
Chapter 3

Obligations of registered tax practitioners

Outline of chapter

3.1 Division 604 of Item 18 of Schedule 1 to this Bill amends Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) to outline the obligations of registered tax agents, BAS service providers and their nominees (collectively referred to as ‘tax practitioners’).

- Tax practitioners are required to comply with a legislated Code of Professional Conduct (Code), and failure to comply with the Code may attract administrative sanctions imposed by the Tax Practitioners Board (the Board).
- Tax practitioners may also be liable to penalties for certain specified misconduct.
- There is no statutory liability to pay any penalty, fine and/or interest charge incurred by a tax practitioner’s clients due to the negligence of the tax practitioner.

3.2 Division 610 of Item 18 of this Bill amends Schedule 1 to the TAA 1953 to provide for:

- administrative sanction decisions of the Board to be reviewable by the Administrative Appeals Tribunal (AAT); and
- special rules relating to the liability for penalties of partners in partnerships.

Context of amendments

Operation of current provisions

Code of Professional Conduct

3.3 The current law does not have a Code to govern the conduct of tax agents and BAS service providers. Section 251K of the *Income Tax Assessment Act 1936* (ITAA 1936) provides that a tax agent's or a nominee's registration may be cancelled or suspended for certain specified conduct, for example, the intentional preparation of a false return.

3.4 Currently, some — but not all — tax agents have to comply with a Code indirectly through their membership of a professional association. Each association has a separate Code and not all tax agents are members of a professional association. Consequently, tax agents currently adhere to slightly different professional and ethical standards.

Administrative sanctions

3.5 The only administrative sanctions that are currently available to the state Tax Agents' Boards (state Boards) are suspension or cancellation of registration. This can leave the state Boards without an effective response to conduct that is not desirable, but does not warrant depriving a person of their livelihood.

3.6 Subsections 251K(1) and (2) of the ITAA 1936 provide that each state Board may suspend or cancel the registration of a tax agent or nominee if they have been convicted of a specified offence, or if they are satisfied that:

- any return prepared by the tax agent is false in any material particular;
- the tax agent has neglected the business of a principal;
- the tax agent has been guilty of misconduct; or
- the tax agent or the nominee of a tax agent is not a fit and proper person to prepare income tax returns and transact business on behalf of taxpayers.

3.7 A state Board must cancel the registration of a tax agent under subsections 251K(3C) and (4) if:

- for individuals:

- the tax agent has become an undischarged bankrupt and/or permanently ceases to carry on a business as a tax agent.
- for partnerships:
 - there is no partner registered as a nominee of the partnership, any partner becomes an undischarged bankrupt, or the partnership permanently ceases to carry on a business as a tax agent.
- for companies:
 - there is no employee registered as a nominee of the company, the company goes into liquidation, or the company permanently ceases to carry on a business as a tax agent.

Penalties

3.8 Section 251N of the ITAA 1936 currently provides for a criminal penalty of \$1,000 for a registered tax agent who allows another person (who is not their employee or partner, a registered tax agent, or under the supervision and control of a nominee) to prepare income tax returns or conduct other business relating to any income tax matter on their behalf.

Negligence

3.9 Section 251M of the ITAA 1936 currently provides that a registered tax agent is liable to pay a fine, penalty or interest charge that a taxpayer has incurred due to the negligence of the tax agent. The amount that is recoverable from the tax agent cannot be reduced because of any contributory negligence of the taxpayer.

Rationale for major changes

Code of Professional Conduct

3.10 A new legislative Code sets out the conduct expected of tax practitioners, thereby allowing taxpayers to have greater confidence that they are dealing with tax practitioners who have, and maintain, high standards across the profession.

Administrative sanctions

3.11 The Bill provides the Board access to a graduated level of administrative sanctions for breaches of the Code, so that the Board is able to respond to breaches appropriately.

Penalties

3.12 For serious misconduct, such as making a false or misleading statement to the Commissioner of Taxation (Commissioner) or the Board, or employing or using the services of deregistered entities, the Board is able to apply to the Federal Court of Australia (Federal Court) for an order that the tax practitioner pay the Commonwealth a pecuniary penalty (civil penalty order).

3.13 Civil penalties are more appropriate than deregistration for certain misconduct prohibited under this Bill, which, although serious, do not warrant the cancellation or suspension of registration resulting in the loss of livelihood for tax practitioners. Civil penalties are more appropriate than criminal penalties because the conduct is not considered serious enough to justify the possibility of a criminal conviction or imprisonment. There is, however, a need for potentially more significant monetary penalties to deter tax practitioners from breaches in circumstances where suspension or termination would be inappropriate.

Negligence

3.14 The Bill removes the special statutory cause of action allowing taxpayers to recover a penalty, fine or interest charge that the taxpayer incurred due to the negligence of their tax agent. This provision of the former law did not allow contributory negligence of the taxpayer to be taken into account. It was also out of step with state laws that cap liability for negligence at common law. Although these issues could be addressed by amending the provision, this would add significant complexity. Moreover, the new framework addresses in a more direct way the concerns that gave rise to the old provision.

3.15 First, the tax law with respect to interest charges has changed considerably since the statutory remedy was originally enacted. Now, under the Shortfall Interest Charge (SIC), interest charges for tax shortfalls are four percentage points lower than the General Interest Charge. The reduced SIC does not contain penalty elements, but merely seeks to neutralise the 'loan benefits' that taxpayers might typically receive from the temporary use of the shortfall amount. Consequently, errors by tax agents will not generally have a penalty impact on taxpayers.

3.16 Secondly, under this Bill administrative penalties will no longer be imposed on taxpayers for the carelessness of their tax practitioners (please refer to Chapter 6 of this explanatory memorandum for details).

3.17 Taxpayers will retain a cause of action at common law to recover damages for the negligence of their tax practitioners and a cause of action under section 52 of the *Trade Practices Act 1974* to recover damages for engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. (Note that the primary tax could not be recovered under a statutory negligence claim but may be recovered under a common law negligence claim in certain situations where there is an overpayment of primary tax.)

Summary of new law

3.18 The ethical and professional standards required of tax practitioners in the provision of tax agent services for a fee are set out in the Code, which governs the conduct of all tax practitioners.

3.19 If the Board finds that a tax practitioner has breached the Code, it may impose one or more of a range of graduated administrative sanctions. The sanctions the Board may impose include:

- cautioning the tax practitioner;
- requiring the tax practitioner to complete a course of training;
- subjecting the tax practitioner to specified restrictions when conducting their practice;
- requiring the tax practitioner to practise under supervision; and/or
- suspending or terminating the tax practitioner's registration.

3.20 The Board or the Commissioner may also apply to the Federal Court for a civil penalty order against a tax practitioner for certain serious misconduct. The Board or the Commissioner can apply for a civil penalty order where a tax practitioner:

- makes a false or misleading statement that he or she knows or ought to reasonably know is false or misleading;

- employs or uses the services of deregistered entities that he or she knows or ought reasonably to know that the entity's registration was terminated; and/or
- signs a declaration or other statement in relation to a taxpayer and that document was prepared by an entity outside of the control of the tax practitioner.

3.21 The Board or the Commissioner may also apply to the Federal Court for an injunction to prevent or compel certain action. The ability to apply for injunctions is explained in Chapter 4 of this explanatory memorandum.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Code of Professional Conduct governs all registered tax agents, BAS service providers and their nominees. The Code establishes the professional and ethical standards required of tax agents, BAS service providers and their nominees.	No equivalent.
In addition to suspension and termination of registration, the Board may impose one or more of a range of administrative sanctions.	The state Boards may suspend or cancel registration, or take no action.
The Board or the Commissioner may apply to the Federal Court for a civil penalty order against a tax practitioner for conduct that involves a tax practitioner making a false or misleading statement and/or employing or using the services of deregistered entities.	No equivalent. The state Boards have discretion to suspend or cancel the registration of a tax agent if they are satisfied that any return prepared by the tax agent is false in any material particular.

<i>New law</i>	<i>Current law</i>
The Board or the Commissioner may apply to the Federal Court for a civil penalty order against a tax practitioner for conduct that involves a tax practitioner signing a declaration or other statement in relation to a taxpayer when the document was prepared by an entity other than the tax practitioner, their nominee, an individual working under their supervision or control, or another tax practitioner.	There is a strict liability offence that imposes a criminal penalty on a registered tax agent who allows a person other than an employee or another registered tax agent to prepare or conduct business relating to an income tax return or objection on their behalf, unless they are under the supervision or control of a registered tax agent or a nominee of a registered tax agent.
The Board or the Commissioner may apply to the Federal Court for an injunction to prevent or compel certain action. (The ability to apply for injunction is explained in Chapter 4 of this explanatory memorandum.)	No equivalent.
No equivalent, as taxpayers are excused from penalties in certain circumstances. (Please refer to Chapter 6 of this explanatory memorandum.)	An entity is entitled to recover the amount of the fine, penalty or interest charge from a tax agent, nominee or an exempted person under section 251L of the ITAA 1936, if the reason they are liable to pay that amount is a result of the negligence of the tax agent, nominee or the exempted person.

Detailed explanation of new law

Obligations of registered tax practitioners

Code of Professional Conduct

3.22 The Code governs all tax practitioners in the provision of a tax agent service or BAS service (collectively termed ‘tax agent services’) for a fee. [*Schedule 1, Item 5, subsection 995-1(1) to the ITAA 1997 and Item 18, Division 604, section 604-5 of Schedule 1 to the TAA 1953*]

3.23 The purpose of having a legislative Code is to establish clearly the professional and ethical standards required of tax practitioners in the provision of tax agent services, whether or not they are members of a professional association. The Code outlines the duties that tax practitioners owe to their clients, the Board and other tax practitioners.

3.24 The introduction of the Code, together with mechanisms for enforcing it, will ensure that tax practitioners possess appropriate skills and knowledge. The Code, however, will not place an additional burden on competent tax practitioners. Rather, it reflects existing best practices, bringing tax practitioners into line with what is required of professionals under the codes of conduct of related professions, such as the accounting and legal professions.

Principles of the Code

3.25 The Code comprises of a list of core principles. A single instance of a particular conduct may amount to a contravention of more than one of these principles.

3.26 The principles fall within six over-arching categories:

- compliance;
- honesty and integrity;
- independence;
- confidentiality;
- competence; and
- responsibility.

3.27 The Board is responsible for administering the Code, and has the power to issue guidelines to explain how elements of the Code apply in practice. The powers of the Board are explained in Chapter 5 of this explanatory memorandum.

Compliance

3.28 A tax practitioner must comply with the taxation law and must not knowingly impede the proper administration of the taxation law. *[Schedule 1, Item 18, Division 604, subsections 604-10(1) and (2) of Schedule 1 to the TAA 1953]*

3.29 The definition of a *taxation law* in section 995-1 of the *Income Tax Assessment Act 1997* covers all laws that the Commissioner administers, including any Acts for which the Commissioner has the general administration, and any regulations under those Acts.

3.30 As this Bill when enacted will become part of a taxation law, a tax practitioner must comply with the registration requirements and all the

principles of the Code, and must not engage in conduct for which the Board can apply to the Federal Court for a civil penalty order.

3.31 The requirement to comply with the taxation law does not prohibit a practitioner from advising a client to follow a taxation ruling issued by the Australian Taxation Office (Tax Office), even if they believe that ruling is inconsistent with the law. The ability of a taxpayer to receive the benefit of an incorrect ruling in their favour is a protection provided by the taxation law (see section 357-60 of Schedule 1 to the TAA 1953). Therefore, relying on a ruling is compliance with the taxation law.

3.32 To comply with a taxation law, tax practitioners must properly discharge their own personal tax obligations. This includes lodging their personal income tax returns on time.

Example 3.1

Robert is a nominee for a registered company tax agent. For the past two years, Robert has failed to lodge his own income tax return. Each failure to lodge his tax return amounts to a breach of the Code as Robert has failed to comply with a taxation law.

Honesty and Integrity

3.33 A tax practitioner must behave honestly and with integrity. Tax practitioners must be straightforward and honest in their approach to the provision of tax agent services. [*Schedule 1, Item 18, Division 604, subsection 604-10(3) of Schedule 1 to the TAA 1953*]

Example 3.2

Jack maintains a bank account in a false name and omits the interest from his income tax returns. Jill, a registered tax agent, assisted Jack to set up this account. The Board may conclude that such behaviour calls into question Jill's honesty and integrity.

Independence

3.34 A tax practitioner must always act lawfully in the best interests of their client, as the interests of the client are paramount. A tax practitioner must also have regard to the responsibilities owed to the community through its laws. This includes having regard for the other principles in this Code. [*Schedule 1, Item 18, Division 604, subsection 604-10(4) of Schedule 1 to the TAA 1953*]

Example 3.3

Michael works in the hospitality industry. He engages Rahul, a registered tax agent, to prepare and lodge his income tax return. He instructs Rahul to claim a deduction for work clothing for the black trousers he is required to wear. Although it is in Michael's best interest to reduce his taxable income, Rahul is aware that Michael cannot claim the cost of his work clothing as an allowable deduction because the trousers are not protective or specific to his occupation. He advises Michael accordingly.

3.35 Other than with the consent of the relevant clients, a tax practitioner must not allow their own interests to conflict with those of their clients, and must not allow the interests of one of their clients to conflict with those of another client. This is to ensure that all conflicts are appropriately disclosed and managed. *[Schedule 1, Item 18, Division 604, subsections 604-10(5) and (6) of Schedule 1 to the TAA 1953]*

3.36 The best evidence of disclosure of a conflict of interest is often in the form of a waiver signed by the client/s. Use of a waiver is therefore a simpler way to prove compliance with this principle of the Code. Once a conflict of interest is declared and addressed appropriately, the tax practitioner is allowed to act for his or her client even though the conflict still exists.

Example 3.4

James and Margie, recently divorced, have used the same registered tax agent, Sally, for the past ten years. In preparing their returns post divorce, it became apparent that the claiming of a deduction by James would have prevented the claiming of a deduction by Margie. Although Sally's professional judgment was that the deduction was more properly claimable by James, she was in a position where her duty to Margie was in conflict with her duty to James. Sally discloses and receives a waiver from both clients. She is not in breach of the Code.

Confidentiality

3.37 Tax practitioners must respect the confidentiality of information disclosed by their client, or that is otherwise acquired in the course of their work.

3.38 A tax practitioner is only permitted to disclose their client's confidential information where they receive specific authority from their client, or where there is a legal or other overriding duty to disclose. *[Schedule 1, Item 18, Division 604, subsection 604-10(7) of Schedule 1 to the TAA 1953]*

Example 3.5

The Tax Office is conducting an audit on Patricia's income tax return from the previous financial year but Patricia does not have all her receipts and payment summaries. As her registered tax agent, Anthony, completed her tax return, the Tax Office has issued a notice under section 264 of the ITAA 1936 for Anthony to provide it with all relevant information regarding Patricia's income tax return from the previous financial year. Although Anthony is required to maintain the confidentiality of Patricia's information, the notice creates an overriding legal obligation. Anthony must therefore provide the Tax Office with the information requested by the notice.

Competence

3.39 A tax practitioner has a duty to exercise appropriate professional skill and care when providing tax agent services.

3.40 A tax practitioner must refrain from providing tax agent services they are not competent to provide, unless expert advice and assistance is obtained. In addition, a tax practitioner must not claim knowledge of a taxation law that is greater than their actual knowledge. [*Schedule 1, Item 18, Division 604, subsection 604-10(8) of Schedule 1 to the TAA 1953*]

3.41 These requirements prevent practitioners with very narrow, specialised knowledge from providing tax agent services that are outside of their area of expertise.

Example 3.6

Matilda, a registered tax agent who specialises solely in providing advice on superannuation tax related matters, may be in breach of the Code if she provides tax advice on capital gains tax transactions for a fee unless she can otherwise satisfy the Board that she is competent to give that advice.

3.42 A tax practitioner must maintain up to date knowledge and skills relevant to the tax agent services they provide. Keeping up to date with developments in the tax law and tax administration may require the tax practitioner to undergo a certain minimum number of hours of continuing professional education per year as determined by the Board. [*Schedule 1, Item 18, Division 604, subsection 604-10(9) of Schedule 1 to the TAA 1953*]

3.43 Tax practitioners are not responsible for the veracity of the tax information provided to them by their clients. However, tax practitioners should take reasonable care to ensure the true state of their client's tax affairs. Where there are grounds to doubt the information provided by the client, the tax practitioner must make reasonable enquiries as to the

accuracy and completeness of the information. [*Schedule 1, Item 18, Division 604, subsection 604-10(10) of Schedule 1 to the TAA 1953*]

Example 3.7

Renny is entitled to claim a deduction for certain self education expenses and provides Chris, her registered tax agent, with receipts for expenses totalling \$1,000. Chris claims the amount without examining Renny's receipts. It turns out that Renny misled Chris because the receipts were not all receipts for university textbooks, but rather for books that she bought for personal use. Chris believed that the amount Renny claimed was quite high, but did not make any further enquiries, nor did he check what the receipts were actually for. If he had checked the receipts it would have been apparent that some were not related to Renny's course. Chris has breached the Code for failing to take reasonable care to establish the true state of the affairs of his client.

3.44 In situations where a tax agent prepares returns based on the information provided by a BAS service provider, the tax agent must similarly take reasonable care to ensure the accuracy of the information on which they base their services.

Example 3.8

Mark, a registered tax agent, has been engaged by ABC Ltd to prepare its income tax return. ABC Ltd gave Mark all its tax information, including its BAS and GST reconciliation accounts prepared by Craig, a BAS service provider. If Mark has doubts as to the accuracy of Craig's work, he could demonstrate having taken reasonable care by asking to see the original documentation (eg. tax invoices) or asking that Craig explain the procedure and methodology used to arrive at a particular determination. While a full 'audit' of the work provided is not necessary, it cannot simply be taken at face value.

3.45 To ascertain and satisfy a taxpayer's liabilities or obligations, a tax practitioner must take all reasonable steps to apply the taxation law correctly to the circumstances of their clients. It follows that, as well as establishing the facts, a tax practitioner must interpret and apply taxation laws reasonably. [*Schedule 1, Item 18, Division 604, subsection 604-10(11) of Schedule 1 to the TAA 1953*]

3.46 Where a tax practitioner is uncertain about how a taxation law applies to a particular situation, it is their responsibility to consider and seek clarification from relevant authorities and sources such as:

- legislation and relevant extrinsic material (eg. explanatory memoranda);
- relevant case law;

- the Commissioner's views as expressed in rulings and determinations on the topic;
- the Commissioner's instructions in documents such as income tax return form instructions, BAS instructions, fact sheets and practice statements;
- information published or provided by a recognised professional association (RPA) or legal professional association;
- information published by experts and other tax practitioners/specialists and commentaries.

Example 3.9

Justin is a registered tax agent. Justin's friend John has asked him to complete a BAS for John's business. Justin has never completed a BAS before and does not refer to the BAS instructions (as issued by the Tax Office) when completing the BAS. Several mistakes are made on the BAS that Justin completes. Justin is in breach of the Code for failing to take reasonable care to apply correctly the taxation law to John's business.

3.47 Where a tax practitioner, after consulting the relevant authorities and sources, is still uncertain of how to apply a taxation law, they may need to seek assistance from another party, such as another tax practitioner, a legally qualified professional, an RPA, a legal professional association, or the Tax Office. The tax practitioner should be satisfied that the individual or organisation from which assistance is sought has the ability and resources to provide advice on taxation law. If the client is to bear the associated costs, the tax practitioner should seek approval from the client before seeking such assistance.

3.48 One cost effective method of clarifying anything involved in the application of a relevant law is to seek a private ruling from the Tax Office (see section 357-55 of Schedule 1 to the TAA). A private ruling can be sought by a taxpayer (or a tax practitioner on their behalf) by lodging a simple form with the Commissioner. This is a low cost, low risk alternative to other forms of taxation assistance. The private ruling can be relied upon by the taxpayer (or the tax practitioner on behalf of the taxpayer) to bind the Commissioner. However, there is no obligation for the taxpayer to rely on the private ruling. A taxpayer or tax practitioner obtains an objection right under Part IVC of the TAA 1953 where he or she applies for a private ruling and the Commissioner fails to make the ruling or declines to rule within a certain time period.

Responsibility

Advising clients of their rights and obligations

3.49 A tax practitioner must advise clients of their rights and obligations that are relevant to the tax agent services or BAS services being provided. *[Schedule 1, Item 18, Division 604, subsection 604-10(12) of Schedule 1 to the TAA 1953]*

3.50 The advice should include (without limitation):

- an explanation of the nature of self assessment, including the Commissioner's ability to amend an assessment within a certain time of the original assessment;
- the client's obligation to keep proper records and the consequences of not doing so;
- that the responsibility for the accuracy and completeness of the particulars and information required to comply with the laws relating to taxation rests with the client; and
- where necessary, the rights or options available to clients including how to seek a private ruling and how to object or appeal against adverse decisions made by the Commissioner.

Supervision and control

3.51 Tax practitioners are accountable for tax agent services provided by people working on their behalf. *[Schedule 1, Item 18, Division 604, subsection 604-10(13) of Schedule 1 to the TAA 1953]*

3.52 Tax practitioners must ensure that a person working for them or on their behalf has appropriate skills and experience, and that they are appropriately supervised.

3.53 In some tax practices the initial preparation of clients' approved forms is done by employees or contractors who are not tax practitioners. The employee then submits the completed returns to a tax practitioner for their checking and signature. The supervision and control principle assures taxpayers that when they engage the services of a tax practitioner, the service will either be provided by a tax practitioner or by another person whose work is properly supervised by a tax practitioner.

Example 3.10

Nick has recently been engaged as a contractor by Jeremy, a registered tax agent. Nick completes several income tax returns which Jeremy

signs without checking, assuming the returns to be correct. It turns out that Nick incorrectly interpreted the eligible termination payment rules on several of the returns. Jeremy is in breach of the Code for failing to exercise proper supervision and control of work undertaken by Nick.

Holding money or other property on trust for clients

3.54 A tax practitioner may receive money or other property from or on behalf of a client and hold it on trust for the client, including money received for the cost of providing tax agent services. The tax practitioner must account for the money or other property to the client and may only disburse the money or property in the trust account on authority (in some cases, in writing) from the client. The tax practitioner may refer to the accounting standards of the RPAs and relevant State laws such as the Legal Profession Acts and Trust Accounts Acts from various Australian jurisdictions for further guidance. *[Schedule 1, Item 18, Division 604, subsection 604-10(14) of Schedule 1 to the TAA 1953]*

Example 3.11

Anthony, a registered tax agent, receives money on trust from his clients. To account for all the trust money he receives, Anthony sets up a general trust account with an authorised deposit-taking institution. Anthony is only permitted to disburse the money in the trust account at his clients' written direction.

Holding professional indemnity insurance

3.55 A tax practitioner is required to maintain appropriate professional indemnity insurance. The Board can specify what type or level of professional indemnity insurance a tax practitioner is required to maintain. *[Schedule 1, Item 18, Division 604, subsection 604-10(15) of Schedule 1 to the TAA 1953]*

3.56 Tax practitioners are professionals who hold themselves out as having a special skill that members of the community are entitled to rely on. As they are agents for the client, they can be liable for any financial loss or damage which their clients suffer through failure or mistake. The requirement to be insured guarantees that the client is compensated for their loss even if the financial resources of the tax agent are not sufficient.

3.57 In determining the appropriate type or level of professional indemnity insurance for tax practitioners, the Board may refer to the insurance level standards currently imposed by RPAs, and the Commonwealth legislative framework regarding the capping of liabilities for damages, for guidance.

Following the directions of the Board

3.58 A tax practitioner must respond to requests and directions from either the Board or the Commissioner in a timely, responsible and reasonable manner. [*Schedule 1, Item 18, Division 604, subsection 604-10(16) of Schedule 1 to the TAA 1953*]

3.59 Occasionally a tax practitioner may have to balance their obligation to comply with requests from the Board against other professional obligations, such as common law privileges or statutory obligations. Consequently, claiming legal professional privilege or other legal rights of the client is not an unreasonable response to the direction of the Board or Commissioner.

3.60 Where there is no conflict of obligations, failure to follow a direction of the Board and/or the Commissioner will amount to a breach of the Code and may warrant the Board imposing one of the more serious administrative sanctions at its disposal, such as termination of the tax practitioner's registration.

Example 3.12

Mario is a director of M&J Tax Pty Ltd, a registered tax agent. Recently, Mario was penalised for being a promoter of a tax exploitation scheme, which is a relevant adverse event for the purpose of registration. The Board subsequently informed M&J Tax Pty Ltd, by notice in writing, that it was required to remove Mario from its board of directors for a certain period. M&J Tax Pty Ltd ignores the Board's direction and allows Mario to continue to sit on the board. This failure to follow the Board's direction is a breach of the Code and may be sufficiently serious for the Board to decide to terminate the company's registration.

Administrative sanctions for failing to comply with the Code

3.61 Compliance with the Code is mandatory for all tax practitioners. If tax practitioners do not comply, they may be liable for sanctions imposed by the Board.

3.62 The graduated sanctions available to the Board allow it to tailor the sanction to the seriousness of the conduct that breaches the Code. The purpose of sanctions is not to punish tax practitioners, but to improve their performance.

3.63 Where there has been a breach of the Code, the Board may impose any one or more of the following sanctions:

- a written caution; [*Schedule 1, Item 18, Division 604, subsection 604-15(a) of Schedule 1 to the TAA 1953*]
- an order requiring the tax practitioner to take one or more actions including, but not limited to, the following:
 - complete a course of education or training specified in the order by the Board;
 - provide services (for which the tax agent or BAS service provider is registered) only under the supervision of a registered tax agent or BAS service provider that has been specified in the order; and/or
 - provide only those services that are specified in the order; [*Schedule 1, Item 18, Division 604, paragraph 604-15(b) and subsection 604-20(1) of Schedule 1 to the TAA 1953*]
- suspension of registration; [*Schedule 1, Item 18, Division 604, subsections 604-15(c) and 604-25(1) of Schedule 1 to the TAA 1953*]
- termination of registration. [*Schedule 1, Item 18, Division 604, paragraph 604-15(d) and section 604-30 of Schedule 1 to the TAA 1953*]

Example 3.13

Arif is a registered BAS service provider. Several complaints have recently been made to the Board regarding Arif.

As a result of investigating Arif, the Board discovers that he has made numerous errors in advising clients, largely in relation to recent developments in taxation law. Arif has not undertaken any approved continuing professional education courses for the last five years. The Board concludes that Arif is in breach of the Code (subsections 604-10(8) and 604-10(9)) partly due to failing to maintain up to date knowledge and skills relevant to the tax agent services he provides. The Board issues Arif with a written caution. The Board also issues Arif with an order to complete further training and, until the training is completed, the order states that Arif must work under supervision and control of another registered BAS service provider.

3.64 The graduated sanctions provide the Board with the capacity to tailor its response to the severity of the breach of the Code. For instance, in the case of isolated mistakes, the Board may take no specific action, or issue a written caution. For repeated mistakes the Board may issue an order specifying that the tax practitioner must undertake further education or training in the particular area. In more severe cases, where a tax practitioner has displayed a serious disregard for the Code, suspension or termination of registration may be appropriate. This is particularly so

where a tax practitioner causes serious damage to their clients, or to the integrity of the taxation system. Behaviour that calls into doubt the honesty, integrity or competence of a tax practitioner, or raises questions about their suitability to practise will warrant more severe sanctions including suspension or termination of registration.

Example 3.14

Rithy is a registered tax agent. It is brought to the Board's attention that for the 2004-05 financial year Rithy lodged 22 income tax returns on behalf of clients which contained mistakes in relation to allowable deductions. The Board orders Rithy to undertake a course in taxation law specialising in general and specific deductions. Rithy ignores the Board's direction and fails to comply with the order by the notified date. When questioned as to the cause of his failure to comply, he responds simply that he has been too busy. Rithy fails to comply with a new order for training issued by the Board with an extended date. The Board subsequently suspends Rithy's registration for displaying a serious disregard of the Code by failing to follow directions of the Board.

Example 3.15

Complaints are made to the Board that Christine, a registered BAS service provider, has been giving her clients advice about their income tax obligations for the past year. Christine is acting outside her expertise and is in breach of the Code for providing a tax agent service which she is not competent to provide. When questioned by the Board, Christine fails to provide any reasonable excuse. The Board issues Christine with a written caution for failing to comply with the Code and orders her to only provide those services for which she is registered to provide.

Period of orders

3.65 The Board may specify the period of time in which the tax practitioner has to comply with requirements of an order, or alternatively, the time period within which the tax practitioner must perform certain requirements stated in the order. [*Schedule 1, Item 18, Division 604, subsection 604-20(2) of Schedule 1 to the TAA 1953*]

Period of suspension of registration

3.66 Where the Board decides to suspend the registration of a tax practitioner, the Board may also determine a period of suspension that applies to the tax practitioner. If the tax practitioner's registration has already been suspended, the Board can extend that suspension for a further period, which commences at the end of the original suspension

period. *[Schedule 1, Item 18, Division 604, subsections 604-25(1) and (3) of Schedule 1 to the TAA 1953]*

3.67 Tax practitioners may not provide tax agent services while their registration has been suspended or terminated. If the tax practitioner does provide tax agent services in these circumstances, the Board may impose further administrative sanctions on the tax practitioner, for example, it may suspend the tax practitioner's registration for a further period or terminate registration. Alternatively, the Board may apply to the Federal Court for a civil penalty order or an injunction to restrain the tax practitioner from continuing to provide tax agent services. (Please refer to Chapter 3 of this explanatory memorandum.) *[Schedule 1, Item 18, Division 604, subsection 604-25(2) of Schedule 1 to the TAA 1953]*

Example 3.16

Luke has had his registration terminated by the Board for conduct that is in serious breach of the Code. Luke does not inform his clients that his registration has been terminated and continues to provide tax agent services. The Board applies to the Federal Court for a civil penalty order against Luke for providing tax agent services for a fee while unregistered. At the same time, the Board also applies to the Federal Court for an injunction to restrain Luke from continuing to provide tax agent services to his clients.

3.68 A tax practitioner under suspension can apply for registration if their registration is due to expire during the suspension period. The Board can also impose further administrative sanctions, including termination for failure to comply with the registration requirements, during the suspension period. *[Schedule 1, Item 18, Division 604, subsection 604-25(4) of Schedule 1 to the TAA 1953]*

Notification of the Board's decision

3.69 Where the Board sanctions a tax practitioner, the Board must notify the tax practitioner of their decision in writing. The notice must contain the reasons for the Board's decision. (Please refer to Chapter 4 of this explanatory memorandum). *[Schedule 1, Item 18, Division 604, subsections 604-20(2), 604-25(1) and section 604-30 of Schedule 1 to the TAA 1953]*

3.70 A decision by the Board to impose an administrative sanction is a reviewable decision for which the tax practitioner may apply to the AAT for a review. *[Schedule 1, Item 18, Division 610, paragraphs 610-5(e), (f), (g) and (h) of Schedule 1 to the TAA 1953]*

Penalties

3.71 The Board or the Commissioner may apply to the Federal Court for an order that a tax agent or BAS service provider is to pay a civil penalty for certain specified misconduct that includes:

- making false or misleading statements;
- employing or using the services of a tax agent or BAS service provider who has had their registration suspended or terminated;
- signing a declaration, statement or document that has been prepared by an entity other than the tax agent or BAS service provider, their nominee, a person working under their supervision and control or another tax agent or their nominee.

[Schedule 1, Item 18, Division 604, sections 604-35, 604-40 and 604-45 of Schedule 1 to the TAA 1953]

3.72 The maximum amount of the civil penalty per offence is 250 penalty units (currently \$27,500) for an individual and 1,250 penalty units (currently \$137,500) for a body corporate. *[Schedule 1, Item 18, Division 604, sections 604-35, 604-40 and 604-45 of Schedule 1 to the TAA 1953]*

3.73 Where a partnership is liable for a civil penalty, every partner is liable unless that partner was not engaged in the conduct, did not aid, abet, counsel or procure the conduct, or was not in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or by any act or omission of the partner). This requirement applies to the civil penalties in Divisions 602 and 604 of this Bill. *[Schedule 1, Item 18, section 610-10 of Schedule 1 to the TAA 1953]*

3.74 Where a partnership consists of both individual and corporate partners, individual partners may be subject to the penalty applied to individuals, while corporate partners are subject to the level of penalty applied to bodies corporate.

Making false or misleading statements

3.75 A tax practitioner must not prepare or certify a statement, or permit another person to do so, in circumstances where they know or ought reasonably to know that the statement is false, incorrect or misleading in a material respect. *[Schedule 1, Item 18, Division 604, section 604-35 of Schedule 1 to the TAA 1953]*

3.76 If competent tax practitioners take reasonable care to ensure that statements are not false or misleading, the civil penalty provisions will not apply. Tax practitioners are therefore not required to audit the veracity of

all the information that the client gives to them, merely to take reasonable care that statements are correct.

3.77 If a tax practitioner has reason to believe that the client's records are incorrect or misleading, the tax practitioner should:

- discuss the matter with the client to clarify any possible misstatement or omission;
- advise the client to disclose the misstatement or omission to the Tax Office if the relevant documents have already been submitted; and/or
- withdraw from the engagement if the client, after having been advised, refuses to explain or correct any apparent misstatement or omission.

Employing tax agents or BAS service providers whose registration has been terminated

3.78 A tax agent or BAS service provider must not provide tax agent services for a fee where their registration has been terminated by the Board (see paragraph 3.67 above). Similarly, a tax agent or BAS service provider must not employ or use the services of an entity whose tax agent or BAS service provider registration has been terminated to provide tax agent services on their behalf within three years of the termination, where they know or ought reasonably to know, that the entity's registration has been terminated by the Board for certain causes. [*Schedule 1, Item 18, Division 604, subsection 604-40(1) of Schedule 1 to the TAA 1953*]

Example 3.17

Frank is a registered tax agent with a large client base. Due to his heavy workload he decides to employ his friend Cheryl to assist with the preparation of tax returns. Frank was aware that Cheryl had previously been a registered tax agent, and that her registration was terminated by the Board the previous year as a result of a conviction for fraudulent activities.

Frank is liable to pay a civil penalty for employing a person whose registration has been terminated within the previous five years.

3.79 However, a tax agent or BAS service provider will not be liable for a civil penalty if they employ or use the services of another tax agent or BAS service provider whose registration has been terminated for one of the following reasons:

- the entity surrendered the registration;

- the entity was registered as a nominee, but the tax agent or BAS service provider (as the case may be) notifies the Board that they no longer want the person to be their nominee or the registration of the tax agent or BAS service provider has been terminated; [*Schedule 1, Item 18, Division 602, paragraph 602-80(2)(d) of Schedule 1 to the TAA 1953*]
- the entity ceases to carry on a business as a tax agent or a BAS service provider;
- the entity became an undischarged bankrupt or went into external administration; or
- a reason prescribed by the regulations.

[Schedule 1, Item 18, Division 604, subsection 604-40(2) of Schedule 1 to the TAA 1953]

3.80 These exemptions from penalty cater for entities whose registration has been terminated without involving serious misconduct by the entities. It would be unfair for those entities that become bankrupt independent of their business endeavours (for example, if they agree to be a guarantor for a loan) to automatically be prevented from providing tax agent services for three years.

3.81 The prohibition only applies to the employment or use of a deregistered tax agent in the first three years of deregistration. This is to ensure an individual is not prevented from working in the tax industry for an indeterminate period.

Signing of declarations, etc

3.82 A tax agent or BAS service provider is liable for a civil penalty if they sign a declaration or other statement that is required by a taxation law (or BAS provision for BAS service providers) which was prepared by an entity other than:

- the tax agent or BAS service provider;
- the nominee of the tax agent or BAS service provider;
- another tax agent or BAS service provider;
- a nominee of another tax agent or BAS service provider; or
- a person working under the supervision and control of the tax agent or BAS service provider or their nominee.

[Schedule 1, Item 18, Division 604, section 604-45 of Schedule 1 to the TAA 1953]

3.83 Tax practitioners are not liable for a civil penalty if they sign a declaration or other statement prepared by an entity that is not listed in paragraph 604-45(1)(c), provided they have reviewed the document and have taken reasonable steps to ensure the accuracy of the document before signing it. *[Schedule 1, Item 18, Division 604, subsection 604-45(3) of Schedule 1 to the TAA 1953]*

3.84 A tax practitioner wishing to rely on subsection 604-45(3) bears an evidential burden in proceedings for a civil penalty order. *[Schedule 1, Item 18, Division 604, subsection 604-45(4) of Schedule 1 to the TAA 1953]*

Example 3.18

Hans, who is not registered to provide tax agent services, has prepared a number of income tax returns for a fee. He arranges for his friend Joel, a registered tax agent, to sign and submit these income tax returns in return for providing Joel with a share of his profits. The returns contain significant errors as Joel did not check the work of Hans. Joel is liable for a civil penalty for signing a tax return that was not prepared by him or a person working under his supervision and control and was not reviewed by him. Hans is also liable for a civil penalty for providing tax agent services for a fee while not being registered.

3.85 Actual knowledge of the elements of the civil penalty is not required because the tax agent or BAS service provider ought to know that they are signing a document that was not prepared by an adequately qualified or supervised person.

Injunction

3.86 The Board or the Commissioner may apply to the Federal Court for an injunction to prevent or compel certain action. The ability to apply for injunctions is explained in Chapter 4 of this explanatory memorandum