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Regulation of tax agents in Australia

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Abstract

This article critiques the Australian developments in the regulation and control of tax agents and considers them within the context of both ethics and the policy that encourages tax compliance. The article notes a subtle shift in the relationship between tax agents and their clients from one where the client's (legitimate) interests are paramount to one where similar weight is given to the interests of the Australian Taxation Office and observance of the law.

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1. INTRODUCTION

The relationship between taxpayers and the tax agents who represent them has been changed in Australia as a result of the enactment the *Tax Agent Services Act 2009 (Cth)* (TASA). In this article a reference to a tax agent[2] means a reference to a professional who assists a taxpayer in understanding and acquitting their obligations under the tax law and who represents the taxpayer in their dealings with the Commissioner of Taxation. The regulation of tax agents in Australia includes regulation of 'BAS agents' which are Business Activity Statement agents being professionals who assist business taxpayers in the compilation of their periodic Business Activity Statement (BAS) returns and the other returns identified below in part 4 of this article. The role of tax agents is important in understanding tax compliance and aspects of the practitioner experience have been discussed by Dabner in the *British Tax Review*.[3] Whereas Dabner has examined the role of tax intermediaries in New Zealand Australia and the United Kingdom he has not considered (it not being his purpose to do so) the shift in emphasis in the role of tax intermediaries in Australia that this article does. The authors of this article note the tightening of 'controls' on agents in the form of Australia's now highly regulated and recently revamped regime applicable to tax agents the origins of which date back to the 1920's. This article identifies how the Australian approach has subtlely shifted the principal allegiance that taxpayer representatives have, from their clients alone to compliance with the law and with the wishes of the revenue authority and it discusses the implications of this.

The article starts by considering the critical role of tax agents in relation to taxpayer compliance. It then considers briefly the history of regulation of tax agents before identifying the key features of the new regime. It then goes on to explore how the controls interact with several sets of rules applicable to compliance behaviour. Such rules include severe penalties applicable to tax agents in Australia under the *Promoter Penalties*[4] regime, targeted at the propagation of tax avoidance schemes. It is also necessary to consider the application of the Australian Tax Office's (ATO's) *Risk Differentiation Framework*[5] that (anecdotally, owing to obscurity in the operation of the *Framework*) includes the performance of the tax representative within the matrix of factors that determine the risk to the Revenue posed by the taxpayer.

2. THE CRITICAL ROLE OF THE TAX AGENT

A tax agent is a professional who assists taxpayers comply with their obligations under tax law, usually by using the information they are provided with in order to complete the annual income tax return. They also represent taxpayers in their dealings with the revenue authority.[6] Most personal taxpayers in Australia use a tax agent to

[2] "Tax agent" and "BAS Agent" are defined in the TASA by means of lengthy detailed definitions of "tax agent service" and "BAS agent service" under s 90–5 and 90–10 of the TASA.

[3] Justin Dabner "Constraints on the 'partnership' model - what really shapes the relationship between the tax administrator and tax intermediaries in Australasia and the United Kingdom" B.T.R. 2012, 4, 526–552 (Dabner).

[4] Division 290 of Schedule 1 *Taxation Administration Act 1953*.

[5] ATO Risk Differentiation Framework Fact Sheet publication (2013) Nat 73993 at https://www.ato.gov.au/Business/Large-business/In-detail/Risk-Differentiation-Framework/Risk-differentiation-framework-fact-sheet/.

[6] See note above.

complete their tax return.[7] Taxpayers who are not natural persons frequently use a tax agent too.[8] For companies the public officer signs off the tax return. This is often a tax agent used by the company for this purpose.

The role of the tax agent can be critical to compliance with the tax system. In Australia, the tax agent profession (the demographics of the group and the qualifications expected of them are discussed more fully below) is populated principally by individuals qualified in accounting. Professional accountants are subject to the ethical obligations set by their professional association. Thus, members of the Institute of Chartered Accountants,[9] of CPA Australia[10] and of the Institute of Public Accountants[11] are subject to their respective codes of professional conduct. All participants in the tax system are, of course, also subject to the law and would be subject to criminal penalties for making knowingly false statements, even on behalf of a client. Not all tax agents are members of professional bodies, however, and thus these agents have no professional code derived from that quarter.[12] Furthermore (although this point cannot be taken too far), professional codes tend to emphasise the relationship between the professional and their clients rather than the relationship between the professional and third parties.[13] The relevant literature[14] suggests that the role of the tax return preparer (a tax agent for our purposes) is critical in managing the

[7] Australian Taxation Statistics — in 2011/12, the proportion of individual tax returns filed by tax agents was 72.44%. See https://data.gov.au/dataset/taxation-statistics-2011-12/resource/f163573b-49a8-483a-bb21-f858a94414ee.

[8] There is no published data on this but as company and other business tax affairs are complex it is submitted that most business entities would use a tax adviser/agent for lodgement.

[9] See http://www.charteredaccountants.com.au/.

[10] See http://www.cpaaustralia.com.au/.

[11] See https://www.publicaccountants.org.au/.

[12] Cynthia Coleman (Tax Practitioners Board Member) noted that nearly 50% of registered tax agents are not subject to any other professional code than that of the Tax Practitioners Board. "The Tax Practitioners Board: Enforcing ethics of registered representatives" — presentation to Atax Seminar "Ethics and Taxation Advice" 4 November 2013, University of New South Wales. A list of the professional bodies that are recognised by the Tax Practitioners Board can be found in the Tax Practitioners Board Annual Report 2012/13 at Table 3.2.

[13] This might be observed from the tenor of, for example, Compiled APES 110 Code of Ethics for Professional Accountants which notwithstanding its acknowledgement of an accountant's wider obligations to the public, devotes much of its attention to the risks to the accountant's integrity and judgment and to the risks to and inherent in the professional/client relationship. Tan (Tan, L. M, "Taxpayers' Preference for Type of Advice from Tax Practitioner: A Preliminary Examination", (1999) 20 *Journal of Economic Psychology* 431–447, at 435) reports research by S. Scotchmer ("The effect of tax advisors on tax compliance" in J.A. Roth, J.T. Scholz (Eds) (1989) 2 *Taxpayer compliance: Social science perspectives* 182–197) which suggests "… tax practitioners do not cheat but are prevented from taking riskless tax positions due to their duty to act in the interest[s] of the[ir] client."

[14] See, for example, Killian S, Doyle E., (2004) "Tax Aggression Among Tax Professionals: The Case of South Africa" 4(3) *Journal of Accounting, Ethics and Public Policy* and the literature cited therein especially Jackson, B. R., and Milliron, V. C. "Tax compliance research: findings, problems and prospects." (1986) 5 *Journal of Accounting Literature*, 125-165; Milliron V., (1988) "A Conceptual Model of Factors Influencing Tax Preparers' Aggressiveness" in Moriarty S. and Collins J., (Eds.), *Contemporary Tax Research* 1–15, University of Oklahoma; and Reckers, P. M. J., Sanders, D. L., and Wyndelts, R. W. "An Empirical Investigation of Factors Influencing Tax Practitioner Compliance" (1991) 13(2) *The Journal of the American Taxation Association*, 30–46. Also see Hite, P. A. and G. McGill: "An Examination of Taxpayers' Preference for Aggressive Tax Advice", (1992) 45 *National Tax Journal*, 389–403; Tan, L. M "Taxpayers' Preference for Type of Advice from Tax Practitioner: A Preliminary Examination", (1999) 20 *Journal of Economic Psychology* 431-447; Newberry, K. J., P. M. J. Reckers and R. W. Wyndelts, "An Examination of Tax Practitioner Decisions: The Role of Preparer Sanctions and Framing Effects Associated with Client Condition", (1993) 14 *Journal of Economic Psychology*, 439-452.

tax compliance process and engendering the right compliance culture. It has been suggested that tax culture is a shared body of beliefs held by a society's tax practitioners and policy makers.[15] The literature is not entirely consistent on the subject of how tax agents influence compliance in that Tan[16] noted a slight propensity for tax preparers to give aggressive advice in situations where there is ambiguity in the law, whilst both Tan and Hite et al[17] have found that taxpayers generally prefer conservative tax advice. Tan has also noted that some research suggests that tax preparers play a dual role in that they can on the one hand enforce the law and on the other exploit ambiguities.[18] The consequence of this critical role of tax agents in contributing to tax culture and of the fact that such a large proportion of individual taxpayers in Australia uses a tax agent to prepare their tax returns means that it is imperative in developing policies and strategies to encourage tax compliance to regulate tax agents. The early work of, inter alia, Jackson and Milliron[19] identified within their "agency theory" analysis[20] the incentives affecting tax preparers. On the one hand, there was an incentive to maximise revenue by efficiently serving their clients and, on the other hand, there was an incentive to fulfil a responsibility (on pain of penalty — in that research situation — borne by their client rather than by the preparer) to the government. This pointed to agency theory as a valid methodology for researching the role of tax preparers in compliance. The recent changes to the tax agent rules in Australia directly influence this agency relationship, making the responsibility to government explicit. The threat of preparer penalties has been demonstrated by Reckers et al to influence preparers to be more accurate in signing declarations and more conservative in advising clients.[21]

Long before the research results referred to above, Australia had evidently recognised the pivotal role played by tax preparers and the long standing practice of regulating the membership of the tax agent community has provided a solid base for the modern approach. The history of such regulation is discussed below.

Before doing so, the background point concerning the ethical environment in which tax agents operate requires elaboration. The suggestion is made that existing professional ethical frameworks may miss sections of the tax agent community as they do not already belong to a regulated (usually self-regulated) professional body. In addition, the ethical guidelines observed by professional bodies such as the various accounting associations have application to a wide variety of professional transactions and relationships and are not aimed specifically at the tax compliance role. Thus,

[15] Livingston M. A. "Law, Culture, and Anthropology: On the Hopes and Limits of Comparative Tax" (2005) 18 *Canadian Journal of Law and Jurisprudence* 119 at 121.

[16] Tan, L. M, "Taxpayers' Preference for Type of Advice from Tax Practitioner: A Preliminary Examination", (1999) 20 *Journal of Economic Psychology* 431–447, 445.

[17] Hite, P. A. and G. McGill, "An Examination of Taxpayers Preference for Aggressive Tax Advice", (1992) 45, *National Tax Journal*, 389–403, 399.

[18] Tan n 16, 434, referring to S. Klepper, M. Mazur and D.S. Nagin "Expert intermediaries and legal compliance: The case of tax preparers" (1991) 34 *Journal of Law and Economics*, 205 - 229.

[19] Jackson B.R., V.C. Milliron, "Tax Compliance Research: Findings, Problems, and Prospects" (1986) 5 *Journal of Accounting Literature* 125–166, 155.

[20] Agency theory is the theoretical analysis of relationships between principals and agents. It is concerned with resolving the problems that arise in such relationships where (inter alia) the goals of the principal and the agent differ. For a discussion, see Kathleen M. Eisenhardt "Agency Theory: An Assessment and Review" (1989) 14, 1, *The Academy of Management Review* 57–74.

[21] Reckers, P. M. J., Sanders, D. L., and Wyndelts, R. W. (1991). "An Empirical Investigation of Factors Influencing Tax Practitioner Compliance" 13(2) *The Journal of the American Taxation Association*, pp. 30–46, 43.

there is an obvious policy imperative for the Australian government to develop a framework within which tax agents should carry out their role that safeguards the interests of the their clients and of the tax system. As indicated, steps in this direction were taken many years ago and that history is described next.

3. THE HISTORY OF THE TAX AGENTS' RULES IN AUSTRALIA

Tax agents have been regulated in Australia for almost a century. The *Income Tax Assessment Act 1936-1943* (Cth) established[22] that the Commonwealth Government might enter into arrangements with the various states for the purposes of constituting or recognising various Tax Agents' Boards for each jurisdiction.[23] The Queensland Tax Agents' Board was already in existence, having been established in 1922[24] and the South Australian Board had been in existence since 1924.[25]

The six state Boards (New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia) "...were set up with the aim of registering 'fit and proper' persons to be tax agents"[26] and seem to have functioned well, and in a coordinated fashion. One source seems to suggest that the creation of a national framework that recognised existing State Boards was possibly an initiative of the ATO[27] rather than of the politicians of the day, although this interpretation may be going too far. Were it an ATO initiative it would be a clear manifestation of a strategy on the part of the ATO to engage more closely with the tax agent sector and secure the interests of the revenue.

4. THE NEW TAX AGENTS SERVICES REGIME

The entire system was changed with a new legislative regime established under the *Tax Agent Services Act 2009 (Cth)* (TASA) leading to the creation of a single national Tax Practitioners Board (Board). The Tax Agent Services Bill 2008 provided for registration of 'tax agents'[28] and Business Activity Statement Agents ('BAS agents')[29]

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[22] See, s251H *Income Tax Assessment Act 1936-43 (Cth)*.

[23] An example of recognition may be found in the *Tax Agents' Board Arrangements Act No. 28, 1943 (NSW)*. This seems to have arranged that the Board of Appeal established for the hearing of tax appeals under the *Income Tax Management Act No 48 1941 (NSW)* would constitute a Tax Agents Board for these purposes.

[24] See also, D'Ascenzo, M. "A proud history: Australia's Tax Agents' Boards", Speech by the Commissioner of Taxation to mark the closing of the six state Tax Agents Boards. Canberra, 18 November, 2009. (http://www.ato.gov.au/corporate/content.aspx?doc=/content/00221636.htm, accessed 19 August 2013).

[25] South Australia Income Tax (Amendment) Act 1924.

[26] D'Ascenzo, M. "A proud history: Australia's Tax Agents' Boards", above n 24 .

[27] See, L. Edmonds, *Working for all Australians 1910-2010: A brief history of the Australian Taxation Office,* Ch. 4 "The 1940's –Rebirth in adversity" where it is suggested that "The details of the new legislation were worked out at a conference of ATO officials in January 1943 and the amended income tax legislation came into force from 1 August. Its major innovations included a much stronger instalment system known as PAYE (pay as you earn) and the registration of tax agents." http://www.ato.gov.au/About-ATO/About-us/In-detail/History/Working-for-all-Australians-1910-2010/ (accessed 19 August 2013).

[28] Tax agents are qualified persons who represent a taxpayer in their dealings with the Tax Office and complete and lodge forms and returns on their behalf. It is their services that are defined in TASA rather than a specific definition of "tax agent" or "BAS agent".

[29] BAS agents are paid a fee by business taxpayers to compile a periodic "Business Activity Statement" on their behalf. Their role and the advice they give to their clients are more limited than that of Tax agents.

and for the regulation of such tax agents and BAS agents. The Bill also included an enforceable Code to "provide certainty and clarity for agents as to what is expected of them",[30] with a view to reducing compliance costs. The rationale for this change is set out in the Explanatory Memorandum that accompanied the Bill.

The Explanatory Memorandum refers (in the usual upbeat style of such things) to a number of impacts that the Bill was intended to have, such as improving:

> ... the regulatory environment for the provision of tax agent services for a fee or other reward by increasing the consistency in registration and providing appropriate, but flexible, regulation and greater certainty for agents.[31]

This would be achieved through

> [t]he establishment of a national Board [that] will benefit tax agents and BAS [Business Activity Statement] agents by providing nationally consistent regulation ... [and which] ... will enable the Board to allocate and use its resources more efficiently, and is expected to increase certainty for agents in the way in which the legislation will be administered.[32]

The Bill recognised that not all the changes would be welcome, but these were mitigated by compensations. The Explanatory Memorandum explained that BAS agents would face barriers to entry, but greater clarity in the regulatory requirements they faced. This would improve taxpayer confidence.[33] According to the Explanatory Memorandum, a broad based regime of sanctions was envisaged which would be "... more constructive and educative administrative sanctions …"[34] and these would "… encourage agents to comply with the Code and … improve their performance."[35]

It was also suggested that this regime with its emphasis on civil rather than criminal sanctions, which it replaced, would be efficacious "… by providing appropriate consequences for misconduct and by providing effective disincentives to act inappropriately."[36] This, it was said, would "… benefit agents and the integrity of the tax system …".[37]

Thus, the State-based approach has become a single national system under the TASA which now regulates all tax agents and also regulates BAS agents. The inclusion of this latter category of agent was necessary as a result of the introduction of the Goods and Services Tax (GST) and consequential reforms which resulted in the need for taxpayers to complete periodic returns that are not income tax returns. Such returns include, usually quarterly, information about the business's obligations and compliance activities relating to GST, Pay-as-you-go (PAYG) income tax instalments, PAYG tax withheld from payments to third parties, fringe benefits tax (FBT)

[30] Explanatory Memorandum to Tax Agent Services Bill 2008, page 5.
[31] Id, page 4.
[32] Id, page 5.
[33] Id.
[34] Id.
[35] Id.
[36] Explanatory Memorandum to Tax Agent Services Bill n 30 above, page 5. Further description of the civil penalties regime is available on the Board website at http://www.tpb.gov.au/TPB/Subsidiary_content/Reg_info_sheets/0295_Civil_penalties.aspx (accessed January 2014). This explains that civil penalties, unlike criminal penalties, do not involve imprisonment or criminal convictions.
[37] Explanatory Memorandum to Tax Agent Services Bill n 30 above, page 5.

instalments on benefits provided to employees, luxury car tax (LCT) payments, wine equalisation tax (WET) payments by certain businesses, and fuel tax credits entitlements of some businesses.[38] Such BAS providers are commonly qualified as bookkeepers whereas tax agents, as already mentioned (see pages 336 and 337 above), are commonly qualified as accountants. Not all accountants are members of professional associations with codes of practice. Moreover, at the time when registration of BAS agents was being implemented even fewer bookkeepers would have been members of professional bodies, thus providing further incentive to regulate the ethical framework within which such tax professionals operate. This discussion of BAS agents leads to the next topic in this article which deals with who may act as a tax agent in Australia.

5. ELIGIBILITY REQUIREMENTS

The TASA sets out criteria for eligibility for registration as a tax agent or BAS agent.[39] These requirements cover individuals, partnerships and companies. These indicate that individuals[40] aged 18 years or more are eligible for registration subject to the satisfaction of the Tax Practitioners Board (Board) as to their being a fit and proper person (discussed further below at page 343 onwards) and their meeting certain requirements prescribed by regulations concerning, principally, their educational qualifications and their professional experience.

These same requirements are incorporated into the eligibility requirements for registration of companies as each director of the company must meet the same eligibility requirements as an individual; and the eligibility for registration of partnerships in that each partner must meet the same eligibility requirements as an individual or in the case of a partner that is a company, those applicable to a company. [41]

Companies and partnerships involving companies must meet further requirements regarding their capacity to provide competent services in terms of having enough tax agents and requirements that the company not be under administration nor have been convicted of a serious tax offence (defined term) involving fraud or dishonesty during the previous 5 years.[42]

The TASA regime is now well established after four years.[43] The Board's Annual Report 2011–2012[44] indicated that by 30 June 2012 over 52,000 agents had been registered[45] and that this figure included not only tax agents and BAS agents but also other professionals "… who provide services with a tax advice element, such as

[38] See, the Australian Taxation Office 'Activity statements home' at http://www.ato.gov.au/Business/Activity-statements/ (accessed 19 August 2013).
[39] See TASA at Div 20.
[40] Section 20-5 TASA.
[41] Id.
[42] Id.
[43] The Board commenced operation, on 1 March 2010, when the TASA commenced. (http://www.tpb.gov.au/TPB/Subsidiary_content/Annual_report_and_strategic_plan/0253_2010_Annual_Report.aspx).
[44] Australian Government, *Tax Practitioners Board Annual Report 2011–12* (TPB Report 2011–12).
[45] The Board Report 2011–12 note n 44 above page ii.

quantity surveyors and research and development consultants".[46] There were about 38,000 tax agents and over 14,000 BAS agents registered.[47]

The Chairman of the Board indicated in the Report that its purpose is to "... regulate … tax and business activity statement (BAS) agents to protect consumers."[48] And that the Board "… aims to assure the community that tax and BAS agents meet appropriate standards of professional and ethical conduct."[49]

This is achieved

> by:
>
> - administering a national system to register tax and BAS agents, making sure they have the necessary qualifications, experience and personal attributes to be registered
> - regulating tax and BAS agents through measured responses to breaches of the *Tax Agent Services Act 2009* (TASA)
> - taking Federal Court action against unregistered agents, seeking civil penalties and injunctions where appropriate
> - providing information, assistance and guidance to agents and would-be agents about registration, professional conduct and practice issues.[50]

The Board is thus not merely a registering body but is active in "policing" the profession, which is as it should be in the case of a regulatory system. The Board's 2011–12 Annual Report revealed that seven tax agents/BAS agents were de-registered for breaches of the Code of Professional Conduct or on grounds related to their lack of fitness and propriety. Several other agents had voluntarily surrendered their registration when they became aware of impending action against them by the Board.[51]

The Board also "… commenced the first civil penalties actions under the TASA. In the first case decided, in May 2012, the Federal Court of Australia imposed a $30,000 penalty on an unregistered agent for preparing tax returns for a fee without being registered".[52]

These actions arose from investigations undertaken by the Board which finalised 17 actions during the year reported and had 12 still underway at 30 June 2012.[53] There were four investigations leading to applications by the Board to the Federal Court to consider the imposition of civil penalties on persons allegedly practising as tax preparers although unregistered.[54]

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[46] Id.
[47] Id.
[48] Id.
[49] Id.
[50] Id.
[51] Id, page iii.
[52] Id page iii.
[53] Id page 45.
[54] Id.

The Board has since increased its activity significantly reporting in its 2012–13 Annual Report that having had 12 investigations on hand at the start of that year it commenced 1,133 investigations, finalising 952 with 193 still in progress at the end of June 2013.[55]

The Board has also issued a number of Guidelines concerning educational standards for registrants that will ultimately become law once tabled in Parliament,[56] and an important Explanatory Paper setting out its interpretation of the requirement that agents must be 'fit and proper' persons as required under s 20-A of the TASA. Prior to this article being published, this paper had been the subject of consultation and had been issued as an exposure draft before finalisation.[57]

6. THE 'FIT AND PROPER PERSON' REQUIREMENT

As discussed above (page 342), the requirement that a tax agent or BAS agent be a fit and proper person is a requirement for both initial and continued registration. It will also be recalled that it is also a requirement where companies are registered (or partnerships of companies) that the tax agent directors be fit and proper persons. Clearly, if one of the objects of the regulation process is to secure improvement in the tax compliance culture it is important to ensure that honest and professional persons are involved in representing taxpayers in their submissions to the ATO.

It is an important feature of the system that the requirement of fitness and propriety in one's practice is related to the Code of Professional Conduct (Code) — discussed below (page 344 onwards) — which is found in the TASA, in that a breach of this Code may have implications for a finding as to whether an agent or applicant is regarded as fit and proper. The Board has explained in its Explanatory Paper that when taking action against an agent its options include such things as the imposition of sanctions for breach of the Code, application for the imposition of civil penalties for breach of the civil penalty provisions, and the termination of an agent's registration on the basis that the agent is no longer a fit and proper person. [58]

The Explanatory Paper also states that "[i]t is possible that matters impacting on the fitness and propriety of an agent may also be relevant to a finding under the Code or under one of the civil penalty provisions." [59]

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[55] Australian Government, *Tax Practitioners Board Annual Report 2012–13* page 47.

[56] See, Australian Government, *Tax Practitioners Board Annual Report 2010–11* page 32. A useful table summarizing the qualifications required may be found at http://www.tpb.gov.au/TPB/Qualifications_and_experience/0240_Qualification_and_experience_requirements_for_tax_agents.aspx (Accessed January 2014).

[57] The Board Report 2010-11 n 56 page 32.

[58] Explanatory Paper TPB (EP) 02/2010 *Fit and proper person*, page 4. On its website, the Board summarizes the civil penalties as follows: (1) Penalties applying for conduct that is prohibited without registration and (2) Penalties applying for conduct undertaken by a registered entity. The first category includes receiving a fee/reward for work only a registered agent should undertake (up to $42,500 fine for individuals); advertising tax agent services whilst unregistered; misrepresentation of registration. Penalties for conduct in the second category include a registered entity making a false or misleading statement (especially) to the Commissioner (up to $42,500 fine for individuals); use of deregistered entities to deliver services; signature of declaration/statement required by a taxation law or BAS provision, which was not prepared by the registered entity or another registered entity or agent (up to $42,500 fine for individuals).

[59] Explanatory Paper TPB (EP) 02/2010 *Fit and proper person*, page 4.

In cases where the Board is satisfied that there has been a breach of the Code the sanctions available to it for the breach are a caution given in writing[60] or an order that requires the tax agent or BAS agent to take certain steps including any of: completing a specified course of education/training, providing the relevant services only under supervision by another agent, providing only specified services. [61] The registration of an agent might also be suspended or even terminated. [62]

7. OBLIGATIONS OF TAX AGENTS UNDER TASA

The obligations of tax agents are to be found in the Code which is enacted in TASA and which consists of 14 principles. For the sake of thoroughness, these principles are set out in full in the Appendix to this article. [63] The principles fall into the five broad categories of 'Honesty and integrity'; 'Independence'; 'Confidentiality'; 'Competence' and 'Other responsibilities'.

There are three components in the Honesty and integrity category. These are (unsurprisingly) that the agent must act with honesty and integrity, must comply with tax laws in relation to their personal affairs and must account for money and property held in trust for a client. Under Independence, there are requirements that the agent act lawfully in the client's best interests and have adequate arrangements for the management of conflicts of interest arising from their work as a tax agent or BAS agent. The Confidentiality principle is simply that an agent must not, without a client's permission, disclose information relating to a client's affairs to anyone, except there is a legal duty to do so.

The Competence principle is heavily emphasised in that it has four requirements. First, the service provided must be provided in a competent fashion; secondly, the agent must maintain the relevant knowledge and skills; thirdly, the agent must take reasonable care in ascertaining the state of affairs of the client to the extent that this is relevant to any statement made or a thing done on behalf of a client, and, fourthly, the agent must take reasonable care to ensure that the tax laws are applied correctly to the circumstances in which the advice is given.

Finally, the 'Other responsibilities' category covers four matters that are essentially administrative in character but, nevertheless, very important. These include the following requirements: not to obstruct the administration of tax law; to advise a client of rights and obligations pertaining under the relevant laws; to maintain professional indemnity insurance; and to respond in manner that is timely, responsible and reasonable, to requests and directions of the Board.

All these principles are elaborated upon in a further Explanatory Paper relating to the Code published by the Board.[64] The Explanatory Paper explains how the Code applies only to registered agents, but notes that there are also civil penalty provisions available that might apply to persons who are not registered but have engaged in conduct that brings them within the relevant penal provisions of the TASA. Further, the same

[60] Id, with reference to s30–15 TASA.
[61] Id, pages 4–5 with reference to s30–20 TASA.
[62] Id, pages 4–5 with reference to s30–20 TASA.
[63] See, s30–10 TASA.
[64] Explanatory Paper TPB 01/2010 Code of *Professional Conduct.*

conduct might be both a breach of the Code and be within the civil penalty provisions of TASA.[65]

In this Explanatory Paper, the Board has identified each of the terms and expressions used in the Code that it is possible to define or explain, ranging from 'honesty and integrity' through 'taxation laws' and 'personal affairs' to 'account' and 'best interests of your clients'. By this means it has given guidance as to the ambit of the Code and to the matters in which it will take an interest.

Some of these words and phrases have a specific meaning when used in a particular context. For example, one of the questions concerning whether a person has acted with 'honesty' and 'integrity' is expressed as "is the person of such reputation and ability that officers of the ATO may assume that taxation returns lodged by the agent have been prepared by the agent honestly?"[66] This emphasizes the perspective of the ATO rather than that of (for example) a reasonable observer. This is despite the fact that the Code operates within a regulatory system intended to benefit taxpayers and to secure the interest of taxpayers in being reliably represented, sometimes against the ATO. It might be perceived that the interests of the ATO are weighted more heavily in an environment where there is a risk that professional self-interest or the interests of a client will prevail. In fact, the approach adopted here might be perceived as aligning the professional self-interest associated with remaining registered with the interests of the ATO in having tax agents "on their side".

'Personal affairs' is, sensibly narrowed by reference to personal *tax* affairs and the Explanatory Paper states that

> … 'personal affairs' refers to a tax agent's or BAS agent's personal taxation obligations, including timely lodgement of … [various tax returns and statements] … and payment of … [various contributions and instalments].[67]

It is widened, however, to include the affairs of the professional practice, for example, maintenance of registration[68] There is an emphasis on professional competence and on the ability of the tax agent to service clients – the Explanatory Paper explicitly notes that the agent must have enough registered professionals to provide services competently and to properly supervise the services provided to clients. [69]

This is followed by examples, drawn from the Explanatory Memorandum to the Tax Agent Services Bill 2008, of circumstances to be taken into account in deciding whether the agent has properly complied with taxation laws in relation to their own personal affairs.

These are, in turn, followed by a detailed explanation of what must be done by a tax agent or BAS agent in order to comply with the requirement that they account for money and property held in trust for clients. This explanation spells out the type of actions one would regard as normal and sensible such as keeping such monies separate

[65] Id, pages 6–7.
[66] Based on *Re Su and Tax Agents' Board of South Australia* 82 ATC 4284 at 4286, referred to in the Explanatory Paper n 64 above page 10.
[67] Explanatory Paper n 64 above, page 11.
[68] Id.
[69] Id, page 12.

from their own funds,[70] only dealing with the money as instructed, and keeping a regular account of it.[71]

The requirement in the Code that a tax agent or BAS agent must act lawfully in the best interests of the client leads the Board into an interesting discussion of this aspect. The Explanatory Paper goes to some lengths to explain how this does not mean that an agent owes a fiduciary duty to the client, although the agent/client relationship is very similar to a fiduciary one. A fiduciary relationship is one in which the interests of the agent must not be allowed to conflict with those of the client and would imply supremacy of the interests of the client. The Explanatory Paper explains that the taxpayer client's interests are not paramount to the extent that the agent can depart from the law.[72] The supremacy of the law and the duty of ensuring proper compliance rather than the client's wishes when they are in conflict are made very clear. The Explanatory Paper is also emphatic in its statement that "… the Code of Conduct does not create a fiduciary duty between an agent and their client".[73] The stress laid on the lack of a fiduciary relationship means that the client's interests cannot be seen as overriding. This is a departure from the usual approach to the professional/client relationship which places the interests of a client above other interests (although not above the law). One perception might be that this departure from the more common emphasis on the client's interest has been adopted because a fiduciary relationship would operate counter to the interests of the revenue authority. It could equally be argued, of course, that all that this represents is an aspiration to ensure that compliance with tax law is achieved.

Notwithstanding the Explanatory Paper's stress that the relationship is not a fiduciary one, it does draw, slightly confusingly, on examples of fiduciary relationships to illustrate breaches that the Board might use in determining whether an agent has breached the Code in dealings with a client.[74] Further statements also deal with the contractual relationship between client and agent and stress that the agent's duties are not wholly based on that contract. Thus, the agent's obligations under the Code have to be considered, not just the contractual terms of their engagement.[75] This is possibly another manifestation of the policy to align the interests of the ATO and of the compliant agent, counter-balancing an alignment of the interests of the agent with those of the client exclusively.

It is interesting that there is no explanation or expansion in the Explanatory Paper of the role of the agent in circumstances where such agent might be regarded as not pursuing a client's interest with adequate vigour or aggression – as where, for example, the law is unclear and an opportunity for avoidance has arisen. Nor is there, in this part of the Explanatory Paper, any discussion of the interest of the client where the agent has not taken advantage of a tax law that operates in the client's favour. It is perhaps understandable that the Explanatory Paper does not do so. First, it may be thought that aspects of negligence are covered by the contractual relationship between the parties or, perhaps, by the possibility of suing an agent for damages in tort if the advice given is negligent; secondly, the question of competence is addressed

[70] Id, page 13.
[71] Explanatory Paper n 64 above, pages 13–14.
[72] It is not suggested that a fiduciary could do this either.
[73] Explanatory Paper n 64 above, page 14 at paras 50, 51 and page 15 para 53.
[74] Id, pages 14 and 15.
[75] Id, page 15, para 55.

elsewhere in the Explanatory Paper under relevant aspects of the Code.[76] These aspects focus on technical competence and maintenance of skills and knowledge. Once again, however, this focus shows that the emphasis in this professional relationship is not on the overriding interests of the client.

The Board has signalled clearly, and as intended by the TASA, that agents are not (at least under the statute) expected to pursue the best interests of their clients with the same exclusive attention to the client's interests above other constraints (the law permitting) as other professions such as lawyers. TASA and the Code seem to place at least as great an emphasis on compliance with the law as on the interests of a client. At first, it seems as if the Explanatory Paper gives an example of the difference between an agent's duties and those of a fiduciary by referring to a s264[77] notice (which requires a person to immediately provide to the Commissioner of Taxation any documents and records they hold that relate to a taxpayer's tax liability). The Paper seems to suggest (on one reading) that an agent might have to provide requested documents to the ATO, whereas a lawyer must not, in cases where the documents may be subject to lawyer/client privilege and the client has not waived the privilege or the status of the documents needs to be ascertained before they are handed over.[78] A later part of the Explanatory paper, however, reasserts client privilege in certain documents even if held by a tax agent or BAS agent.[79] This may be an aspect of the relationship, albeit non-fiduciary, that a Court in Australia will have to determine. This is discussed further below under the topic of confidentiality.

One of the examples of the requirement that the agent must act in the best interests of the client is that (based on the general law applicable to fiduciaries)[80] a conflict between the agent's own interests and those of the client should be avoided. This means that there is an expectation that agents will have in place a means of managing such conflicts. This is an explicit part of the Code and is covered at some length in the Explanatory Paper.[81] The guidance provided here (which is to develop systems to control avoid and disclose conflicts of interest) is sound and is well aligned with similar guidelines on dealing with conflicts of interest that are provided by professional bodies, such as the CPA Australia.[82]

The requirement of confidentiality in Principle 6 of the Code similarly parallels the various guidelines for accountants in Australia.[83] In both cases the fact that the law may override any general principle of confidentiality is stressed. Agents can be in no doubt that when asked for information they will have an obligation to provide it if the law supports the request. Indeed, the Explanatory Paper sets out several examples of circumstances in which the law overrides confidentiality which are said to include:

> providing information to the Tax Practitioners Board under a notice issued pursuant to section 60-100 of the TASA.

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[76] Id, page 23 onwards, paras 93–117.
[77] See, s 264 *Income Tax Assessment Act* 1936.
[78] Explanatory Paper n 64 above, page 17, para 63.
[79] Explanatory Paper n 64 above, paras 92 and 104.
[80] See, Ysiah Ross, Peter MacFarlane, *Lawyers' Responsibility and Accountability – Cases, Problems & Commentary* 4th Ed, Lexis Nexis 2012, para 11.2 for cases and examples.
[81] Explanatory Paper n 64 above, page 17 para 64 — page 20, para 77.
[82] See, for example, section 220 of *APES 110 Code of Ethics for Professional Accountants*, December 2010.
[83] See, section 140 of *APES 110 Code of Ethics for Professional Accountants*, December 2010.

> providing information to a court or tribunal pursuant to a direction, order, or other court process, to provide that information.
>
> providing information or documents to the ATO under a notice pursuant to section 264 of the Income Tax Assessment Act 1936 (ITAA 1936). This requirement is subject to that material being properly withheld by the tax agent or BAS agent under legal professional privilege.
>
> providing information or documents to the ATO pursuant to section 353-10 of Schedule 1 to the Taxation Administration Act 1953 concerning indirect taxation laws (including GST).[84]

The assertion of legal professional privilege is an interesting feature of this list of examples. The tax agent or BAS agent is not directly required by legal professional privilege to withhold documents from the ATO. It is conceivable that circumstances could arise where the obligation does exist (such as where the tax agent is also a lawyer or is covered by a client's legal privilege in a given situation, such as where the tax agent is the agent of the lawyer and the client's privilege extends to the material held by the tax agent on behalf of the client, through the lawyer). It seems that this may be a grey area requiring judicial consideration.

The Explanatory Paper also considers each of the other principles of the Code. As has been mentioned, these include a requirement that the agent's service or that provided on the agent's behalf, is provided competently. In relation to competence, the Board explains that this requirement includes an expectation that agents will maintain their skills so that they themselves remain competent as well as an expectation that they provide their services in a competent manner.[85] It is noticeable that the duty that this addresses is, once again, framed as an obligation in two directions. Not only must the client be able to rely on the tax agent's work, the ATO must also be able to do so:

> A tax agent or BAS agent will be competent if the agent possesses such skill, ability and knowledge required to perform a tax agent service that clients may entrust their taxation affairs to the agent's care and officers of the ATO may rely upon client returns or other documents prepared by the agent.[86]

This demonstrates again that the Australian tax agent regime is intended to regulate the service from the perspective of the client who should be able to rely on the advice and actions of the agent and expect that the obligations of the agent under the law have been met – but the ATO is also to be able to rely on the actions of the agent and be assured that they have acted competently and diligently. The agent, thus, represents the interests of both the taxpayer and the ATO. There can be no doubt that this must create tensions – as noted by Dabner who has said that there is "… a cohort within the profession [that] appears to be reluctant to acknowledge any duty to the system and is therefore hardly likely to embrace the spirit of a partnership relationship with the ATO".[87]

Another part of the Code that has benefitted from elucidation by the Board is the requirement in Principle 9 of the Code, that a tax agent or BAS agent needs to take

[84] Explanatory Paper n 64 above, page 22, para 92.
[85] Id, pages 23-24, paras 96–98.
[86] Id, para 96.
[87] Dabner n 3 above, page 535.

reasonable care in ascertaining a client's affairs "… to the extent that ascertaining the state of those affairs is relevant to a statement … [the agent is] … making or a thing … [they] … are doing on behalf of the client".

This expectation may cause some discomfort for new registrants[88] in that it implies an expectation that they should actively enquire into a client's affairs to an extent that, before the introduction of the Act, they might not have done. Indeed, Dabner has noted that respondents to his research revealed that they would not divulge to the ATO the details of clients that are not compliant.[89]

The Explanatory Paper explains that the extent of inquiry/knowledge is limited to the extent that the state of those affairs is relevant to a statement the agent is making or a thing the agent is doing on behalf of a client. That is, the requirement to take reasonable care is limited by the scope of the engagement between the tax agent or BAS agent and the client.[90]

However, the Explanatory Paper does explain (relying on the Explanatory Memorandum that accompanied the 2008 Bill) that active enquiry may be needed. It illustrates this point by explaining that the 'reasonable care' expectation may require an agent to ask questions when seeking information. That the questions should be based on their professional knowledge and experience and if there is reason to doubt the information that the client has provided they must take actual steps and make reasonable enquiries to satisfy themselves as to the accuracy and completeness of the information provided.[91] This emphasizes a professional but critical approach to the information provided by a client.

Statements by the client that seem plausible and consistent with their other statements and that reveal no basis on which to doubt their reliability may be accepted without further checking.[92] But where the information supplied is implausible or inconsistent with information provided in the past, further enquiries are required.[93] This does not extend to an expectation that the agent will audit, or examine records etc., but the Explanatory Paper is explicit in its statement that "… a tax agent or BAS agent does not discharge their responsibility in such a case by simply accepting what they have been told …".[94]

The defence that an agent was simply following instructions (presumably accompanied by an indication that the client has signed the tax return or other document) is clearly not available under this new regime; the plausibility of the client's information must be tested.

If the Australian position described above does not already amply illustrate that the agent under the Australian system is also the agent of the ATO the explanation of the next Principle (11) of the Code would appear to reinforce the point. It deals with the

[88] This is anecdotal and is derived from a social conversation between one of the authors and a newly registered BAS agent.
[89] Dabner n 3 above, page 536.
[90] Explanatory Paper n 64 above, para 119.
[91] Id, para 128.
[92] Id, para 129.
[93] Id, para 130.
[94] Id, page 31, paras 128 -132.

requirement that an agent "… must not knowingly obstruct the proper administration of the taxation laws".

There is a narrow example of an exclusion from this rule made in a reference to professional privileges rules and guidelines which explain that a tax agent or BAS agent is not in breach of this requirement when reliance is placed on the rights of the client or agent to withhold documents or not to provide information.[95]

> A tax agent or BAS agent does not breach this requirement by relying on the agent's or the client's rights to withhold documents or to not provide information. Examples of such rights may include legal professional privilege or the ATO accountant's concession set out in the published 'Guidelines to Accessing Professional Accounting Advisor's Papers'.[96]

Various omissions may also amount to obstruction – such as repeated failure to attend appointments, and failure to reveal how access to information might be obtained etc.[97]

The contrary view, of course, is that the mere fact that a person is not permitted to obstruct the administration of the law does not make that person a law enforcement agent, they are merely ensuring there is compliance with the law.

It is noticeable all the same that the balance of obligations borne by an agent is explicitly pushed further in the direction of the agent being an agent of the tax system rather than merely a champion of the taxpayer.

The taxpayer who is seeking a champion in this environment may be disappointed to read the explanation of the Code that a tax agent or BAS agent must "… advise … [their] … client of the client's rights and obligations under the taxation laws that are materially related to the tax agent services you [the agent] provide".[98] This does not mean that the client can be assured of a universal advice on all aspects of the tax law and the various opportunities for tax minimization that may be open to them. The Explanatory Paper explains how this would be addressed in an engagement letter which may include, inter alia, providing advice on:

> the nature of self-assessment, including the Commissioner's ability to amend an assessment within a certain time after the original assessment, impose penalties and issue rulings on which clients may rely:
>
> - 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 taxation laws rests with the client;
> - the application of the safe harbour provisions contained in the Taxation Administration Act 1953; and

[95] Explanatory Paper n 64 above page 33, para 140.
[96] Id.
[97] Id, para 145.
[98] This is Principle 12 of the Code.

- 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.[99]

There is no mention in this advice that complies with the law, but which might well include advice about arrangements to minimise tax.

It seems clear from this that there is no promise in the agent/client relationship that a client be provided with the most advantageous tax advice, only that the client will have an understanding of the rights under the contract with the tax agent or BAS agent, the (relatively narrow) manner in which the safe harbour provisions might protect them from the consequences of delay and similar unprofessional conduct of their tax agent, and of the obligations in terms of record keeping, completeness of information etc. It seems the obligation to provide the best advice[100] is merely implied.

It might be concluded from the Board's expressed intention as to how it will administer the Code that the statutory and regulatory environment affecting tax agents and BAS agents has explicit obligations on the part of agents that operate to the benefit of their clients and to the benefit of the operation of tax laws. The consequence of a breach of these obligations by the agent may be a suspension or cancellation of registration at one extreme or a caution or requirement to undertake remedial education at the other. A breach of the Code may lead the Board to consider that an agent is not a fit and proper person. Thus, the Code is a significant advance on what was in place under the previous Tax Agent Registration Boards because, whilst those Boards could deregister agents on the grounds that they were not a 'fit and proper person', they did not have a Code of Professional Conduct against which to measure the propriety of a person's conduct or fitness to act as a tax agent. In addition, it should be borne in mind that breach of the Code could be conduct that triggers a civil penalty. For example, breach of the requirement to act honestly might trigger a civil penalty if the dishonesty takes the form of making a misleading statement to the Commissioner[101] and would afford the Board a choice of sanctions to impose on the offending agent. Under the previous system this choice would not have been so clearly available to the Tax Agent Registration Boards. The new system in Australia has fundamentally changed the ground rules.

8. HOW DOES THE ATO INTERACT WITH TAX AGENTS AND BAS AGENTS?

This article has noted that from a policy perspective it is desirable that the ATO be able to control the compliance environment and culture through the way tax agents operate. It has also attempted to demonstrate how the tax agent and BAS agent groups are closely regulated. This should not be taken, however, as an indication that the TASA and the Board operate under the direction of the ATO. On the contrary, the Board is a separate statutory body.[102] The ATO is, of course, one of its stakeholders.[103] As the TASA has evidently established an administrative environment in tax under which the ATO appears more able to rely on tax agents than they were

[99] Explanatory Paper n 64 above, pages 37–38, para 156.
[100] See, for example, the NSW Supreme Court decision in *Bell v Vahexi Pty Ltd* 99 ATC 4055.
[101] Breach of s 50-20 of TASA.
[102] See, http://www.tpb.gov.au/TPB/About_us/Our_stakeholders/TPB/About_us/0343_Our_stakeholders.aspx.
[103] Id.

under the previous statutory regime, but one in which the ATO does not actually regulate the profession, one wonders how this translates into the manner in which the ATO conducts its relationship with agents.

The introduction to the internet-based Tax Agent Induction Package includes an introductory welcome letter from the relevant Deputy Commissioner of Taxation. The letter used in 2012 included in part:

> … Registered tax agents should also ensure they keep their personal tax obligations, and those of entities they are associated with, up to date. Not meeting your personal tax obligations puts you at risk of prosecution action. Instances where registered tax agents do not meet their personal obligations will be forwarded to the Tax Practitioners Board for consideration as potential breaches of the code of professional conduct under the *Tax Agent Services Act 2009*.
>
> Effective tax administration relies heavily on a capable, sustainable and well regulated tax profession. Registered tax agents such as you are vital in influencing voluntary compliance and ensuring taxpayers understand their rights and obligations.
>
> Given the central role you play as a registered tax agent, we closely monitor your clients' levels of compliance and seek your assistance and active support to ensure the integrity of the tax system. Where we see trends outside the norm or outside of published benchmarks in certain industries, we will check your clients' tax returns and activity statements and your practice …[104]

It is evident from this letter that the agents it was sent to should understand that the ATO sees the involvement of agents as a way of securing compliance by taxpayers. It also makes it clear that the agent's own compliance is important and non-compliance might lead to prosecution and to an investigation by the Board as to whether the agent has breached the Code. It is registered tax agents who "... are vital in influencing voluntary compliance ..." and whose "... assistance and active support" is sought "... to ensure the integrity of the tax system." This message was tied in with the other, less than subtle, indication that departures from compliance norms on the part of the agent's clients will result in checks not only of the clients but also of the tax agent's practice. It is interesting to note that this part of the letter was removed in the 2013 version.

The information for new tax agents also includes a full explanation of the ATO's Risk Management approach and of the Promoter Penalties rules (in Div 290 TAA 1953). The ATO booklet that sets this out is *Guide for tax intermediaries: Good governance and promoter penalty laws.*[105] The tenor of the Commissioner of Taxation's foreword

[104] Introductory letter at http://www.ato.gov.au/taxprofessionals/content.aspx?doc=/content/20323.htm&mnu=43362&mfp=001/005 (accessed 1 March 2012) An updated letter, with the offending sentence removed is at http://www.ato.gov.au/Tax-professionals/Tax-agents/In-detail/New-agents/Tax-agent-induction-package/ (accessed 19 August 2013).

[105] Commonwealth Government (2011) *Guide for tax intermediaries-Good governance and promoter penalty laws.*

sets the tone of the publication. Mr D'Ascenzo (the Commissioner at the time) explained in that foreword that

> We are increasing our focus on tax advisers whose behaviours show a propensity to develop or encourage participation in tax exploitation schemes by clients.
>
> As tax advisers, you not only need to be aware of the risks to your clients of participating in tax exploitation schemes but also the risks to yourself. Better practice would counsel the existence of internal checks and balances within your firms or companies to ensure you and your colleagues are operating within the law.
>
> As well as potentially higher scrutiny for your clients, there have been a number of recent changes to the law where action can be taken against advisers who promote tax exploitation arrangements.[106]

The foreword continues to explain that the penalties under the promoter penalties rules can be very high indeed – as much as twice the fee received in respect of the scheme or $2.75m, whichever is the greater. It also warns that there may be consequences for the tax agent under the TASA or prosecution.

> … where we find evidence that tax practitioners are engaging in high risk activities that are not lawful or are not acting honestly in advising clients about aggressive tax planning arrangements, they will be referred to the Tax Practitioners Board for appropriate sanctions.
>
> It is also possible to prosecute tax advisers who give false or misleading information to clients about the tax benefits arising from participation in tax exploitation arrangements, or whose conduct facilitates involvement of their clients in fraud or evasion.[107]

The foreword is factually correct, but it is interesting to note how the reference to the Board is open to an interpretation that it would not be expected to investigate and come to its own conclusion – it would simply impose "appropriate sanctions".

The Guide describes and sets out in the form of a figure how the ATO compliance model identifies risks within the Promoter Penalty environment and addresses these risks in an appropriate manner. Tax agents engaged in more serious 'Aggressive Tax Planning' face a higher risk of ATO scrutiny and intervention.[108]

The Promoter Penalty regime and the full contents of the Guide are of interest and significance to tax agents. It is a means to make it not worth their while for tax practitioners to promote schemes that the ATO would regard as Aggressive Tax Planning. In simple terms, the effect of the regime is that an agent (or any entity) may not engage in conduct that results in its being a promoter of a tax exploitation scheme[109] and an agent may not conduct itself in such a way that results in a scheme being promoted on the basis of a product ruling being implemented in a way that is

[106] Id, page i.
[107] Id.
[108] The relevant figure can be found at page 4 of Commonwealth Government (2011) *Guide for tax intermediaries-Good governance and promoter penalty laws*.
[109] Section 290-50(1) Schedule 1, *Tax Administration Act* 1953.

materially different from the way described in the product ruling.[110] Some discussion of these concepts can be found in a recent case.[111]

9. TAX AGENTS AND THE ATO'S RISK DIFFERENTIATION FRAMEWORK

The previous description of the ATO's approach to 'Aggressive Tax Planning' alluded to a differentiation framework used by the ATO to identify and scrutinize taxpayers they regard as of higher risk. Factors that are relevant in determining the risk posed by a particular taxpayer are the taxpayer's compliance history and the processes they have in place for managing compliance risk. It appears that included within the purview of these factors is the identity of the tax agent employed by the taxpayer.[112] Thus, the agent becomes part of the mix of factors taken into account by the ATO in adopting a particular compliance stance in relation to a taxpayer. The same factors are used in the ATO's *Risk Differentiation Framework Fact Sheet for Large Businesses.*[113]

It is not clear whether the tax agent's compliance standing in the eyes of the ATO is always revealed to the taxpayer as part of the explanation of what risk rating the taxpayer has been allocated by the ATO. That such conversations take place seems likely[114] in light of the fact that the ATO announced through its communications with large business that their risk categorisation is something about which the Commissioner will both write to them and meet to discuss with senior management of the very largest businesses. [115]

It is also unclear whether the tax agent will routinely be present at such a meeting or will have other notice of the risk rating that has been allocated to their clients or, indeed, that which has been allocated to them as tax agent. As such a rating, especially a rating that may impact on their clients, concerns their reputation and livelihood, it would be desirable and fair for the tax agent to be aware what impact its own rating has on the affairs of its clients — and if the rating seems wrong it seems it would also be fair to be able to challenge it.

Minutes of the (North Queensland) Regional Tax Practitioner Working Group (RTPWG) record the reaction of some of the members of that group to a presentation on the topic of risk profiling tax agents.[116] There is evidently a range of differing views on the risk profiling process. Some members saw the positive in the fact that one tax agent was profiled as high risk and, thus, targeted for frequent audit of its clients was beneficial to tax agents with a low risk rating. Others questioned crude

[110] Section 290-50(2) Schedule 1, *Tax Administration Act* 1953.
[111] See, *FCT v Ludekens & Anor* [2013] FCA 142; [2013] FCAFC 100; and [2014] HCA Trans 86.
[112] See, Craig Jackson, (2012) "Managing the ATO's perception of you in the new tax risk differentiation framework world", Presentation to The Tax Institute (NSW) 23/2/12.
[113] Commonwealth Government (2011) *Fact sheet for large business taxpayers Business — The risk differentiation framework.*
[114] Anecdotally, this has occurred on at least one occasion.
[115] See, ATO Website for Business taxpayers "Writing to you about our view" at http://www.ato.gov.au/Business/Large-business/In-detail/Risk-Differentiation-Framework/Writing-to-you-about-our-view/ (accessed 19 August 2013).
[116] See, *Nth QLD RTPWG minutes*, (October 2011) Item 5 - Profiling Registered Agents to Support Differentiation accessible at http://www.ato.gov.au/Tax-professionals/Tax-practitioner-consultation/In-detail/Regional-Tax-Practitioner-Working-Groups/North-QLD/Nth-QLD-RTPWG-minutes,-October-2011/?default=&page=7#5._Profiling_Registered_Agents_to_Support_Differentiation (accessed 19 August 2013).

measures of risk such as the mere presence of an agent's name on a list of addressees advised of a possible tax scheme to which they may care to introduce clients. The argument raised was that the presence of their name on the list might indicate their efforts to gather intelligence about inappropriate tax schemes rather than it being evidence of their propensity to actually participate in them. Once again, it seems that if an agent is to be rated under risk profiling, adequate opportunities to challenge the outcome of the profiling exercise ought also to be put in place.

The risk profiling exercise is being prosecuted with vigour by the ATO as evidenced by a news item which suggested that a 'hit list' of a thousand tax agents and their clients had been targeted for audit by the ATO based on their risk profile.[117] This announcement appears to have been a reference to the New South Wales (NSW) RTPWG meeting in October 2011.[118]

The risk profiling process and the inclusion of tax agents in it has many implications in that the more sophisticated it becomes, the better will be the outcome for the ATO in collections and in the integrity of the tax system, to the benefit of society. However, the usual safeguards associated with the rule of law such as the ability to challenge an outcome that is detrimental to one's reputation and means of earning a living ought to be observed. That this opportunity to challenge a ranking seems to be in place is suggested by the minutes, referred to above of the NSW RTPWG[119] which assure registered agents that the ATO will explain how and why agents have been rated as they have been, will empower agents to understand the ATO's view of them and what the agent can do to change their rating, and that it will listen to feedback so as to improve and refine its differentiation approach.

It is hoped that the use in these minutes of the terms such as 'empower', 'based in evidence', 'explain what they can do to change', 'encourage and listen to feedback', imply a right to be heard and to contest an incorrect risk rating under a fair process.

10. REPORTABLE TAX POSITIONS AND THE ROLE OF TAX AGENTS

In addition to the tightening of the role of the tax agent and ensuring the tax agent is essentially 'on the same side' as the ATO in its interaction with the tax system, a further constraint aimed at controlling avoidance has come to light. This is the Reportable Tax Position (RTP) regime. This is not strictly a regime that controls registered tax agents but it does involve them, as will now be explained.

The RTP initiative requires selected taxpayers to report and disclose to the ATO, by means of a schedule, "their most contestable and material tax positions".[120] The requirement that this schedule be lodged seems to be an administrative rather than

[117] See, 17 Feb 2012 *Adelaide Advertiser* "Cashed-up tradies face tax heat" at http://www.adelaidenow.com.au/business/tradies-face-tax-heat-crackdown-aims-to-catch-dodgy-accountants/story-e6frede3-1226273336711 (accessed 2 March 2012).

[118] See, *NSW RTPWG minutes*, (October 2011) Item 5 – Registered agents differentiation project - accessible at http://www.ato.gov.au/Tax-professionals/Tax-practitioner-consultation/In-detail/Regional-Tax-Practitioner-Working-Groups/NSW/NSW-RTPWG-minutes,-October-2011/?default=&page=7#5._Registered_agents_differentiation_project (accessed 19 August 2013).

[119] Id.

[120] See, https://www.ato.gov.au/Business/Large-business/In-detail/Key-products-and-resources/Large-business-and-tax-compliance-publication/?amp=&page=35.

substantive measure[121] targeted at large businesses.[122] The involvement of the tax agent in this administrative measure to identify in advance what the contentious issues are in the ATO's relationship with targeted taxpayers may not be obvious at first. It is submitted, however, that the definition of a "reportable tax position" is one that will often require tax agents (as well as in-house tax counsel and other advisers) to exercise professional judgment. Thus, their advice becomes a crucial aspect of the operation of the RTP regime, and so they become an important part of its operation. The particular aspect of the definition that prompts this suggestion is the inclusion in RTP of "...a material position that is about as likely to be correct as incorrect or less likely to be correct than incorrect …".[123] This can place the tax agent at the centre of the need to submit a schedule. One wonders what data is gathered as to the frequency with which certain tax agent's names are found, or not found, linked with clients making RTP disclosures. Dabner's research seems to suggest that there will be reluctance on the part of tax agents to reveal some tax positions,[124] although this regime will make it increasingly difficult for tax agents or BAS agents not to do so.

11. CONCLUSION

This article has noted that the Australian legislature has apparently heeded the evidence in the compliance literature, which demonstrates the critical role in tax compliance that is played by tax intermediaries.[125] There are good reasons for the ATO, in return for fully sanctioned participation in the tax agent system, to attempt to align tax agents' interests with its own.

This appears to have been achieved in most emphatic fashion in Australia. At least insofar as the statutory regime is concerned, the Australian rules have reached a point where tax agents in Australia have to consider a range of matters in addition to the instructions of the client. They have a role in securing compliance of the taxpayer with tax law and there are suggestions that the ATO would seek to influence how this is done. This arises from the expectation that tax agents and BAS agents will verify the information the taxpayer provides to them. It also arises from the professional risk they face in representing non-compliant taxpayers. The outcome is quite understandable and highly desirable from the point of view of the public purse. There remain some questions as to what controls on the arrangements the courts may determine to impose under rule of law principles (such as the right to know that an adverse finding has been made against one, and the reasons for it, the right to challenge an outcome that is detrimental to one's reputation and professional income etc.), but provided taxpayers and agents have an opportunity to have their treatment by the ATO reviewed by the courts, it should be that such concerns can be assuaged. More interesting, and perhaps more threatening, is the suggestion in Dabner's interviews with tax professionals in the UK that tightening the controls on them may

[121] See, (2011) *International Tax Review*, "Australia deals with new methods of resolution" 12 September 2011.
[122] See, *Reportable tax position schedule*, at http://www.ato.gov.au/Business/Large-business/In-detail/Reportable-tax-positions/Reportable-tax-position-schedule/. At the time of writing reports were that 56 large taxpayers were required to lodge schedules in 2012.
[123] http://www.ato.gov.au/Forms/Guide-to-reportable-tax-positions-2013/?page=7#Definitions (accessed January 2014).
[124] See, n 122 above and reference to Dabner n 3 above, page 536.
[125] See, the sources at n 14 above.

damage the relationship between tax professionals and HMRC.[126] One wonders whether, insofar as the UK experience is relevant to Australia tightening control on tax agents and BAS agents in Australia might undermine the relationship between them and the ATO. Time will tell.

[126] Dabner n 3 above, page 546. Dabner referred to "The recent HMRC initiatives, referred to above, viewed by the profession as an attempt to regulate it and push down further responsibilities from the administrator to the profession" as a factor that might damage the relationship between the HMRC and tax professionals.

12. APPENDIX

Code of Professional Conduct for Tax Agents/BAS Agents[127]

Honesty and integrity

(1) You must act honestly and with integrity.

(2) You must comply with the taxation laws in the conduct of your personal affairs.

(3) If:

you receive money or other property from or on behalf of a client; and

you hold the money or other property on trust;

you must account to your client for the money or other property.

Independence

(4) You must act lawfully in the best interests of your client.

(5) You must have in place adequate arrangements for the management of conflicts of interest that may arise in relation to the activities that you undertake in the capacity of a registered tax agent or BAS agent.

Confidentiality

(6) Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission.

Competence

(7) You must ensure that a tax agent service that you provide, or that is provided on your behalf, is provided competently.

(8) You must maintain knowledge and skills relevant to the tax agent services that you provide.

(9) You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing you are doing on behalf of a client.

(10) You must take reasonable care to ensure that taxation laws are applied correctly to the circumstances in relation to which you are providing advice to a client.

Other responsibilities

(11) You must not knowingly obstruct the proper administration of the taxation laws.

(12) You must advise your client of the client's rights and obligations under the taxation laws that are materially related to the tax agent services you provide.

(13) You must maintain the professional indemnity insurance that the Board requires you to maintain.

(14) You must respond to requests and directions from the Board in a timely, responsible and reasonable manner.

[127] See s30–10 TASA.