



THE TAX INSTITUTE

THE MARK OF EXPERTISE

18 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) D18/2013: Code of Professional Conduct – reasonable care to ensure taxation laws are applied correctly

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) D18/2013: Code of Professional Conduct – reasonable care to ensure taxation laws are applied correctly (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 ensure taxation laws are applied correctly during the course of their dealings with their clients.

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 10 (which is about taking reasonable care to ensure taxation laws are applied correctly to the circumstances in which a registered agent is providing advice). 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, no reference was made to the use of engagement letters that can be entered into between a registered agent and their client. The current Exposure Draft does address the circumstances where limitations may be placed on the services to be provided by the registered agent by the scope of the terms of an engagement letter¹. The Exposure Draft also references *TPB Information Sheet TPB(I) 01/2011: Letters of Engagement*.

It is useful that this point has been made in the current Exposure Draft. However, a statement should be included in the Exposure Draft confirming that a registered agent is not able to contract out of their obligations under the Code (see further below).

We also note that references made to the circumstances where a registered agent takes a reasonably arguable position in relation to a particular matter noted in the original draft do not feature in the current version of the Exposure Draft. We query the absence of guidance on this particular issue in the current Exposure Draft.

Issues raised in previous submission

In our previous submission on the first iteration of the Exposure Draft, a copy of which has been included in the Appendix, we raised concerns about one of the examples used in the draft where we requested the Board provide some context around why a registered agent is unable to contract out of their Code Item 10 obligation or discharge their obligation by limiting the terms of their engagement. We note that this issue is not considered in the current Exposure Draft and recommend that it should be referred to in the body of the Exposure Draft.

We also suggested that the issue of when a client should refuse instructions from a client should be referred to in the body of the Exposure Draft and not just in the examples. We note that Examples 1 and 2 in the current Exposure Draft cover this issue relatively clearly, though we note that inclusion of a comment in the body of the Exposure Draft on this issue would also be useful.

Issues with the current draft

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

- a) Footnote 1 on page 2 of the Exposure Draft refers to paragraphs 118-132 of *TPB(EP) 01/2010 Code of Professional Conduct*. Paragraphs 118-132 include commentary on Code Item 9 in the Explanatory Paper. The correct reference should be to the commentary on Code Item 10 which is contained in paragraphs 133 – 138 of this Explanatory Paper. Accordingly, the footnote

¹ Refer to paragraphs 16 to 19 of the Exposure Draft

should be updated. (We note the correct references were contained in the first iteration of the Exposure Draft).

- b) 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)."

- c) 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?
- d) We suggest insertion of the words "for the purpose of TASA" at the end of paragraph 13 in the Exposure Draft to ensure a registered agent is aware that an incorrect interpretation and application of a tax law may not necessarily amount to a failure to take reasonable care in the context of TASA.
- e) The list contained in paragraph 15 of the Exposure Draft does not make any reference to a registered agent (particularly a tax agent) being required to have regard to commercial law and accounting principles. While we acknowledge the list included in the Exposure Draft is not exhaustive, given the emphasis in the education requirements for registering agents on knowledge of accounting and

commercial law principles, for the purpose of consistency, these elements should be reflected here too.

- f) The facts in Example 1 should be corrected to reflect the fact that Danny is a BAS agent who is only able to provide BAS services and is therefore only able to ensure “BAS provisions²” are applied correctly. It is not up to Danny to determine whether the bar stools are a business expense. Danny is only able to determine whether the bar stools are a creditable acquisition for GST purposes and whether input tax credits can be claimed.
- g) The “alternative scenario” in Example 2 refers to the situation where a registered agent should consider declining to act for a client if they have been allocated a specified amount of time to complete a task and the agent thought this amount of time to be unrealistic in which to complete the task³.

In reality, an agent may attempt to renegotiate the terms of their engagement to seek further time to complete the task, though a client may not always agree. It would be useful if the Board could further explain the point trying to be made here; that registered agents need to give consideration to whether they can take reasonable care in ensuring tax laws are applied correctly to a client’s situation in the circumstances where they are faced with tight budgets and timeframes that may prevent them from properly doing the amount of work required to satisfy this obligation.

- h) In the circumstances outlined in Example 3, it would not be unreasonable to anticipate that a registered agent who researches an area of tax law for the purpose of applying it for the first time may like to review the knowledge they have obtained from their research with someone they know to be an expert in the area to confirm their understanding is correct. We recommend that an additional fact be introduced under the heading “Reasonable care steps” along the lines of “Julie then seeks out a colleague whom she knows is expert in the application of the margin scheme to confirm the understanding she has obtained from her research is correct”.
- i) Example 4 makes reference to the situation when there is more than one view that can be taken in applying tax laws to a client’s circumstances and the client may be looking for an alternative (perhaps more favourable rather than more correct) opinion. Under the sub-heading “Reasonable care steps”, reference is made to taking the “more correct view”. Under the sub-heading “Alternative scenario”, reference is made to making the “most correct” application of the tax law. We suggest this be amended to “more correct”.

² These are defined in section 995-1 of the *Income Tax Assessment Act 1997* (Cth).

³ See the second paragraph under the heading “Alternative Scenario” in Example 2 which refers to the terms of the engagement giving Sarah only a specified amount of time which Sarah considered to be insufficient to complete the work.

- j) 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. This would involve including further examples and updating existing examples to reflect the more complicated types of scenarios registered agents may come across in practice.

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 from the top of the signature.

Steve Westaway
President

Appendix 1



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) D16/2012: Code of Professional Conduct – reasonable care to ensure taxation laws are applied correctly

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) D16/2012: Code of Professional Conduct – reasonable care to ensure taxation laws are applied correctly (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 guiding them as to how they can meet and discharge the obligation under the Code of Professional Conduct (**Code**) to take reasonable care to ensure taxation laws are applied correctly during the course of their dealings with their client.

It is important that registered agents are both aware of this obligation and know what they are required to do in order to discharge this obligation during the course of their engagement with their clients.

However, The Tax Institute notes that further context around some of the examples included in the Exposure Draft would be most useful to alleviate any uncertainty a registered agent may have about particular circumstances they may encounter in their practice as well as some examples around when a taxpayer may be able to access the safe harbour provisions.

We note the following in relation to Examples 4, 5 and 6:

- **Example 4** - it would be useful if the Board could give some context as to why a registered agent is not able to contract out of this Code requirement or discharge this obligation by simply limiting the terms of their engagement as set out in Example 4.
- **Examples 5 and 6** - we note the Board gives some context as to when a registered agent should refuse instructions from a client, as contained in Examples 5 and 6. However, it would be useful if this context was set out in the body of the Exposure Draft, rather than contained within the examples themselves.

It would also be useful if the Board could include some examples demonstrating when a taxpayer would be able to access the safe harbour provisions so they know what the consequences may be if they have engaged a registered agent who has not exercised reasonable care in advising them and that agent has not ensured that tax laws have been applied correctly to the client's circumstances.

The Tax Institute notes that registered agents may also find themselves in difficult situations, having to balance their obligations under the Code with their obligations to their clients and they will ultimately look to the Board for guidance on how to deal with these situations.

For example, an agent may have to take a particular stance in respect of information given to them for tax purposes, based on certain limitations imposed on them as agreed with their client. As an example, a client believes their "repairs and maintenance" expenses to be \$10,000. The claim being made is comparable to the prior year's claim for "repairs and maintenance" expenditure made by the client. Though the tax agent would ordinarily query this expense, the client is not prepared to provide further information to the tax agent and has instructed the tax agent to rely on and prepare the tax return on the basis of the information already provided. This is not an unusual term of an engagement between a tax agent and their client.

Due to the limited terms of the engagement, the tax agent is unable to make further enquiries into the veracity of the information provided. On the basis that ordinarily "repairs and maintenance" expenses are deductible, the tax agent in good faith forms the view that the whole of the expense is deductible. On this basis, the tax law appears to have been applied correctly.

Subsequent to this, the ATO investigates the client and determines that \$4,000 of the expense claimed is not deductible as it is not true "repairs and maintenance" expenditure. Consequently, given the tax agent's involvement in the preparation of the client's return, the ATO reports the matter involving the tax agent to the Board. The

client becomes angry with the tax agent that part of a deduction claimed has been denied and threatens to sue the tax agent for the consequential income tax (and likely penalties) now payable by the client.

In this circumstance, would the Board regard the agent as having taken reasonable care to apply the tax law correctly, despite the incorrect result at law ultimately arising because the tax agent relied on information provided by the client and was limited by the terms of their engagement from making further enquiries? Would the Board regard the agent as not having taken reasonable care to correctly apply the tax laws, when it appears the tax agent acted in good faith?

It seems the safe harbour rules would also have no application to the client here as there does not appear to be a false or misleading statement and therefore the client would incur the cost of the penalties and might pursue their "threat" of legal action against the tax agent to recover the equivalent cost of the penalties from the tax agent.

This is an example of a difficult situation registered agents may find themselves in in trying to balance their obligations under the Code as well as to their clients. It would be useful if the Exposure Draft contained sufficient guidance to provide registered agents with the proper "tools" to properly balance these competing obligations when faced with these types of difficult circumstances.

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 from the top of the signature.

Steve Westaway
Vice President