted above, the justification for a national body relied on a number of perceived shortcomings with the existing State arrangements. While State Boards were all subject to the same law, the State bodies were seen as operating somewhat independently from one another, with the concern being that separate operations had resulted in administrative and interpretative inconsistencies between State jurisdictions.¹⁹ The establishment of a national body with relatively wide powers and a degree of

¹³ Act No 13, 2009.

¹⁴ Tax Agent Services (Transitional Provisions and Consequential Amendments) Act 2009 (Australia; Act No 114, 2009) and Tax Agent Services Regulations 2009 (Australia).

¹⁵ The original intent had been to introduce the provisions as amendments to the Taxation Administration Act 1953 (Australia), the administration of which rests with the Australian Commissioner of Taxation, thus making the Commissioner ultimately responsible for the operation of the new regime.

¹⁶ Parliament of the Commonwealth of Australia, *Tax Agent Services Bill 2008: Explanatory Memorandum*, (Canberra, 2008), Ch 1: New Legislative Regime for the Provision of Tax Agent Services.

¹⁷ Part 6, Division 60 of the Tax Agent Services Act 2009 (Australia).

¹⁸ Section 60-15 Tax Agent Services Act 2009 (Australia).

¹⁹ See n 16, Ch 5: The Tax Practitioners Board and its Role, paras 5.7-5.10, p 92.

flexibility was seen as the preferred methodology to overcome these shortcomings with the State-based Boards.

The Board is created as a statutory body within the portfolio responsibility of the Australian Treasurer, and comprises a Chair and six or more members,²⁰ although the Chair cannot be an Australian Commonwealth officer.²¹ This prohibition followed consultation which strongly argued for a degree of independence of the Board from the ATO, and it was considered that such independence may be compromised if a delegate of the Commissioner of Taxation was Chair of the Board.

The Minister has responsibility for appointment of members of the Board and determining the tenure of a member's term on the Board. The Minister may also remove a member for specified offences.²²

The Board has a wide grant of powers intended to provide the Board with a degree of flexibility in the administration of the new regime. In terms of its investigatory powers, the Board has the power to investigate:²³

- An application for registration as a tax practitioner;
- The conduct of a tax practitioner; and
- Other matters prescribed by regulation.

It would appear that the Board can investigate matters referred to it, but may also take a proactive role in initiating investigations. The Board may conduct investigations itself, or appoint a committee to undertake the investigation,²⁴ and has power in these investigations to require the production of documents, to require witnesses to attend and give evidence, and to take evidence on oath or affirmation.²⁵

For investigations in relation to applications for registration, the Board must make a decision in relation to that application, either granting or denying registration. For other investigations, the Board may decide:²⁶

- To take no further action;
- To impose a sanction;
- To terminate a registration; or
- To seek a civil penalty or injunction from the Federal Court of Australia.

²⁰ Section 60-10 Tax Agent Services Act 2009 (Australia).

²¹ Section 60-25(2) Tax Agent Services Act 2009 (Australia).

²² Section 60-60 Tax Agent Services Act 2009 (Australia); broadly encompassing misbehaviour; physical or mental incapacity; becoming bankrupt or similar; being absent without leave from three consecutive meetings; or engaging in paid employment outside the duties of office without approval.

²³ Section 60-95 Tax Agent Services Act 2009 (Australia).

²⁴ Section 60-85 Tax Agent Services Act 2009 (Australia).

²⁵ Sections 60-100 to 60-110 Tax Agent Services Act 2009 (Australia).

²⁶ Section 60-125 Tax Agent Services Act 2009 (Australia).

The granting of these powers stands in a stark contrast with the sanctions available to the previous State-based Boards, which could only suspend or cancel a registration, that is, an ‘all or nothing’ approach. A tax practitioner subject to an investigation must be notified of the investigation, and the tax practitioner and the ATO must be notified of the outcome of the investigation.²⁷

A further significant divergence from the former State-based regime has been the addition of an accountability requirement on the Tax Practitioners Board – the Board is charged with reporting and disclosure obligations.²⁸ The Chair of the Board has an obligation to provide an annual report to the Minister, who would, in turn, be required to table the report in Parliament. The Board is also required to maintain a public register of tax practitioners, and to publish details of sanctions imposed where registration had been suspended or terminated for wrongdoing, thus meeting a consumer-protection imperative.²⁹

While there is a general prohibition of disclosure of information acquired by existing and previous Board members and assisting staff while performing their duties,³⁰ this does not extend to information that relates to:

- Establishing whether a taxation offence has been committed; or
- The potential for making a proceeds of crime order.

Information provided in relation to these matters may be disclosed to the Commissioner.³¹

One advantage that would be expected to ensue from the legislated reporting and publication obligation would be a greater degree of transparency and accountability, which may go some way to establishing the perception of a degree of independence for the Board, and redressing the perception that tax agent registration under the State Boards had been a function of the ATO.

Critical to a perception of independence of the Board must be the operational relationship with the ATO. In operational terms, the stated intention is that the Board would have administrative and operational decision-making independence from the ATO, although the ATO would provide administrative support.³²

Although this issue of independence of the Board from the ATO is of prime significance, no real guidance as to demarcation has been provided, with the Explanatory Memorandum accompanying the Tax Agent Services Bill 2008 (Australia) noting that “[t]he exact nature of the service relationship and arrangements between the Board and the ATO will be determined through agreements between the two parties”.³³

²⁷ Section 60-125(8) Tax Agent Services Act 2009 (Australia).

²⁸ Subdivision 60-F of the Tax Agent Services Act 2009 (Australia).

²⁹ Parliament of the Commonwealth of Australia, *Tax Agent Services Bill 2008: Explanatory Memorandum*, (Canberra, 2008), Ch 5: The Tax Practitioners Board and its Role.

³⁰ Section 70-35 Tax Agent Services Act 2009 (Australia).

³¹ Section 70-40 Tax Agent Services Act 2009 (Australia).

³² Section 60-80 Tax Agent Services Act 2009 (Australia).

³³ See n 29, Ch 5: The Tax Practitioners Board and its Role, para 5.31, p 97.

Given the lack of clarity and guidance in this critical area of the interaction between the Board and the ATO, it must come as no surprise that the independence of the Board has been a matter for ongoing concern raised by the professional bodies in consultation on the regime. An adequately resourced and independent Board is seen as a critical underpinning of any new legislative regime governing the registration and administration of tax practitioners. In recognition of the significance placed by the profession on the matter of independence, the Australian Government has undertaken to review the current arrangements within three years of implementation.³⁴

3.2 Registration and Regulation of Practitioners

The Act provides, in s 2-10, that there is a requirement to be registered to provide tax agent services for a fee, or to engage in other conduct connected with providing such a service. In contrast with the previous State-based registration regime, which encompassed only tax agents and their nominees, the new legislation provides for registration as a registered tax agent and/or registered BAS agent. While BAS service providers will need to be registered, they provide a more restricted range of services than a tax agent. Division 90 of the Act provides that registration is required under the Act to be a registered agent.³⁵

A tax agent service is defined widely as a service relating to ascertaining or advising on obligations under a taxation law, or representing an entity in dealings with the Commissioner, in circumstances in which the entity could reasonably be expected to rely on the service.³⁶ A BAS service is defined as being a sub-set of a tax agent service, being limited to ascertaining and advising under the BAS provisions.³⁷

³⁴ See n 29, Ch 6: Regulation Impact Statement, para 6.71, p 143.

³⁵ Section 90-1 Tax Agent Services Act 2009 (Australia): “*registered tax agent or BAS agent* means an entity that is registered under this Act as a registered tax agent or a registered BAS agent.”

³⁶ Section 90-5(1) Tax Agent Services Act 2009 (Australia):

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.

³⁷ Section 90-10(1) Tax Agent Services Act 2009 (Australia):

A *BAS service* is a tax agent service:

- (a) that relates to:
 - (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a BAS provision; or
 - (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a BAS provision; or
 - (iii) representing an entity in their dealings with the Commissioner in relation to a BAS provision; 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:

The inclusion of BAS services is a recognition of the reality that with changes in tax administration legislation and administrative practice, there is a range of services provided under the broad ambit of tax services, and any regulation of the system should apply equally to providers of any services across this spectrum of services.

A matter of concern during the consultation phase had been the broad nature of a tax agent service, in that with growing deregulation on the economy generally, and superannuation in particular, it may appear somewhat surprising that financial planners and other like advisers are precluded from offering tax advice for a fee unless they have been registered to provide tax agent services. The intention that the provisions apply to any services involving an application or an interpretation of a taxation law is made clear in the Explanatory Memorandum, with examples illustrating the application of the provisions in circumstances where the previous regime would not have applied.³⁸

Further concerns raised since the enactment of the legislation have prompted the Australian Government to announce further consultation in relation to particular classes of advisers, and the advice which they are able to provide.³⁹

3.2.1 *Conditions to register*

Under the legislation, registration is available for individuals, partnerships and companies.⁴⁰ Notes to the legislation⁴¹ and the Explanatory Memorandum⁴² suggest that an individual or company acting in the capacity of a trustee of a trust can be registered.⁴³

For individual registration,⁴⁴ the Board must be satisfied that the individual:

- Is over 18 and is a fit and proper person; and
- Meets the requirements relating to qualifications and experience.

The tests for a partnership and a company are based on the individuals in the partnership or the company.

A partnership⁴⁵ may be registered if:

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- (i) to satisfy liabilities or obligations that arise, or could arise, under a BAS provision;
 - (ii) to claim entitlements that arise, or could arise, under a BAS provision.

³⁸ Parliament of the Commonwealth of Australia, *Tax Agent Services Bill 2008: Explanatory Memorandum*, (Canberra, 2008), Ch 2: Registration of Tax Agents and BAS Agents, paras 2.31-2.32, pp 26-27.

³⁹ N Sherry, "Coverage of Tax Agent Services Regime", *Press Release 72* (23 April 2010). The Australian Government announced a one-year deferral of the application of the Tax Agents Services Act 2009 (Australia) to financial planners while consultation takes place on options available.

⁴⁰ Section 20-5 Tax Agent Services Act 2009 (Australia).

⁴¹ Section 20-5(1) Note 1 and s 20-5(3) Note, Tax Agent Services Act 2009 (Australia).

⁴² Parliament of the Commonwealth of Australia, *Tax Agent Services Bill 2008: Explanatory Memorandum*, (Canberra, 2008), Ch 2: Registration of Tax Agents and BAS Agents, para 2.20, p 22.

⁴³ Concern had been expressed during the consultation process that the use of service trusts was of such a significance that the issue of trusts should be addressed in the substantive provisions, rather than in notes to the legislation, so as to avoid any uncertainty, but this suggestion has not been adopted.

⁴⁴ Section 20-5(1) Tax Agent Services Act 2009 (Australia).

- Each individual partner is over 18 and is a fit and proper person;
- For a company partner:
 - Each director is a fit and proper person;
 - The company is not under external administration; and
 - The company has not been convicted of a serious taxation offence involving fraud or dishonesty in the previous five years; and
- The partnership has a sufficient number of registered individuals to provide the services to a competent standard and to carry out supervisory arrangements.

A company⁴⁶ may be registered if:

- Each director is a fit and proper person;
- The company is not under external administration; and
- The company has not been convicted of a serious taxation offence involving fraud or dishonesty in the previous five years; and
- The company has a sufficient number of registered individuals to provide the services to a competent standard and to carry out supervisory arrangements.

The provisions allow an individual who was registered as a tax agent prior to 1988 and was still registered to retain their registration even if they did not satisfy the qualification and experience requirements.⁴⁷

3.2.2 *Fit and proper person*

Guidance is provided in the legislation as to the criteria for being a ‘fit and proper person’, with factors to consider including:⁴⁸

- Whether the individual is of a good fame, integrity and character;
- Whether an event has happened to the individual in the last five years, such as being convicted of a serious taxation offence, fraud or dishonesty, being a promoter of a tax exploitation scheme, being an undischarged bankrupt, or serving a term of imprisonment.⁴⁹

While the legislation provides some guidance, there is no definition of what constitutes “fit and proper”, although the Courts have discussed the concept and case law dealing with the previous legislation will remain relevant. The Tax Practitioners Board has released an Exposure Draft indicating that in making the value judgment as to whether a person is “fit and proper”, the Board would have

⁴⁵ Section 20-5(2) Tax Agent Services Act 2009 (Australia).

⁴⁶ Section 20-5(3) Tax Agent Services Act 2009 (Australia).

⁴⁷ Section 20-5(4) Tax Agent Services Act 2009 (Australia).

⁴⁸ Section 20-15 Tax Agent Services Act 2009 (Australia).

⁴⁹ Section 20-45 Tax Agent Services Act 2009 (Australia).

regard to the fundamental concepts that have been identified in the Court cases, and also to the matters considered by the State Tax Agents' Boards in reaching such a determination.⁵⁰

In an administrative law context, the High Court of Australia considered the meaning to be attributed to 'fit and proper person' in *Australian Broadcasting Tribunal v Bond*,⁵¹ with Toohey and Gaudron JJ suggesting that the term, by itself, carried no precise meaning, and regard should be had to the context, the activities in which the person was engaged, and the ends served by those activities, as the concept of a fit and proper person could not be separated from the conduct in which the person was engaged. Their Honours noted:⁵²

"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 an indication of likely future conduct) or reputation (because it provides an 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."

Regard was had to this decision by Senior Member Allen in the decision in *Re Shaheed and Tax Agents' Board of New South Wales*.⁵³

In relation to the attributes required of a tax agent to satisfy the 'fit and proper person' test, Davies J in *Re Su and Tax Agents' Board of South Australia*⁵⁴ noted that:

"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."

His Honour noted that certain convictions (such as tax evasion) would be inconsistent with the role performed by a tax agent. Even if an agent was convicted of offences which did not relate to character, this could still demonstrate that the agent lacked integrity and competence and neither clients nor officers of the Taxation Department could rely on the returns prepared by him.

In *Stasos v Tax Agents' Board of New South Wales*,⁵⁵ Hill J reviewed the previous authority on the issue of a fit and proper person, noting that the High Court of Australia had stated in *Hughes and Vale Pty Ltd v State of New South Wales (No 2)*⁵⁶ that, while the inquiry as to whether someone was a fit and

⁵⁰ Tax Practitioners Board, *Exposure Draft: Fit and Proper Person*, (Penrith, 2010), available at: <http://www.tpb.gov.au/TPB/Board/Exposure_drafts/TPB/TheBoard/Exposure_drafts.aspx> (as at 1 December 2010).

⁵¹ *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 (HCA).

⁵² See n 51, p 380.

⁵³ *Re Shaheed and Tax Agents' Board of New South Wales* [2006] AATA 880; (2006) 64 ATR 1145 (AATA).

⁵⁴ *Re Su and Tax Agents' Board of South Australia* [1982] AATA 127; (1982) 13 ATR 192, 195 (AATA).

⁵⁵ *Stasos v Tax Agents' Board of New South Wales* [1990] FCA 379; (1990) 21 ATR 974 (FCA).

⁵⁶ *Hughes and Vale Pty Ltd v State of New South Wales (No 2)* [1955] HCA 28; (1955) 93 CLR 127, 156 (HCA).

proper person would not be limited to a consideration of character, it would be unwise to define the matters to consider as each case would depend on its own circumstances. The High Court of Australia did suggest that in relation to an office, being ‘fit’ involved three elements:

- Honesty to execute the office without malice;
- Knowledge to know what to do; and
- Ability to both intend and execute the office diligently.

Hill J was prepared to extend the elements required, suggesting:⁵⁷

“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 had regard to the comments of Davies J in *Re Su and Tax Agents’ Board of South Australia*, and while agreeing with the comments of Davies J, Hill J went further, suggesting that Davies J omitted to discuss the fact that where a person has demonstrated that he was not a fit and proper person, he must satisfy the Tribunal that he appreciated the significance of his wrongdoing, that he regretted it, and that he has rehabilitated himself so it was truly unlikely that there would be any future lapses. His Honour explained that it was not sufficient for the person merely to express contrition; the Tribunal must be satisfied on the balance of probabilities that the person was contrite and would not deviate from the required high standards in the future.

3.2.3 *Qualifications and experience*

Individuals seeking registration are required to satisfy the prescribed minimum educational requirements and relevant experience.⁵⁸ These requirements are detailed in the Tax Agent Services Regulations 2009 (Australia), with the available paths to registration broadly including:⁵⁹

- Tertiary qualifications from an Australian tertiary institution or equivalent approved by the Tax Practitioners Board, with a course in each of Australian taxation law and commercial law, and 12 months full-time experience in the last five years;
- A diploma from a registered training institution, with a course in each of Australian taxation law and commercial law, and two years full-time experience in the last five years;
- If without formal qualifications, eight years full-time relevant experience in the last ten years; or
- Membership of a professional association.

The Board has the power to accredit professional associations so as to recognise professional qualifications and experience.⁶⁰ In broad terms, to qualify as a recognised professional association (RPA), a professional association must:⁶¹

⁵⁷ See n 55, p 984.

⁵⁸ Section 20-5(1) Tax Agent Services Act 2009 (Australia).

⁵⁹ See Schedule 2 to the Tax Agent Services Regulations 2009 (Australia).

⁶⁰ Section 20-10 Tax Agent Services Act 2009 (Australia).

⁶¹ See Schedule 1 to the Tax Agent Services Regulations 2009 (Australia).

- Be a non-profit association;
- Have at least 1,000 voting members;
- Have adequate corporate governance and operational procedures;
- Have procedures for proper management and internal rules enforced;
- Have professional and ethical standards;
- Have arrangements for hearing complaints against members;
- Have management that is accountable to members; and
- Have minimum educational requirements in accountancy from an Australian tertiary institution or equivalent.

During the consultation phase, there had been some concern among professional associations as to the prescriptive nature of the educational requirements, given the range of backgrounds of some members. This was particularly the case with members of long-standing and experience who may not satisfy the tertiary qualifications requirement, given changing membership entry requirements over a period of years. It would appear that there has been an attempt to address these concerns, with some flexibility as to the criteria for registration, with recognition of experience and professional membership as an alternative to educational qualifications.

3.2.4 Sufficient number of registered individuals

For applicants other than individuals, there is the added requirement that there be sufficient resources to provide service to a competent standard and to provide the necessary supervision. The Explanatory Memorandum suggests that there is no set formula for determining the number of individuals to satisfy the requirement, with relevant factors being the size of the business and services offered, and any quality practices in place.⁶²

This may appear to create an additional layer of complexity in determining whether to grant registration, with practical difficulties in determining just what may constitute an appropriate level of resources in any particular case. This may also create a burden for firms having difficulty recruiting staff in times of skills shortages, especially in regional or less populated areas.

3.3 Code of Professional Conduct

The State Tax Agents' Boards had been limited in the sanctions that they could apply. They could only 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 Tax Agent Services Act 2009 (Australia) 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 expressed during consultation that the Code should not adopt a legislative form. However, the Code has been enshrined as part of the Act.

⁶² Parliament of the Commonwealth of Australia, *Tax Agent Services Bill 2008: Explanatory Memorandum*, (Canberra, 2008), Ch 2: Registration of Tax Agents and BAS Agents, para 2.57, p 38.

The Code as enacted⁶³ contains fourteen elements grouped into five categories, comprising:

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

Key aspects of these categories are outlined below, along with some of the concerns raised in the consultation in relation to the Code.

3.3.1 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 on trust from, or on behalf of, a client must be accounted for to the client and should be held in a trust account.⁶⁴

Some concern had been raised in the consultation as to how strictly this provision would be applied in the case of minor breaches. As an example, a tax practitioner who paid their personal tax liability late would have breached the Code by failing to comply with the taxation laws in their own affairs, although such a breach would be seen as minor. The Tax Agent Services Act 2009 (Australia) retains this requirement in the Code, with the Explanatory Memorandum suggesting by way of an example that a late lodgment of a tax return by a tax practitioner would constitute a breach of the Code.⁶⁵

3.3.2 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.⁶⁶

The requirement in the Tax Agent Services Act 2009 (Australia) for adequate arrangements to manage conflicts of interest represents a change in approach from earlier Exposure Drafts, which had required that conflicts of interest between clients, or between the practitioner and clients, should not be allowed. The Explanatory Memorandum suggests that conflicts of interest should still be avoided unless there is evidence of an informed consent of the parties, with a client waiver being sufficient to demonstrate compliance with the requirements of the Code.⁶⁷ However, the Explanatory Memorandum does note that, regardless of the arrangements in place, there may be circumstances in which the agent cannot remain objective, in which case the agent should not perform services for the client.⁶⁸

⁶³ Part 3, Division 30 of the Tax Agent Services Act 2009 (Australia).

⁶⁴ Section 30-10(1), (2) and (3) Tax Agent Services Act 2009 (Australia).

⁶⁵ See n 62, Ch 3: The Code of Professional Conduct, para 3.28, Example 3.2, p 47.

⁶⁶ Section 30-10(4) and (5) Tax Agent Services Act 2009 (Australia).

⁶⁷ See n 62, Ch 3: The Code of Professional Conduct, paras 3.34-3.36, pp 54-55.

⁶⁸ See n 62, Ch 3: The Code of Professional Conduct, para 3.35, pp 54-55.

3.3.3 Confidentiality

The confidentiality requirement suggests that practitioners should only disclose confidential information of a client in circumstances in which there is a legal duty to do so, or the client has granted specific authority.⁶⁹

3.3.4 Competence

It is the elements of the Code relating to competence which had generated significant concern in consultations on both the 2007 Exposure Draft and the revised 2008 Exposure Draft. The Code requires that tax agent services provided by the practitioner, or on their behalf, be provided competently.⁷⁰ In relation to this aspect, a concern has been the level of supervision or control that would be necessary to satisfy the Code when tax agent services are outsourced to a third party.

An additional concern in this area related to specialist advisers, and whether an adviser who is a specialist in a particular area would, as suggested by the Explanatory Memorandum, breach the Code by providing tax advice on a related area.⁷¹ The competency requirement in the Code requires that tax practitioners maintain the knowledge and skills that are relevant to the tax agent services that they provide.⁷²

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."⁷³ This requirement is not as all-encompassing as the requirement proposed in earlier Exposure Drafts, in that this requirement qualifies the circumstances under which the state of affairs of a client needs to be ascertained, whereas the earlier Exposure Drafts had 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 has remained arguably one of the more contentious of the Code requirements. The Explanatory Memorandum explains that the focus of the requirement is on doing what is reasonable in the circumstances, and that the requirement is subject to the agreed scope of the engagement.⁷⁴ However, the Explanatory Memorandum then suggests that there may be circumstances in which 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.⁷⁵

The final element in the Code requirements for competence is 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,⁷⁶ whether the circumstances be the actual circumstances of a client or

⁶⁹ Section 30-10(6) Tax Agent Services Act 2009 (Australia).

⁷⁰ Section 30-10(7) Tax Agent Services Act 2009 (Australia).

⁷¹ Parliament of the Commonwealth of Australia, *Tax Agent Services Bill 2008: Explanatory Memorandum*, (Canberra, 2008), Ch 3: The Code of Professional Conduct, para 3.40, p 56.

⁷² Section 30-10(8) Tax Agent Services Act 2009 (Australia).

⁷³ Section 30-10(9) Tax Agent Services Act 2009 (Australia).

⁷⁴ See n 71, Ch 3: The Code of Professional Conduct, para 3.49, p 58.

⁷⁵ See n 71, Ch 3: The Code of Professional Conduct, paras 3.52-3.54, pp 58-59.

⁷⁶ Section 30-10(10) Tax Agent Services Act 2009 (Australia).

hypothetical circumstances on which advice is sought.⁷⁷ As explained in the Explanatory Memorandum, 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.⁷⁸

This component of the Code represents a change from the earlier Exposure Drafts, which had required that a tax practitioner take all reasonable steps to ensure a correct application of the taxation law. The new requirement for 'reasonable care' may appear to be 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 consultations on the earlier Exposure Drafts was that a reasonably arguable position (RAP) was accepted in other parts of the taxation law, and that a RAP should be sufficient to satisfy this requirement for taking reasonable steps to correctly interpret and apply the law. While the Explanatory Memorandum states that, in cases of uncertainty, reasonable care may involve seeking advice from the relevant authorities or other practitioners, and suggests that clarification may be sought through a private ruling,⁷⁹ 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 Explanatory Memorandum to apply the tax law correctly to the circumstances, this would be equivalent to relying on a RAP.

3.3.5 Other responsibilities

The final of the categories in the statutory Code of Professional Conduct covers other responsibilities, which are seen to include:⁸⁰

- Not knowingly obstructing the proper administration of the taxation laws;
- Advising clients as to their rights and obligations under taxation laws that are materially related to the tax agent services provided;
- Maintaining a professional indemnity insurance; and
- Responding to requests and directions from the Board.

3.4 Civil Penalties and Injunctions

Under the provisions in Subdivision 50-A of the Tax Agent Services Act 2009 (Australia), there are civil penalties for engaging in conduct that is prohibited because of non-registration. Conduct attracting a civil penalty broadly includes:

- Providing tax agent services or BAS services if unregistered;⁸¹

⁷⁷ See n 71, Ch 3: The Code of Professional Conduct, para 3.55, p 60.

⁷⁸ See n 71, Ch 3: The Code of Professional Conduct, para 3.56, p 60.

⁷⁹ See n 71, Ch 3: The Code of Professional Conduct, paras 3.57-3.59, pp 60-61.

⁸⁰ Section 30-10(11), (12), (13) and (14) Tax Agent Services Act 2009 (Australia).

⁸¹ Subdivision 50-A, s 50-5 Tax Agent Services Act 2009 (Australia).

- Advertising tax agent services or BAS services if unregistered;⁸² and
- Representing that you are a registered tax agent or BAS agent if unregistered.⁸³

Tax agent services and BAS services may be provided for a fee, and may be advertised, by a registered tax agent or BAS agent. Additionally, tax agent services may be provided or advertised by a legal practitioner as a legal service under a Legal Profession Act without attracting a civil penalty. A BAS service may be provided or advertised by a customs broker licensed under the Customs Act 1901 (Australia) without attracting a civil penalty.

Concern had been expressed in consultations on earlier Exposure Drafts that allowing a legal practitioner to provide advice for a fee, even if not a registered tax practitioner, while not allowing accountants to charge for advice if unregistered, reinforced the divide between the professions. This was particularly the case as admission as a legal practitioner did not require taxation studies in a law degree. While the Tax Agent Services Regulations 2009 (Australia) requires that a legal practitioner seeking registration as a tax agent has completed an approved course in Australian taxation law,⁸⁴ a legal practitioner need not be registered and still could provide a tax agent service for a fee where the service is provided as a legal service.

Further civil penalties are provided under Subdivision 50B in respect of:

- Making false or misleading statements to the Commissioner;⁸⁵
- Employing or using the services of de-registered entities;⁸⁶ and
- Signing a declaration required under a tax law where the declaration was not prepared by a registered tax agent or an employee of a registered tax agent.⁸⁷

If an entity contravenes a civil penalty provision, then the Board may apply to the Federal Court of Australia for an order for a pecuniary penalty.⁸⁸ If the entity contravening the civil penalty provision is a partnership, then each partner at the time of the contravention is taken to have contravened the provision and be liable for a component part of the civil penalty. This will not apply if the partner can establish that they did not engage in the conduct nor aided or abetted the conduct, and were not knowingly concerned in, nor a party to, the contravening conduct.⁸⁹

Some concerns had been expressed in consultations on this issue that in a large partnership, actions by a partner in an unrelated area could result in a penalty for all partners. To address this concern, the provisions allow that if a partner can establish that they were not knowingly concerned in the infringing conduct, then they would escape the penalty.

⁸² Division 50, s 50-10 Tax Agent Services Act 2009 (Australia).

⁸³ Division 50, s 50-15 Tax Agent Services Act 2009 (Australia).

⁸⁴ Section 204(a)(iii) Tax Agent Services Act 2009 (Australia).

⁸⁵ Subdivision 50B, s 50-20 Tax Agent Services Act 2009 (Australia).

⁸⁶ Section 50-25 Tax Agent Services Act 2009 (Australia).

⁸⁷ Section 50-30 Tax Agent Services Act 2009 (Australia).

⁸⁸ Section 50-35 Tax Agent Services Act 2009 (Australia).

⁸⁹ Section 50-45 Tax Agent Services Act 2009 (Australia).

4.0 THE NATURE OF LEGISLATION

The detailed and prescriptive legislation in Australia has made for a strongly regulated system for the regulation of tax agents, and a system that is intended to operate at arm's length from the ATO. The legislation and regulations control the composition and powers of the Tax Practitioners Board, the requirements to obtain registration, the professional conduct expected of a registered agent, and the sanctions which may be imposed for any breach.

With the legislation having been developed over a considerable period of time, involving significant consultation with professional bodies, it can be taken that the profession was not only not opposed to, but welcomed, this high degree of regulation for the industry. As noted earlier in the discussion, such a degree of regulation ultimately benefits those taxpayers using the services of a tax agent, as those taxpayers can have a greater degree of faith in both the technical expertise of the registered agent and the professional conduct of the registered agent. Also to benefit is the taxation authority, as it can also have a greater reliance on the operation and efficacy of the registered agents. Given that currently over 70 percent of Australian individual and business taxpayers are reliant on the services of an agent, the degree of regulation and its consequent impact, this development can only be seen as beneficial in the Australian taxation environment.

5.0 NEW ZEALAND TAX AGENT REGISTRATION

The New Zealand approach to the regulation of tax agents is vastly different from the approach adopted by Australia. The rules dealing with the registration of tax agents in New Zealand are contained within s 34B Tax Administration Act 1994 (TAA 1994).⁹⁰ This provision places the responsibility for the operation of the system of tax agent registration with the Commissioner of Inland Revenue, making the Commissioner responsible for compiling and maintaining a list of tax agents.⁹¹ This is in direct contrast with the new Australian regime, during the development of which there was strong support for an organisation independent from the ATO to take responsibility for the registration and regulation of tax service providers, resulting in this task being vested in the Tax Practitioners Board.

As under the Australian regime, a tax agent can be an individual, partnership or company where the entity has satisfied the definition in the legislation. However, the requirements for tax agent registration in New Zealand provide a clear contrast with the Australian requirements. The New Zealand legislation provides that a person is eligible to be a tax agent if:⁹²

- The person prepares the returns of income required to be furnished for 10 or more taxpayers, and
- The person is:
 - A practitioner carrying on a professional public practice; or
 - A person carrying on a business or occupation in which returns of income are prepared; or
 - The Maori Trustee.

⁹⁰ Section 34B was inserted by the Taxation (Business Taxation and Remedial Matters) Act 2007.

⁹¹ Section 34B(1) TAA 1994.

⁹² Section 34B(2) TAA 1994.

On satisfying these requirements, the person becomes eligible to be a tax agent and can notify the Commissioner that they wish to be listed as a tax agent, furnishing the information required.⁹³ Upon an application being made, the Commissioner does have a discretion as to whether to list the person as a tax agent, with the Commissioner being able to refuse to list a person as an agent⁹⁴ or to remove a person from the list of tax agents,⁹⁵ if satisfied that listing the person as a tax agent would adversely affect the integrity of the tax system. Unlike the Australian legislation, there is no statutory specification of the matters that could lead to a refusal to list a person who is otherwise eligible, or to remove a person who had been listed as a tax agent.

It would be expected that a determining factor in deciding whether listing a person would adversely affect the integrity of the tax system would again turn on the question of whether the person satisfied the 'fit and proper person' test. In the New Zealand context, guidance is available on this matter, particularly in relation to applications for admission as a legal practitioner where there has been prior adverse conduct or a conviction. In *Re M*,⁹⁶ the Full Court of the High Court⁹⁷ provided guiding principles on determining whether an applicant was a fit and proper person, including:

- The focus being forward looking, with the function of the Court not being to punish past conduct;
- The onus being on the applicant to demonstrate the necessary qualities and attributes;
- Due recognition to the circumstances of youth in relation to errors of conduct; and
- Looking to the facts in the round, and not just having regard to a previous conviction.

These principles were applied in *Re Owen*,⁹⁸ with the Court finding in its ultimate conclusion:⁹⁹

"But the more difficult question is whether the public generally and members of the profession would share the view that Mr. Owen is now a person of such integrity, probity and trustworthiness as to be fit to be admitted as a barrister and solicitor. Faced with the evidence of his criminal record alone the answer would undoubtedly be No. But with the benefits which we enjoy, in having before us the positive evidence of recent years and with the advantage of hearing Mr. Owen being cross-examined by experienced counsel, we are satisfied that both the public and responsible members of the profession would, if similarly placed, share our view that Mr. Owen is a suitable candidate for admission."

This approach is not dissimilar to the approach of Hill J in the Federal Court of Australia decision in *Stasos*¹⁰⁰ discussed earlier, in which his Honour demonstrated a forward-looking focus in suggesting that the applicant in that case needed to demonstrate that he appreciated the significance of his wrongdoing, he regretted the wrongdoing, and that he had rehabilitated himself. Hill J suggested that

⁹³ Section 34B(3) TAA 1994.

⁹⁴ Section 34B(4) TAA 1994.

⁹⁵ Section 34B(8) TAA 1994.

⁹⁶ *Re M* [2005] 2 NZLR 546 (HC).

⁹⁷ Comprising Panckhurst and Chisholm JJ.

⁹⁸ *Re Owen* [2005] 2 NZLR 536 (HC).

⁹⁹ See n 98, p 543, para 38 per Panckhurst and Fogarty JJ.

¹⁰⁰ *Stasos v Tax Agents' Board of New South Wales* [1990] FCA 379; (1990) 21 ATR 974 (FCA).

the Australian Administrative Appeals Tribunal needed to be satisfied on the balance of probabilities that the applicant would not deviate from the required high standards in the future.

In addition to specifying the disqualifying factors in relation to initial registration, the Australian statutory scheme provides a Code of Professional Conduct for registered tax service providers, with the Tax Practitioners Board having the power to penalise any breach of the Code. The New Zealand scheme has only the one penalty of removal from the list of tax agents when the Commissioner is satisfied that listing the person as a tax agent would adversely affect the integrity of the tax system. Ensuring professional conduct, and disciplining breaches of professional conduct, is a task seemingly left to professional bodies.

However, given the pre-requisites for listing as a tax agent, it would appear that the power of determining who is in professional public practice in New Zealand lies with the Commissioner, with the statute not requiring membership of a professional body for listing as a tax agent. While membership of a professional body would certainly be a factor to consider in determining whether to list the person as a tax agent, it could be that a person could be a listed tax agent while not being a member of any professional body, and potentially not subject to any disciplinary action for professional misconduct.

A further difference between the Australian and New Zealand regimes lies in the consequences of being a registered/listed tax agent. Registration is required in Australia for the agent to be entitled to either advertise tax agent services, or charge for tax agent services, with penalties if these activities are undertaken without registration. By contrast, the consequence of listing by the Commissioner in New Zealand is that the agent is entitled to an automatic extension of time for filing income tax returns. If an unlisted agent provides and charges for tax agent services in New Zealand, then the only detriment the agent would appear to suffer is that there is no automatic extension of time for filing.

These foregoing factors illustrate that tax agent services in New Zealand could be provided by a person who is neither listed as a tax agent, nor a member of any professional body, highlighting the less restrictive approach to the provision of tax agent services in New Zealand when compared with that in Australia. The final part of this article proffers some suggestions as to the possible reasons for these divergent approaches to the provision of tax agent services in the two countries.

6.0 REASONS FOR THE DIFFERENT APPROACHES

While the two regimes differ markedly, each seems to be accepted as appropriate and effective in its own jurisdiction. Some possible reasons for the divergent approaches are canvassed in the following discussion.

As noted at the outset of this article, a major reason for the regulation of tax agent services is to provide assurance to taxpayers seeking such services as to the competence of the tax agent. Given the requirement in Australia for all taxpayers to lodge a return¹⁰¹ and the resultant high level of reliance on tax agents by individuals,¹⁰² it may be that the Australian regime feels a greater need to regulate agents, so as to ensure that the large numbers of individual taxpayers using a tax agent are being protected. By contrast, the New Zealand regime does not require all individuals to file a tax return. With the combined factors of a smaller population and fewer individuals needing to file returns resulting in a

¹⁰¹ The Budget Speech 2010-11 has foreshadowed the future use of pre-filled tax returns with a standard work-related deduction.

¹⁰² Over 70 percent of individuals have returns lodged by a tax agent; see n 9.

smaller pool of tax agents in New Zealand, it may be that this smaller pool of agents does not require the regulation and oversight that is considered necessary for tax practitioners in Australia.

A further reason may relate to the dealings with professional organisations. Apart from law societies, the New Zealand Institute of Chartered Accountants (NZICA) is the only major professional body representing accountants, having the potential to make dealings between Inland Revenue and the professional body less complex and more informal than may be the case in Australia, where there are a number of professional bodies representing accounting and taxation professionals.¹⁰³ This number and range of professional bodies in Australia would appear to underlie the decision to provide for regulations allowing the Tax Practitioners Board to approve recognised professional associations (RPAs) and recognised BAS agent associations, ensuring that these organisations meet prescribed standards.¹⁰⁴ With a single professional body in New Zealand, the standards of the body could be more readily monitored.

A further consequence of there being a single professional body for accountants in New Zealand may be the establishment of a closer relationship between the professional body and Inland Revenue, whereby issues may be dealt with on a more informal basis without the need for legislation and regulation. However, such an informal basis of operation would lack the certainty and transparency provided by legislation. Also, as noted earlier, a person could be listed as a tax agent without being in the professional organisation, and a person can prepare and lodge tax returns for others without being a listed tax agent, the only downside for that person being that there would be no extended lodgment time.

One other factor may be related to the history and culture of the revenue organisations themselves. There may be a feeling amongst Australian tax practitioners that the ATO has historically taken a suspicious, if not aggressive, stance in relation to taxpayers, and this has engendered in the tax practitioner industry a suspicion of the ATO. This may partly explain the strong drive from the industry, during the consultation phase, for the regulation of tax agents to be outside the control of the ATO, to the extent of having separate legislation which would be outside the administrative control of the ATO. It may be that New Zealand, with a smaller population and a smaller tax industry, may be able to take a more co-operative approach in the operation of the industry, and not feel the need for regulatory control.

7.0 CONCLUDING REMARKS

As noted at the outset, the regulation of tax agents is seen to be in the best interests of both the taxpayer, by ensuring competent and ethical behaviour of tax agents, and the revenue authorities, who can deal effectively with this registered group. The divergent approaches taken to the issue of registering/listing tax agents in Australia and New Zealand illustrate that there is no uniform approach by which countries may realise the goal of an effective regulatory system for tax agents.

While only in its infancy, there would appear to be a strong industry support to make the newly introduced Australian legislative regime effective in its operation, especially given the amount of consultation with and input from tax professionals over a number of years. The approach adopted is

¹⁰³ Including the Institute of Chartered Accountants, CPA Australia, National Institute of Accountants, Taxation Institute of Australia and various bookkeepers' associations.

¹⁰⁴ Schedule 1 to the Tax Agent Services Regulations 2009 (Australia) provides the requirements as to membership size, corporate governance, and professional and ethical standards.

prescriptive in its nature, prescribing in legislation and regulations the educational, experience, and behavioural requirements to achieve and maintain registration as a tax service provider.

The New Zealand approach, while based in legislation, provides for the management of tax agent listing within Inland Revenue, with the Commissioner having the power to include persons on the list of tax agents. Further, not being listed as a tax agent does not preclude a person from offering tax agent services, the limitation being that they do not have the availability of an extended filing time.

The vastly different approaches to tax agent regulation provide a clear illustration that there is no 'one size fits all' remedy, with countries needing to determine the approach that would be the most effective in their own jurisdictions.

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APPENDIX

Feature	Australia	New Zealand
Governing legislation	Separate legislation – Tax Agent Services Act 2009 (Australia)	Incorporated in Tax Administration Act 1994
Regulating body	Tax Practitioners Board – independent from ATO	Commissioner of Inland Revenue
Entities that can be registered	<ul style="list-style-type: none"> • Individual • Partnership • Company 	<ul style="list-style-type: none"> • Individual • Partnership • Unincorporated body • Company
Legislative registration requirements	<ul style="list-style-type: none"> • Over 18 years old • Fit and proper person • Prescribed educational qualifications • Prescribed experience qualifications • Partnership and company – sufficient registered individuals for service and supervision 	<ul style="list-style-type: none"> • Prepare returns for 10 or more taxpayers • Professional practitioner or in business of preparing returns
Proscribed conduct if unregistered	<ul style="list-style-type: none"> • Cannot charge for agent services • Cannot advertise agent services • Cannot represent that registered • Civil penalty for breach 	<ul style="list-style-type: none"> • Can still provide agent services • No filing time extension
Code of professional conduct	<p>Prescribed by statute, with following main categories:</p> <ul style="list-style-type: none"> • Honesty and integrity • Independence • Confidentiality • Competence • Other responsibilities 	Non. Professional conduct is the responsibility of professional bodies
Breach of professional conduct	<p>Administrative sanctions by Tax Practitioners Board:</p> <ul style="list-style-type: none"> • Caution • Order for education, supervision etc • Suspension of registration • Termination of registration 	Removal from tax agent list