

TPB Information Sheet

TPB(I) 34/2018

Code of Professional Conduct – complying with taxation laws in the conduct of your personal affairs

DISCLAIMER

This is a Tax Practitioners Board (TPB) information sheet (TPB(I)). It is intended to be for information only. While it seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the TPB's powers in the *Tax Agent Services Act 2009* (TASA).

In addition, please note that the principles and examples in this TPB(I) do not constitute legal advice and do not create additional rights or legal obligations beyond those that are contained in the TASA or which may exist at law.

Document history

This information sheet is based on the TASA as at 15 March 2017 (latest version available at time of publication).

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Introduction

1. This Information Sheet (TPB(I)) has been prepared by the Tax Practitioners Board (TPB) to assist registered tax practitioners¹ understand their obligations under subsection 30-10(2) of the *Tax Agent Services Act 2009* (TASA) in the Code of Professional Conduct (Code) Item 2).
2. In this TPB(I), you will find the following information:
 - what is Code Item 2 (paragraphs 3 to 8)
 - how to comply with Code Item 2 (paragraphs 9 to 12)
 - consequences for failing to comply with Code Item 2 (paragraphs 13 to 16)
 - case studies and examples involving Code Item 2 (paragraph 17)

What is Code Item 2?

3. Code Item 2 states that a registered tax practitioner must comply with the taxation laws in the conduct of their personal affairs.²
4. Importantly, this obligation under Code Item 2 is no different to an existing legal obligation that already applies to all taxpayers under the tax law more generally, for example, section 161 of the *Income Tax Assessment Act 1936* requires taxpayers to lodge an income tax return.
5. The term 'taxation laws' means:
 - (a) an Act of which the Commissioner of Taxation (Commissioner) has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or
 - (b) legislative instruments made under such an Act (including such a part of an Act); or
 - (c) the *Tax Agent Services Act 2009* or regulations made under that Act.³

¹ Tax practitioners refers to tax agents, BAS agents and tax (financial) advisers collectively.

² Section 30-10(2) of the TASA.

³ Under section 90-1(2) of the TASA, the term 'taxations law' has the same meaning in the TASA as in section 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997).

6. The Commissioner is responsible for the general administration of a number of Acts and regulations concerning, among other things:
 - income tax
 - indirect taxes (including GST, luxury car tax, wine equalisation tax)
 - superannuation
 - Medicare levy
 - fringe benefits tax
 - franking deficit tax
 - withholding taxes
 - petroleum resource rent tax
 - the administration and collection of the above taxes.

What does 'personal affairs' mean?

7. The term 'personal affairs'
 - refers to a registered tax practitioner's personal taxation obligations, including the accurate and timely lodgement of personal income tax returns, activity statements⁴, instalment payments and employer obligations, such as payment of superannuation guarantee contributions and PAYG withholding; and
 - includes a tax practitioner's practice⁵, the affairs of all associated entities of a registered tax practitioner and any entity that the registered tax practitioner has direct or indirect control over. This includes associated companies, trusts (including corporate trustees of the trusts), a self-managed superannuation fund that the tax practitioner is trustee of and/or partnerships.
8. In the case of a company or partnership registered tax practitioner (including a company as trustee of a trust), the taxation obligations of the company or partnership mean the tax affairs of the company or partnership registered tax practitioner.

How to comply with Code item 2

9. Registered tax practitioners play a crucial intermediary role between taxpayers and the Australian Taxation Office (ATO). Registered tax practitioners offer a wide range of services on behalf of taxpayers⁶ and are therefore critical in facilitating a more efficient administration of the tax system for all parties.
10. Recognising that registered tax practitioners are taxpayers themselves, it is important that registered tax practitioners, who are entrusted to manage the tax affairs of their clients lead by example by ensuring that they themselves comply with their personal tax obligations.

⁴ Paragraph 3.28 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

⁵ Paragraph 3.29 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

⁶ In 2017, 74% of individuals and 95% of business lodged through a tax professional (source www.ato.gov.au)

11. A registered tax practitioner will have complied with the taxation laws in the conduct of their personal affairs, and therefore Code item 2, if they have:
- complied with their personal taxation obligations, including the lodgement of their personal income tax returns and activity statements⁷ by their due date
 - complied with the taxation obligations of the registered tax practitioner practice⁸, including meeting their employer obligations such as superannuation guarantee and PAYG withholding
 - paid their tax debts by the due date or have entered into, and are complying with a formal payment arrangement with the ATO to pay their tax debt by instalments
 - complied with the tax obligations of associated entities
 - provided a full and complete disclosure of outstanding personal tax obligations to the TPB (including in any application for registration or renewal or as part of the TPB's annual declaration requirement)
 - notified the TPB of any changes in circumstances, including that they no longer meet a registration requirement or there is a change in the composition of their tax practice, within a certain period of time.⁹
12. In determining whether a registered tax practitioner is complying with the taxation laws in the conduct of their personal affairs, the TPB will also consider whether any monies owed relate to a liability to the Commonwealth of Australia or to public monies, such as a liability arising from employer obligations. The TPB recognises that failing to meet these employer obligations will have a direct impact on taxpayers' retirement and other benefits. While the TPB is concerned about all outstanding personal tax obligations, failure to meet obligations that relate to public monies will be viewed by the TPB more seriously.

Consequences for failing to comply with Code Item 2

13. If a registered tax practitioner fails to comply with taxation laws in the conduct of their personal affairs, the TPB will find that the registered tax practitioner has breached the Code and may impose sanctions for that breach. The TPB will then take into account the nature of the outstanding taxation obligations in determining what sanction, if any, to impose on a registered tax practitioner who has found to be in breach of Code Item 2. Such considerations include, but are not limited to:
- the number of outstanding lodgements
 - how outstanding or late the lodgements are/were
 - the amount of the tax debt
 - the period of time over which the tax debt arose
 - the circumstances in which the outstanding personal tax obligations arose
 - what steps have been taken by the tax practitioner to resolve the outstanding personal tax obligations
 - the tax practitioner's compliance with any payment arrangements
 - any other mitigating circumstances raised by the tax practitioner.

⁷ Paragraph 3.28 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*; *Grosfeld and Tax Practitioners Board* [2014] AATA 100 at [30] and [41].

⁸ Paragraph 3.29 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*

⁹ See Subdivision 30-C of the TASA

14. Ultimately, whether a registered tax practitioner has complied with their obligations under Code Item 2 is a question of fact. This means that each situation will need to be considered on a case-by-case basis having regard to the particular facts and circumstances of that case.
15. In addition, it is important to be aware that conduct that leads to a breach of Code Item 2 could impact on a tax practitioner meeting the fit and proper person requirement¹⁰ and other Code items¹¹, such as Code Item 1, which relates to honesty and integrity.
16. If a registered tax practitioner breaches the Code, the TPB may impose one or more of the following sanctions:¹²
 - a written caution
 - an order requiring the tax practitioner to do something specified in the order
 - suspension of the tax practitioner's registration
 - termination of the tax practitioner's registration.

Case studies and examples

17. The following case studies and examples illustrate previous decisions by the TPB and the Administrative Appeals Tribunal (AAT) as they relate to Code item 2. These case studies and examples provide general guidance and in all cases, consideration will need to be given to the specific facts and circumstances.

Example 1 – ATO debts (public monies) and failure to comply with a payment arrangement

- The AAT affirmed the TPB's decision to terminate a tax agent's individual registration as he ceased to meet the ongoing registration requirement to be a fit and proper person.
- The tax agent was not found to be a fit and proper person. This was because of his failures to ensure that a trust, of which he was the trustee, had a debt that was not paid to the ATO when due. This debt also included a significant amount of public money (\$562,182) and he also failed to have any payment arrangement in place to reduce the debt on a regular basis.
- For more information, see *Juneja & Three Wickets Pty Ltd and Tax Practitioners Board [2016] AATA 786*

¹⁰ For more information about the fit and proper requirement, see www.tpb.gov.au

¹¹ For more information about the other items of the Code of Professional Conduct, see www.tpb.gov.au

¹² Section 60-125(2) of the TASA.

Example 2 – ATO debts and outstanding lodgements

- The AAT affirmed the TPB's decisions to terminate the registration of an individual Gold Coast tax agent and to reject an application for renewal of registration by an associated company tax agent, on the grounds that the individual ceased to be a 'fit and proper person'.
- The AAT was not satisfied that Mr Gregory Brown, who was the sole director of GJ Brown & Co Pty Ltd (Company), was a fit and proper person. This was based on his repeated failures to comply with his personal tax obligations, as well as the tax obligations of the company as trustee of the GJ Brown Practice Trust (Trust) and two other companies of which he was the sole director.
- The non-compliance issues found by the TPB and the AAT included failures to lodge income tax returns, fringe benefits tax (FBT) returns and BAS by the relevant due dates, and failures to pay significant tax liabilities as and when they fell due. Mr Brown had also been convicted of six tax offences for failing to lodge his personal income tax returns and income tax returns of the Trust, and had also subsequently failed to comply with court orders requiring him to lodge the Trust's outstanding returns.
- In concluding that termination of Mr Brown's registration was the appropriate outcome, the AAT took into account:
 - that Mr Brown's conduct involved breaches of the tax laws in both his personal and director capacities over a lengthy period of time
 - that although Mr Brown redressed a number of outstanding obligations by the time of the AAT final hearing, these steps were taken belatedly and only in response to action taken against him by the ATO and TPB
 - that some of the non-compliance issues still remained unresolved at the time of the hearing
 - the absence of a satisfactory explanation or supporting evidence for the circumstances that Mr Brown claimed contributed to the non-compliance issues
 - that the TPB had previously formally cautioned the company for breaching the TASA by failing to lodge income tax returns and BAS by the relevant due dates
 - the fundamental concerns to ensure public protection and preserve the community's confidence in tax practitioners.
- For more information, see *GJ Brown & Co Pty Ltd & Gregory Brown and Tax Practitioners Board [2016] AATA 740*

Example 3 – ATO debts, outstanding lodgements (individual and related company) and failure to comply with a payment arrangement

- A registered tax agent company, Delis Enterprises Pty Ltd, and its sole director and supervising agent, Peter Delis (who was also a registered tax agent), each applied to the TPB for registration renewal under the TASA.
- The TPB rejected Mr Delis' renewal application on the basis that he did not satisfy the 'fit and proper' eligibility requirement for registration under the TASA. The TPB subsequently determined that the company was ineligible for registration as its sole director and supervising agent was not a fit and proper person.
- In determining that Mr Delis was not a fit and proper person, the TPB noted:
 - his failure to lodge his 2009 to 2011 personal income tax returns by their required due dates
 - his failure, as the sole director and supervising agent of the company, to ensure that the company complied with its tax obligations
 - his failure to ensure that another company he controlled complied with its tax obligations; and
 - the fact that he had defaulted on numerous payment arrangements with the ATO in relation to his personal tax debt and those owed by the company.
- Upon review, the AAT affirmed both of the TPB's decisions. The AAT determined that Mr Delis' non-compliance with his tax obligations was lengthy (extending over 14 years), and that although Mr Delis did make payments to the ATO from time to time, these amounts were always less than the amounts owing. The AAT also found that payments were only made following ATO threats of legal action or when Mr Delis faced the risk of losing his tax agent registration.
- Mr Delis and the company appealed the AAT's decision to the Federal Court, submitting that the AAT made numerous errors of law in its review. The Federal Court dismissed the appeal, finding the AAT's decision contained no errors of law.
- For more information, see *Peter Delis & Delis Enterprises Pty Ltd v Tax Practitioners Board VID 797/2015* and *Delis and Tax Practitioners Board [2015] AATA 820*

Example 4 – outstanding lodgements (individual and related entity) and ATO debt (public monies)

- Following an investigation into the conduct of a registered tax agent, the TPB found the agent had, among other things:
 - failed to lodge her personal income tax returns and business activity statements for several periods by their due dates
 - failed to ensure a company of which she was a director complied with its superannuation guarantee obligations
 - failed to ensure a trust, in her capacity as a co-director of the trustee company, complied with its tax and superannuation guarantee obligations.
- Based on the above findings and other matters, the TPB decided to terminate the tax agent's registration. The Board also considered the egregious nature of the tax agent's conduct and decided to prohibit her from applying for registration for a period of five years from the date of termination.