



THE TAX INSTITUTE

THE MARK OF EXPERTISE

19 September 2013

Mr Neil Pegg
Secretariat
Tax Practitioners Board
PO Box 126
HURSTVILLE NSW BC 1481

By email: tpbsubmissions@tpb.gov.au

Dear Mr Pegg,

Exposure Draft TPB Information Sheet TPB (I) D17/2013: Code of Professional Conduct – reasonable care to ascertain a client's state of affairs

The Tax Institute is pleased to have the opportunity to make a submission to the Tax Practitioners Board (**Board**) in relation to the *TPB Information Sheet TPB (I) D17/2013: Code of Professional Conduct – reasonable care to ascertain a client's state of affairs (Exposure Draft)*.

The Tax Institute broadly agrees with the commentary and examples included in the Exposure Draft and notes the Exposure Draft will be of great assistance to registered tax and BAS agents in assisting them to meet and discharge their obligation under the Code of Professional Conduct (**Code**) to take reasonable care to ascertain a client's state of affairs.

Differences to earlier draft

We note that the emphasis of the Exposure Draft has now changed between its first iteration issued in September 2012 and this second iteration issued in July 2013. The Exposure Draft now focuses solely on guiding a registered agent to meet their obligations under Code Item 9 (which is about taking reasonable care to ascertain a client's state of affairs). The previous iteration also referred to the safe harbour provisions that apply to taxpayers; we note the current Exposure Draft does not refer to the safe harbour provisions.

In the previous Exposure Draft, reference was made to the terms of the engagement letter that can be entered into by a registered agent and their client. In essence, it was

stated that a registered agent's obligations under Code Item 9 may be influenced by the terms of their engagement¹. The current Exposure Draft also addresses engagement letters at paragraphs 21 to 22. However, in this context, the engagement letter is only regarded as a tool which can assist a registered agent to comply with their obligations under the Code and to define the agent's obligations to their client. It no longer refers to an engagement letter as a tool to that can "influence" the agent's obligations under Code Item 9.

It would be useful if a statement was included in the current Exposure Draft confirming that a registered agent is not able to contract out of their obligations under the Code.

We also note that fewer examples have been included in the Exposure Draft, though the examples included are now more comprehensive and include more analysis.

Issues raised in previous submission

In our previous submission dated 16 November 2012 (a copy of which has been included in the Appendix) on the first iteration of the Exposure Draft, we raised some concerns in relation to the examples included. In essence, we noted that it would be useful for the Board to provide some written guidance for certain circumstances, such as around how vigilant a registered agent should be in respect of the documentation provided to it by a client or the circumstances where one registered agent is (or is not) able to rely on the work of another registered agent. The examples included in the current Exposure Draft have been given further context which will assist registered agents to relate particular circumstances they may find themselves in with the circumstances set out in the examples.

We also raised an issue about many registered agents being concerned they will in effect be required to "audit" their clients' accounts before they are able to demonstrate they have discharged their obligation to take reasonable care to ascertain their client's state of affairs, particularly where they are taking on a new client. We suggested the Board consider providing guidance on this issue. We note that the Board has substantially addressed this issue with the comments included at paragraphs 13 to 19 of the Exposure Draft.

We also noted that it would be useful for the Board to update the Information Sheet or include further guidance on their website as more complex circumstances are presented to the Board for guidance. Please refer to our comments included on page 3 of the Appendix in relation to this issue. We maintain the view that this would be a useful exercise for the Board to undertake as new, more complex situations are put to them.

¹ Refer to paragraph 13 of *Exposure Draft TPB Information Sheet TPB(I) D15/2012*

Further, we raised two issues in our submission on the first iteration of the Exposure Draft on which we suggested the Board should consider providing guidance to registered agents. These two points are detailed on page 4 of the Appendix. We again request the Board consider including some commentary on these points.

Issues with the current draft

We bring to your attention some issues with the current Exposure Draft:

- a) Reference is made to the common law duty of reasonable care at paragraph 7 of the Exposure Draft. We understand it is the Board's intention to not require anything more than what the common law already requires a registered agent to do in order to satisfy their common law duty to take reasonable care to be able to satisfy their obligations under the Code. In this regard, we understand the Board will be satisfied that a registered agent will have taken reasonable care for the purpose of the Code if they have satisfied their obligations at common law.

To ensure this message is clear, we suggest the following amendments to paragraph 7 (included in italics):

"The duty to take reasonable care is a well-established feature of the common law in Australia *and is an obligation under the common law which a registered agent must meet*. While Code Item 9 requires registered agents to take 'reasonable care' in ascertaining a client's state of affairs, the Code does not extend the common law duty *of already owed by* registered agents to take reasonable care *beyond the requirements of the common law*. However, it does establish an additional range of possible statutory consequences under the TASA *where a registered agent does not meet these requirements* (see paragraphs 29 to 31 for more information on the consequences for failing to comply with Code Item 9)."

- b) Paragraph 11 of the Exposure Draft refers to the Accounting Professional and Ethical Standards Board's APES 110 *Code of Ethics for Professional Accountants*. It is not clear for what purpose this reference is made. Is it to provide an additional source of information to try to define the term "reasonable care"? Is it intended that the standard required by the Board for a registered agent to take reasonable care will be similar to (or the same as) APES 110?
- c) Paragraph 29 of the Exposure Draft refers to ensuring taxation laws are applied correctly under Code Item 9. We query whether this should in fact refer to ascertaining a client's state of affairs pursuant to Code Item 9.

- d) In the previous iteration of the Exposure Draft, reference was made to what the Board may do when considering the consequences that may apply to a registered agent who has failed to comply with Code Item 9 (we refer to paragraph 22 of the first iteration of the Exposure Draft). We recommend similar wording be included in the current version of the Exposure Draft.
- e) The previous iteration of the Exposure Draft included an example about when a registered agent may refuse to engage a client (Example 8). We recommend a similar example be included in the current Exposure Draft to illustrate that if a registered agent is unable to properly ascertain a client's state of affairs in terms of their engagement with the client, it may be appropriate for the registered agent to refuse to act for the client in appropriate circumstances (and to not feel obliged to take on clients they are uncertain about).
- f) Example 2 does not include an "Alternative scenario" unlike all the other examples which do. Inclusion of an "Alternative scenario" is a useful way to properly demonstrate the points being made by the example. To make best use of the example, we suggest one be included here.
- g) Example 3 refers to preparation of an income tax return based on audited reports. In the example, Penny & Co determines that it can rely on the audited financial statements provided by Marshall's Machinery to Penny & Co they have received from the external auditor, Anthony Brown Davis Auditing Services. It seems that Penny & Co is relying on the fact that the financial statements have been audited to discharge their obligation under Code Item 9 to take reasonable care to ascertain Marshall's Machinery's state of affairs with respect to its financial statements.

Broadly, the role of an auditor is to review the financial statements presented to them and not to participate in their preparation. In this regard, an auditor is only required to review the financial statements provided to them, including the tax provision prepared (either internally or by the entity's tax agent), for their reasonableness and materiality as to whether they represent a true and fair view of the financial position of the entity. The mere fact that an entity's financial statements have been audited does not mean the records supporting the financial statements of the entity have been correctly maintained.

In the course of preparing a client's tax return, a registered tax agent should still ensure they are able to rely on the audited financial statements presented to them and not just rely on the fact they have been audited, given they have an overall duty to prepare the tax return accurately in accordance with the tax law. In this regard, if a registered tax agent is required by the terms of their engagement to rely on audited financial statements for the preparation of the tax return, they must, for example, consider whether there are any issues noted

in the management letter accompanying the financial statements that will impact on their ability to rely on the audited financial statements to prepare the return accurately. Example 3 should make this obligation clear that, to properly discharge their obligation under Code Item 9, the registered agent should still exercise their professional judgment and consider the accuracy of the audited financial statements presented.

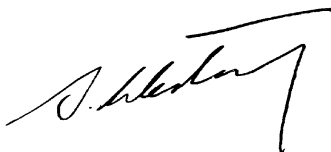
- h) We appreciate the simplicity of Example 4, but note it is broadly not a realistic scenario. In the circumstances of the example, we query how a registered agent could properly discharge their obligation under Code Item 9 if they are not required to make a professional judgment as to nature and accuracy of another agent's work (and professional judgement is exercised by relying on past dealings with the other agent), even if they are familiar with the agent's work.

In our view, Example 4 should include a further "alternative scenario" dealing with the circumstance where Stefan is instructed to rely on Sarina's work and Stefan is unfamiliar with Sarina's work. This raises the question as to what lengths a registered agent should go to make enquiries, when, for example, "Sarina" is a firm of BAS agents rather than just an individual. Are enquiries required to be made of all people at the firm so that Stefan can satisfy himself of the quality of work provided by the firm? Should Stefan only make enquiries of the partner in the firm who is responsible for the matter?

An additional alternative scenario could also be included where Stefan is specifically instructed by Poppy Pies Pty Ltd to accept the information provided by Sarina at face value and not make any further enquiries. In this case, how is Stefan able to demonstrate he has discharged his obligation under Code Item 9? Can he reasonably rely on the instructions provided by his client?

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0011.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Westaway', with a long horizontal line extending from the top of the signature.

Steve Westaway
President

APPENDIX



THE TAX INSTITUTE

16 November 2012

Mr Mark Maskell
Secretary
Tax Practitioners Board
PO Box 9825
PENRITH NSW 2740

By email: tpbsubmissions@tpb.gov.au

Dear Mr Maskell,

Exposure Draft TPB Information Sheet TPB (I) D15/2012: Code of Professional Conduct – reasonable care to ascertain a client's state of affairs

The Tax Institute is pleased to have the opportunity to make a submission to the Tax Practitioners Board (**Board**) in relation to the *Exposure Draft TPB Information Sheet TPB (I) D15/2012: Code of Professional Conduct – reasonable care to ascertain a client's state of affairs (Exposure Draft)*.

Summary

The Tax Institute broadly agrees with the commentary and examples included in the Exposure Draft and notes the Exposure Draft will be of great assistance to registered agents (tax and BAS agents) in guiding them as to how they can meet and discharge the obligation to take reasonable care when ascertaining a client's state of affairs. However, The Tax Institute notes that further context around some of the examples would be most useful to alleviate any uncertainty a registered agent may have about particular circumstances they may encounter in their practice.

Discussion

We refer to comments we provided to the Board by email on 16 January 2012 in relation to the Draft Discussion Paper issued by the Board in November 2011 on the issue of registered agents taking reasonable care to ascertain a client's state of affairs.

A copy of these comments are contained in Appendix A attached. In particular, we refer to the comments we provided highlighting areas for which the Board should provide guidance to registered agents in addition to the areas set out in paragraph 7 of the Draft Discussion Paper.

Examples in the Exposure Draft

We note that the Exposure Draft addresses the majority of the issues raised in paragraph 7 of the Draft Discussion Paper and several examples demonstrating these issues have also been given. Examples of other issues have also been given, though we believe these examples require some explanation to give them context.

For example, it would be useful for the Board to provide some guidance around how vigilant a registered agent should be in respect of the documentation provided to it by a client, particularly where the client does not have sophisticated record-keeping practices in place (eg because the client is new to business) and whether the Board would expect a registered agent to take more care in such a circumstance. We acknowledge Example 9 demonstrates this issue. However, we suggest it would be useful for the Board to give some written guidance around what may or may not be an acceptable level of investigation of a registered agent into the records kept by a client in order to discharge the requirement to take reasonable care to ascertain their client's state of affairs.

A second example where some commentary from the Board would be useful to registered agents is in relation to registered tax and BAS agents being able to rely on each other's work. Example 7 is provided to demonstrate the reliance that can, or cannot, be placed on another registered agent's work, however, a statement from the Board to that effect in addition to the example would confirm whether this is the case.

A third example of this is in relation to the circumstances when a registered tax or BAS agent can refuse to engage a particular client. Some commentary confirming that a registered agent is able to do this, in addition to the example provided, would be useful to confirm that a registered agent is able to refuse a client in appropriate circumstances (and should not feel obliged to take on clients they are uncertain about) where they are unable to properly ascertain the client's state of affairs.

We have not listed every single circumstance where commentary should be provided to give context to the examples. Rather, we have highlighted the importance of giving context to the examples provided so that registered agents know when they may have properly discharged their obligation to take reasonable care in particular circumstances.

Suggested Additional Areas for Guidance

Many registered agents have been concerned that they will in effect be required to “audit” their clients before they are able to demonstrate they have discharged their obligation to take reasonable care to ascertain their client’s state of affairs, particularly where they are taking on a client for the first time. They will look to the Board for assistance in striking the balance between meeting their obligations under the Code of Professional Conduct (**Code**) and being able to, for example, limit the terms of their engagement with a particular client. A client may, for example, require the agent to provide services of preparing an income tax return based on information provided by the client and may not be prepared to pay a registered tax agent for time spent to make any enquiries as to the veracity of the information provided. An agent may have doubts about the veracity of the information but will be unable to make further enquiries due to the limitations of their engagement.

Using the facts of Example 9 from the Exposure Draft, Jenny engages Alice on the basis that she requires Alice to accept the small business software records on face value. Alice forms the view she should investigate further the records given to her. However, Jenny will not pay Alice to spend the time to investigate the information further and the terms of Alice’s engagement with Jenny do not enable her to undertake any further investigation. In this regard, would Alice still be regarded as not having taken reasonable care given the terms of her engagement do not allow her to make further enquiries about the information she has been given even though she has formed the view that she should make further enquiries?

The Board will become aware of more circumstances where registered agents are required to find the balance between their obligations under the Code and their obligations owed to their clients. The factual examples the Board will be presented with will increase in complexity as both registered agents and their clients become more aware of this particular Code obligation. The examples included in the Exposure Draft are good, but we believe further and more extensive examples, such as the one noted above, will be necessary in due course.

We believe it would be helpful, as more of these issues come to light and the Board is required to address them, that further examples be included in the Information Sheet that results from this Exposure Draft. However, the process by which Information Sheets are prepared may not allow for easy updating of the Information Sheet. In this regard, the Board should also consider adding examples to its website or provide access through its website or telephone service (or both) to officers at the Board who are able to assist registered agents to determine how to best handle these kinds of situations, though we acknowledge the advice that may be given by the Board’s officers may be non-binding.

In our submission to the Board in relation to the Draft Discussion Paper, we also noted some areas on which the Board should consider giving guidance to tax agents. In particular:

- whether a registered agent is able to approach third parties for information about the client (other than another registered agent or accessing information that is available on a publicly available register such as the Australian Business Register website, both of which are already dealt with in the Exposure Draft) and whether the client's express permission is required in all such instances; and
- where to direct a client who takes issue with what a registered agent may consider in his or her professional judgment to be proper enquiries into the client's affairs in order to properly discharge their requirement to take reasonable care (that is, how will client complaints be handled in the event the complaint relates to a registered agent simply trying to discharge their obligation to take reasonable care in accordance with the standards set by the Board?)

We request the Board give consideration to including commentary around these issues before finalising the Exposure Draft.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0011.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Westaway', with a long horizontal stroke extending to the right.

Steve Westaway
Vice President

Appendix A

From: Deepti Paton

Sent: Monday, 16 January 2012 5:25 PM

To: Pegg, Neil

Cc: Robert Jeremenko; Karen Touma; Deepti Paton

Subject: FW: Discussion paper - Tax Practitioners Board Seeking feedback
[SEC=UNCLASSIFIED]

Neil

The Tax Institute commends the TPB's efforts to compile a work program for the provision of advice, as well as this specific work stream in relation to the Code of Conduct requirement to take reasonable care in ascertaining a client's state of affairs. As noted on earlier occasions, this requirement has proven difficult to apply and worrisome for many of our members.

We broadly agree with the areas in which further guidance would assist in relation to this requirement as set out in the Discussion Paper. Our comments on the issues identified at paragraph 7 of the Discussion Paper are as follows:

- We broadly agree with the interpretation of the requirement set out at c) as it is our view that in order to justify the trust bestowed on tax agents by the ATO, TPB and taxpayers at large, tax agents should be held to a sufficiently high professional standard i.e. tax agents should not simply be conduits for information provided by the client.
- However it should be noted that as this interpretation creates a higher standard of care than most agents perceived was the case before the introduction of the Tax Agents Services Regime (TASR), there is still confusion in the sector as to the practical implications of this requirement. In providing assistance, we encourage the TPB to be cognisant of the additional challenges faced by tax agents in importing this Code of Conduct requirement into their business practices. We note that according to our members, issues in relation to the application of this requirement are most likely to arise in relation to new clients though business practices will need to be amended in relation to all clients of the agent.
- In addition to the factors set out at paragraph 7, in our view areas in relation to which additional guidance would assist are:
 - How a tax agent should appropriately answer queries from clients as to why such additional checks are now required.
 - Whether the tax agent is permitted to approach third parties for information about the client and whether the client's express permission is required in all such instances.

- Where to direct clients that take issue with the tax agents assessment of what constitutes necessary/appropriate queries in order to fulfil the requirement (i.e. will the TPB be open to receiving complaints on this issue from clients?)
- The appropriate action to take when the tax agent is not satisfied by the client's claims as to matters that affect their tax liability i.e. should the tax agent make further enquiries, to what extent must further enquiries be made (especially if the client refuses to co-operate), at what point should the tax agent refuse to lodge on behalf of the client, how should the agent deal with the resulting impact re; their lodgment obligations (especially under any lodgment differentiation framework implemented by the ATO).
- The rights and obligations of the tax agent under existing fee agreements/engagement letters i.e. in what circumstances can the relevant engagement letter/fee arrangement be renegotiated to take into account the additional work required to be undertaken by the tax agent under this Code of Conduct requirement? This will be especially relevant in relation to long-standing engagement letters. To the extent that the TPB is not able to provide such specific guidance (such as where the TPB takes the view that such matters should be dealt with by negotiation between tax agent and client), the TPB should note that engagement letters which relate to scope of services as well as fees and were entered into before TASR may be affected by this requirement.
- The appropriate course of action to take if a client is unable to substantiate claims (such as expenses) due to poor record keeping.
- Whether a tax agent needs to ascertain the veracity of particular claims or merely ascertain the state of a client's record keeping arrangements.

We welcome the opportunity to review the TPB's Exposure Draft of its advice on this subject in due course. In the meantime, should you have any queries or concerns in relation to the above, please do not hesitate to contact me.

Regards

Deepti

(02) 8223 0044

From: Griffin, Lilian [mailto:Lilian.Griffin@ato.gov.au] **On Behalf Of** Boucher, Dale
Sent: Wednesday, 16 November 2011 4:55 PM
To: Deepti Paton
Cc: Luu, Janette; Pegg, Neil
Subject: Discussion paper - Tax Practitioners Board Seeking feedback [SEC=UNCLASSIFIED]

Dear Mr Paton

Seeking feedback on discussion paper: Reasonable care in ascertaining a client's state of affairs

You may recall that your organisation took part in a Tax Practitioners Board (Board) working group in Brisbane on 25 August 2011 to discuss, prioritise and develop guidance on a range of professional practice matters relevant to registered tax and BAS agents.

Following this meeting and your valuable input, the Board have decided to provide additional guidance on the following areas of the Code of Professional Conduct (section 30-10 of the *Tax Agent Services Act 2009*):

1. Code Item 9 - Reasonable care in ascertaining a client's state of affairs;
2. Code Item 3 - Accounting for money or other property held on trust;
3. Code Item 10 - Reasonable care to ensure taxation laws are applied correctly;
4. Code Item 5 - Managing conflicts of interest.

Further to this, the Board have now developed a draft discussion paper on Code item 9 for your consideration and comment. Please refer to the attachment.

We also encourage you to circulate the attached discussion paper to your members for their feedback, inviting them to provide practical examples of situations that they encounter in their work as a tax practitioner, in the context of applying Code Item 9.

In addition to this, we will be contacting a selection of tax and BAS agents to seek their consideration and feedback on the application of Code Item 9.

Once we have received stakeholder comments, we will prepare and publish an exposure draft information sheet which will be subject to a separate consultation period. We hope to incorporate relevant comments and examples from our stakeholders into the exposure draft information sheet.

We would be grateful if you could email your comments and examples to Neil Pegg at neil.pegg@tpb.gov.au by 15 December 2011

Thank you for your consideration in this matter.

<<FINAL Issues paper Code 9 - FNL - Nov 2011.doc>>

Yours sincerely



Dale Boucher

Chair

Tax Practitioners Board