

Exposure draft

TPB Information Sheet

TPB(I) D46/2021

Supervisory arrangements under the *Tax Agent Services Act 2009*

Tax Practitioners Board exposure draft

The Tax Practitioners Board (TPB) has released this draft Information Sheet (TPB(I) D46/2021) as an exposure draft and invites comments and submissions in relation to the information contained in it within 28 days. The closing date for submissions is **28 June 2021**. The TPB will then consider any submissions before settling its position, undertaking any further consultation required and finalising the TPB(I).

Written submissions should be made via email at tpbsubmissions@tpb.gov.au or by mail to:

Tax Practitioners Board
GPO Box 1620
SYDNEY NSW 2001

DISCLAIMER

This document is in draft form, and when finalised, will be intended as information only. While it seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the TPB's powers in the *Tax Agent Services Act 2009* (TASA) or the *Tax Agent Services Regulations 2009* (TASR). The principles and examples in this TPB(I) do not constitute legal advice. They are also only at a preliminary stage. The TPB's conclusions and views may change as a result of comments received or as other circumstances change.

Document history

This draft information sheet was issued on 31 May 2021 and is based on the TASA as at 17 February 2021 (latest version available at the time of publication).

Issue date: 31 May 2021

Contents

Introduction.....	3
Legislative framework.....	3
Sufficient number requirement.....	3
Supervisory arrangements	5
Sufficient number requirement	7
Who can form the sufficient number?.....	7
Determining the sufficient number	7
Meaning of ‘competent standard’ and ‘supervisory arrangements’	12
‘Competent standard’	12
‘Supervisory arrangements’ and ‘supervision and control’	13
Adequate supervisory arrangements	13
Remote supervisory arrangements	16
Circumstances where a registered tax practitioner is unlikely to carry out adequate remote supervisory arrangements	17
Holding multiple supervisory roles	18
Circumstances where a registered tax practitioner holding multiple supervisory roles is unlikely to carry out adequate supervisory arrangements	18
Code of Professional Conduct	19
Appendix – Case Examples	20
Re: S & T Income Tax Aid Specialists Pty Ltd and Christopher Forward and Tax Agents’ Board of New South Wales 87 ATC 2001.....	20
Re: McGowan and Tax Agents’ Board of Queensland 96 ATC 2056	21
Re: Scott and Tax Agents’ Board of Queensland [2001] AATA 435; [2001] ATC 2218..	22
Re: Cafferty and Tax Agents’ Board of New South Wales [2004] AATA 560	22

Supervisory Arrangements under the *Tax Agent Services Act 2009*

Introduction

1. The TPB has prepared this draft information sheet (TPB(I)) to assist entities in understanding the TPB's approach to supervisory arrangements under the *Tax Agent Services Act 2009* (TASA).
2. All partnerships and companies seeking registration or renewal of registration need to meet the sufficient number requirement. The TPB must be satisfied, among other things, that the partnership or company has a sufficient number of registered individuals to provide tax agent, BAS or tax (financial) advice services to a competent standard, and to carry out supervisory arrangements.
3. In addition, all registered tax agents, BAS agents and tax (financial) advisers (collectively referred to as 'tax practitioners') must ensure that tax agent, BAS or tax (financial) advice services provided on their behalf are provided competently.

Legislative framework

Sufficient number requirement

4. Partnerships and companies seeking registration or renewal of registration as a tax practitioner will need to meet all the eligibility criteria contained in section 20-5 of the TASA.
5. Under paragraphs 20-5(2)(c) and 20-5(3)(d) of the TASA, one of these eligibility criteria is that the partnership or company has:
 - (i) in the case of registration as a registered tax agent – a sufficient number of individuals, being registered tax agents, to provide tax agent services to a competent standard, and to carry out supervisory arrangements, or
 - (ii) in the case of registration as a registered BAS agent – a sufficient number of individuals, being registered tax agents or BAS agents, to provide BAS services to a competent standard, and to carry out supervisory arrangements, or
 - (iii) in the case of registration as a registered tax (financial) adviser – taking into account the requirements of paragraphs 912A(1)(d) to (f) of the *Corporations Act 2001*, a sufficient number of individuals, being registered tax agents or registered tax (financial) advisers, to provide tax (financial) advice services to a competent standard, and to carry out supervisory arrangements.

6. Paragraph 912A(1)(d) of the *Corporations Act 2001* provides that¹:
- (1) A financial services licensee must:
 - (a) ...
 - (d) subject to subsection (4)² – have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and
 - (e) maintain the competence to provide those financial services; and
 - (f) ensure that its representatives are adequately trained (including by complying with section 921D)³, and are competent, to provide those financial services; and
 - (g) ...
 - 7. All partnerships and companies seeking registration or renewal of registration as a tax practitioner need to meet the sufficient number requirement. This means that these entities will need to have a sufficient number of individuals, being registered tax agents, BAS agents or tax (financial) advisers, to provide tax agent, BAS or tax (financial) advice services to a competent standard, and to carry out supervisory arrangements.
 - 8. The purpose of section 20-5 is to ensure that a partnership or company tax practitioner has sufficient organisational qualifications and experience to provide tax agent, BAS or tax (financial) advice services competently.⁴
 - 9. Further, the sufficient number requirement is an ongoing registration requirement. Under section 30-35 of the TASA, when a partnership or company tax practitioner ceases to meet one of the registration requirements⁵ or any other circumstances relevant to its registration⁶ changes, it must notify the TPB in writing. The partnership or company must notify of this change within 30 days of the day on which it becomes, or ought to have become, aware that the event occurred.⁷
 - 10. Whether a partnership or company tax practitioner has a sufficient number of registered individuals to provide tax agent, BAS or tax (financial) advice services to a competent standard and to carry out supervisory arrangements is a question of fact. This means that each application for registration or renewal will need to be considered on a case-by-case basis having regard to the entity's facts and circumstances.

¹ For more information in relation to the requirements under subsection 912A(1) of the *Corporations Act 2001*, refer to the Australian Securities and Investment Commissioner's Regulatory Guide *RG105 Licensing: Organisation competence*.

² Paragraph 912A(1)(d) of the *Corporations Act 2001*:

- (a) does not apply to a body regulated by APRA, unless the body is an RSE licensee; and
- (b) does not apply to an RSE licensee, unless the RSE licensee is also the responsible entity of a registered scheme.

³ Section 912D of the *Corporations Act 2001* requires relevant providers to meet continuing professional development standard required under subsection 921B(5) of the *Corporations Act 2001*.

⁴ Paragraph 2.56 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

⁵ Paragraphs 30-35(2)(a) and 30-35(3)(a) of the TASA.

⁶ Paragraphs 30-35(2)(d) and 30-35(3)(d) of the TASA.

⁷ Subsection 30-35(4) of the TASA.

Supervisory arrangements

11. Supervisory arrangements are relevant in the following contexts:

- the Code of Professional Conduct which requires all registered tax practitioners to ensure that the services provided on their behalf are provided competently
- civil penalty provisions in section 50-30 of the TASA⁸ (signing of declarations or statements prepared by someone else who is not working under the supervision or control of the registered individual tax or BAS agent)
- relevant experience in Schedule 2 of the Tax Agent Services Regulations 2009 (TASR) where the concept of 'supervision and control' is introduced.

12. Section 50-30 of the TASA provides:

<p>1. You contravene this subsection if:</p> <ul style="list-style-type: none">(a) you are a registered tax agent and an individual; and(b) in the course of providing a tax agent service, you sign a declaration or other statement in relation to a taxpayer that is required or permitted by a taxation law; and(c) the document in relation to which the declaration or other statement is being made was prepared by an entity other than:<ul style="list-style-type: none">(i) ...(iii) another individual who is working under your supervision and control or the supervision and control of another registered tax agent who is an individual.
<p>2. You contravene this subsection if:</p> <ul style="list-style-type: none">(a) you are a registered tax agent or BAS agent who is an individual; and(b) in the course of providing a BAS service, you sign a declaration or other statement in relation to a taxpayer that is required or permitted by a taxation law; and(c) the document in relation to which the declaration or other statement is being made was prepared by an entity other than:<ul style="list-style-type: none">(i) ...(iii) an individual who is working under your supervision and control or the supervision and control of another registered tax agent or BAS agent who is an individual.

⁸ The penalty imposed for contravening these provisions is:

- up to 250 penalty units for an individual tax agent or BAS agent,
- up to 1,250 penalty units for a partnership or company tax agent or BAS agent.

Currently one penalty unit includes \$222.

3. You contravene this subsection if:
- (a) you are a partnership or company that is a registered tax agent; and
 - (b) in the course of providing a tax agent service, you sign a declaration or other statement in relation to a taxpayer that is required or permitted by a taxation law; and
 - (c) the document in relation to which the declaration or other statement is being made was prepared by an entity other than:
 - (i) ...
 - (ii) an individual who is working under the supervision and control of a registered tax agent who is an individual.

4. You contravene this subsection if:
- (a) you are a partnership or company that is a registered tax agent or BAS agent; and
 - (b) in the course of providing a BAS service, you sign a declaration or other statement in relation to a taxpayer that is required or permitted by a taxation law; and
 - (c) the document in relation to which the declaration or other statement is being made was prepared by an entity other than:
 - (i) ...
 - (ii) an individual who is working under the supervision and control of a registered tax agent or BAS agent who is an individual.

13. In the context of relevant experience, Schedule 2 to the TASR provides:

For a BAS agent registration:

103 ... **relevant experience** means work by an individual:

- (a) ...
- (c) under the supervision and control of a tax agent registered under the Act or a BAS agent registered under the Act; or
- (d) under the supervision and control of a tax agent registered under the previous regulatory regime contained in Part VIIA of the *Income Tax Assessment Act 1936*; or
- (e) ...

For a tax agent registration:

207 ... **relevant experience** means work by an individual:

- (a) ...
- (c) under the supervision and control of a tax agent registered under the Act; or
- (d) under the supervision and control of a tax agent registered under the previous regulatory regime contained in Part VIIA of the *Income Tax Assessment Act 1936*; or
- (e) ...

For a tax (financial) adviser registration:

305 ... *relevant experience* means work by an individual:

- (a) ...
- (c) under the supervision and control of a tax (financial) adviser registered under the Act; or
- (d) under the supervision and control of a tax agent registered under the Act, or under Part VIIA of the *Income Tax Assessment Act 1936*; or
- (e) ...

Sufficient number requirement

Who can form the sufficient number?

14. The number of registered individual tax agent(s) or BAS agent(s) that a partnership or company tax agent or BAS agent is required to have, for the purposes of satisfying the sufficient number requirement, is unique and can be wide-ranging having regard to the entity's particular circumstances. The individuals may include partners, directors, employees, contractor and staff provided under a service trust arrangement.⁹
15. Similarly, the number of registered individual tax agent(s) or tax (financial) adviser(s) that a partnership or company tax (financial) adviser is required to have, for the purposes of satisfying the sufficient number requirement, is unique and can be wide-ranging having regard to the entity's particular circumstances. The individuals, in addition to those outlined at paragraph 14 above, may also include the financial services licensee's representatives¹⁰, including authorised representatives of the licensee, responsible managers, compliance officers and regional/line managers.
16. The phrases 'supervisory arrangements' and 'supervision and control' are not defined in the TASA. As a result, these phrases must take on their ordinary meaning, as discussed at paragraph 26 below.

Determining the sufficient number

17. There is no set formula for determining the sufficient number of registered individual tax practitioners required for a partnership or company tax practitioner. However, there must be at least one registered individual nominated as a supervising agent to satisfy the sufficient number requirement.

⁹ See paragraph 2.56 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

¹⁰ 'Representatives' has the meaning given by paragraph (a) of the definition of that expression in section 910A of the *Corporations Act 2001*.

18. In determining the adequacy of the nominated sufficient number, the TPB will take into account a number of factors, including:
- having available adequate resources (including financial, technological and human resources) to provide the tax agent, BAS or tax (financial) advice services and to carry out supervisory arrangements
 - maintaining the competence to provide those tax agent, BAS or tax (financial) advice services
 - ensuring that the registered individual tax practitioner undertaking the supervision and control is fit for purpose, that is, the registered individual is adequately trained and competent, to provide the supervision and control
 - size and scale of the tax agent, BAS or tax (financial) advice services provided within the business (for example, turnover, number of clients, the nature and sophistication of the client base, and number of relevant staff)
 - the type and complexity of tax agent, BAS or tax (financial) advice services being provided and supervised
 - number of qualified and experienced staff
 - the frequency of appropriate training and development activities for all relevant staff
 - the level, type and sophistication of technology or software used, including network security protocols in place and digital monitoring and digital review processes
 - risk management processes and procedures, including the use of delegated supervision processes
 - the supervisory arrangements (for example, quality assurance and control practices and escalation procedures) in place
 - any conditions imposed by the TPB on the entity's registration based on the qualifications and experience of its staff.¹¹
19. In assessing the capacity of the individual tax practitioner assuming the role of supervising agent and their ability to continue providing a competent service to their own client base, it is important to take into consideration all of the factors set out in paragraph 18 above.
20. In addition, the TPB requires that the prior informed written consent of the registered individual tax practitioner forming the sufficient number must be obtained. A partnership or company registered tax practitioner must ensure that the registered individual tax practitioner has considered all the relevant information, including the nature of the supervisory arrangements in place and the supervision and control to be undertaken. The registered individual must provide their prior informed consent by way of a written signed statement to the partnership or company registered tax practitioner. This ensures that the individual is aware of their appointment as a supervising agent and understands the responsibilities of that role.

¹¹ Some of these factors are taken from paragraph 2.56 of the Explanatory Memorandum to the Tax Agent Services Bill 2008.

21. Where existing documentation sets out the nature of the supervisory arrangements and the supervision and control to be undertaken, and the individual tax practitioner forming the sufficient number is aware of and understands the obligations set out in that existing documentation, this will obviate the need for the prior informed written consent to be obtained.

Example 1

AAA Pty Ltd is a registered tax agent company. The company employs Tom, a registered tax agent, and three additional employees who are new to the industry and are not currently registered with the TPB. AAA Pty Ltd provides tax agent services to around 50 clients, including government agencies.

As part of its registration application, AAA Pty Ltd nominated Tom as the supervising agent for the company. AAA Pty Ltd did not seek Tom's prior written informed consent before nominating Tom as its supervising agent.

As AAA Pty Ltd has not received Tom's prior informed consent, AAA Pty Ltd is not meeting its ongoing registration requirement to have a sufficient number of registered individual tax agents to provide tax agent services to a competent standard and to carry out supervisory arrangements on behalf of the company.

22. The TPB is of the view that it is ultimately a matter for the partnership or company to assess how many registered individual tax practitioners their business requires to ensure that tax agent, BAS or tax (financial) advice services are provided competently and to ensure there are adequate supervisory arrangements in place. A partnership or company will be required to demonstrate, on the balance of probabilities, that it satisfies the sufficient number requirement where requested to do so by the TPB.

Tax (financial) advisers

23. The TPB recognises that the business models and structures in the financial services industry are different to those commonly found with tax and BAS agents. This is in part due to the licensing requirements under the *Corporations Act 2001*. Existing business models and structures in the financial services industry that the TPB is aware of include:
- licensees with multiple practices operating under one licence
 - licensees operating with authorised representatives only (which may include corporate authorised representatives and/or individual authorised representatives), employee representatives only or a combination of both
 - licensees with a small number of representatives operating a salaried advice business
 - corporate authorised representatives authorised by one of the above licensee structures
 - authorised representatives, often as sole traders, operating a financial planning business under the licence of a larger licensee.

24. The TPB provides the following additional guidance for Australian financial services (AFS) licensees:

- a. *AFS licensee operates under a corporate authorised representative or individual authorised representative business model only*

An AFS licensee's sufficient number requirement will be met where every entity under that licensee that is required to be registered with the TPB is registered. This means every corporate authorised representative and every individual authorised representative that provides tax (financial) advice services for a fee or reward is registered with the TPB.¹² In this situation, each individual authorised representative and those individuals who make up the sufficient number requirement for their respective corporate authorised representative¹³ will form and satisfy the AFS licensee's sufficient number requirement.

This is because all those individuals should already be registered with the TPB as they are providing tax (financial) advice services for a fee or reward. This approach should not result in the AFS licensee having to register more individuals to assist in satisfying their sufficient number requirement.

Example 2

ABC Pty Ltd is an AFS licensee and operates a business model which comprises of five corporate authorised representatives and three sole trader individual authorised representatives (all of which provide tax (financial) advice services for a fee or reward). ABC Pty Ltd does not have any employee representatives.

In this situation, ABC Pty Ltd's sufficient number requirement will be met through all of:

- the individuals that make up the corporate authorised representative's sufficient number; and
- the sole trader individual authorised representatives.¹⁴

Given who will comprise the sufficient number requirement, ABC Pty Ltd should not have to register any additional individuals to assist in satisfying their sufficient number requirement. However, should ABC Pty Ltd engage some employee representatives, it will no longer meet the sufficient number requirement as there are no individuals within the AFS licensee structure itself that form part of the AFS licensee's sufficient number. In that case, the AFS licensee must notify the TPB of this and advise how they will meet the sufficient number requirement going forward. This information will then be considered by the TPB.

¹² This does not include individuals who are not providing tax (financial) advice services in their own right, but instead are providing, under a supervisory model, tax (financial) advice services on behalf of another registered tax (financial) adviser.

¹³ The individuals forming the sufficient number for a corporate authorised representative may be employee representatives or authorised representatives.

¹⁴ As these authorised representatives are sole trader individuals, they do not need to meet the sufficient number test for their own registration (regardless of whether they have employees or not). However, the sole trader individuals will form the sufficient number requirement for their AFS licensee only.

25. It is ultimately a matter for the AFS licensee to ensure it has a sufficient number of individuals, being registered tax agents or registered tax (financial) advisers, to provide tax (financial) advice services to a competent standard, and to carry out supervisory arrangements.

b. AFS licensee operates under a business model that includes employee representatives and authorised representatives (individuals and/or corporate authorised representatives)

Where an AFS licensee operates a business model that includes employee representatives and/or authorised representatives (individuals and/or corporate authorised representatives) that are not all registered with the TPB, the sufficient number requirement for the AFS licensee must be met through individuals within the AFS licensee structure itself.

Example 3

123 Pty Ltd is an AFS licensee and operates a business model which comprises of 20 employee representatives and four sole trader individual authorised representatives. The employee representatives all provide tax (financial) advice services on behalf of 123 Pty Ltd and the sole trader individual authorised representatives also provide tax (financial) advice services for a fee or reward.

In this situation, 123 Pty Ltd's sufficient number requirement will need to be met through individuals within the AFS licensee structure itself. This includes partners, directors, employees, contractors and staff provided under a service trust arrangement. Further, these individuals may also include the AFS licensee's employee representatives, responsible managers, compliance officers and regional/line managers. However, these individuals must meet the 'competent standard' and 'supervisory arrangement' requirements as referred to in paragraphs 26 to 32 below.

The fact that the four sole trader individual authorised representatives are already registered with the TPB is a not relevant consideration in determining how many individuals within 123 Pty Ltd's structure will make up the licensee's sufficient number requirement.

Meaning of ‘competent standard’ and ‘supervisory arrangements’

26. The phrases ‘competent standard’ and ‘supervisory arrangements’ are not defined in the TASA. As a result they take on their ordinary meaning and are broadly considered to be arrangements aimed at directing, overseeing and checking the tax agent, BAS or tax (financial) advice services performed on behalf of a registered tax practitioner to ensure those services are provided competently.

‘Competent standard’

27. The Macquarie Dictionary¹⁵ provides the following definition:

Competent

1. Properly qualified; capable
2. Fitting, suitable or sufficient for the purpose; adequate.

28. Further, the Code of Professional Conduct contained in section 30-10 of the TASA provides some guidance in relation to the meaning of competence. In particular, sub-sections 30-10(7) to (10) of the TASA, all of which fall under the key principle of ‘competence’, require that tax practitioners must:

- ensure the tax agent, BAS or tax (financial) advice services they provide, or are provided on their behalf, are provided competently
- maintain knowledge and skills relevant to the tax agent, BAS or tax (financial) advice services they provide
- take reasonable care to ascertain clients’ state of affairs
- take reasonable care to ensure the taxation laws are applied correctly.

29. Competence, with respect to tax agents, BAS agents and tax (financial) advisers, can therefore be defined as a state of being capable, fit, suitable or sufficient to provide a tax agent, BAS or tax (financial) advice service.

30. Further, section 20-5 of the TASA requires that a partnership or company tax practitioner have a sufficient number of registered individuals to provide tax agent, BAS or tax (financial) advice services to a competent standard and to carry out supervisory arrangements. The purpose of this provision is to ensure that a partnership or company tax practitioner has sufficient qualifications and experience to provide tax agent, BAS or tax (financial) advice services competently.¹⁶

¹⁵ *The Macquarie Dictionary*, [Multimedia], version 5.0.0.

¹⁶ Paragraph 2.56 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

‘Supervisory arrangements’ and ‘supervision and control’

31. The Macquarie Dictionary¹⁷ provides the following definitions:

Supervise

1. To oversee (a process, work, workers, etc) during execution or performance; superintend; have the oversight and direction of.

Supervision

1. The act or function of supervising; oversight; superintendence.

Control

1. To exercise restraint or direction over; dominate; command
2. To hold in check; curb
4. The act or power of controlling; regulation; domination or command
5. Check or restraint.

32. Considering the ordinary meaning of the words and the purpose of the requirements in section 20-5 of the TASA and the Code of Professional Conduct, supervisory arrangements may be broadly considered to be arrangements aimed at directing, overseeing and checking the services performed on behalf of the partnership or company to ensure that those services are provided competently.

Adequate supervisory arrangements

33. There is no precise definition of what constitutes adequate supervisory arrangements. What is adequate should be determined on the basis of the specific facts of a particular case.

34. Determining whether there are adequate arrangements in place to ensure appropriate supervision and control is being exercised will require an assessment of the measures taken by a registered tax practitioner to supervise and control relevant activities in the context of their circumstances. Guidance can be taken from case law considering these concepts and balancing these considerations.

35. Administrative Appeals Tribunal (AAT) cases decided under the *Income Tax Assessment Act 1936* (ITAA 1936) establish a number of principles concerning what constitutes a sufficient degree of supervision and control. These principles are in the context of:

- the requirement that an agent have some relevant employment prior to being registered as a tax agent
- the prohibition on tax agents allowing other non-tax agent entities, not under the agent’s supervision and control, to prepare statements in relation to a taxpayer required or permitted by a taxation law on behalf of the agent and to conduct business on the tax agent’s behalf.

¹⁷ *The Macquarie Dictionary*, [Multimedia], version 5.0.0.

36. As the TPB must consider the meaning of supervision and control under the TASA in relation to relevant experience and the prohibition on tax agents and BAS agents signing declarations or statements in relation to a taxpayer under a taxation law in the circumstances set out in section 50-30 of the TASA, these principles are equally applicable to the TPB under the TASA. The TPB recognises that although working patterns have evolved over time with an increasing prevalence for workplaces to operate in a remote or digital setting, the underlying principles drawn from the AAT cases continue to remain relevant and can be adapted to evolving work patterns.
37. Some key examples of these cases are provided in the [Appendix – Case examples](#).
38. The following considerations may be relevant in determining whether adequate supervision and control has been, or is being, exercised:
- the level and depth of oversight undertaken over the provision of tax agent, BAS or tax (financial) advice services.¹⁸ While it is not necessary that all work or client interviews be monitored, a substantial degree of oversight¹⁹ (which may or may not include physical) of the staff and what they do is necessary and this will vary according to the skills and experience of the staff and the complexity of the tax agent, BAS or tax (financial) advice services being provided
 - merely checking a document prepared by an unskilled employee to determine whether the contents of the document seem reasonable does not demonstrate a sufficient degree of supervision and control. There must be substantial supervision²⁰
 - the relevant supervision and control must be exercised over the business transacted relating to any statement in relation to a taxpayer that is required or permitted by a taxation law²¹
 - supervision and control, at the very least, requires periodic and ‘spot’ checks of material prepared by staff and supervision of office work²²
 - it is not necessary for there to be an employer/employee relationship in relation to the person performing or doing a particular thing for there to be adequate supervision and control²³
 - the degree of control over the way in which a person carries out their work will be indicative of the level of control.²⁴

¹⁸ *Re S & T Income Tax Aid Specialists Pty Ltd and Christopher Forward and Tax Agents’ Board of New South Wales* 87 ATC 2001 at 2006; *Scott v Tax Agents’ Board of Queensland* 2001 ATC 2218 at 2254.

¹⁹ Substantial supervision means ample or a considerable amount of involvement. It requires more than simply being involved from time to time.

²⁰ *Re S & T Income Tax Aid Specialists Pty Ltd and Tax Agents’ Board of New South Wales* 87 ATC 2001 at 2006; *Re Cafferty and Tax Agents’ Board of NSW* [2004] AATA 560.

²¹ As above.

²² As above; *Re Scott and Tax Agents’ Board of Queensland* 2001 ATC 2218 at 2254.

²³ Explanatory Statement to the Tax Agent Services Regulations 2009, at 13.

²⁴ *City Motors Pty Ltd v Commissioner of State Taxation (WA)* 93 ATC 4742; *Roy Morgan Research Centre Pty Ltd v The Commissioner of State Revenue* 97 ATC 5070 (these cases were decided in the context of determining whether there was an employer/employee relationship between entities. The comments in relation to what constitutes ‘control’ are still, however, instructive in interpreting the requirements for supervision and control under the TASA and the meaning of supervisory arrangements.

39. The following considerations may also be relevant to ensure that adequate supervision and control is undertaken:
- taking reasonable steps to ensure the accuracy of a declaration or statement signed by a registered tax practitioner in relation to a taxpayer that is required or permitted by a taxation law where the document or statement has been prepared by an individual who is not working under the supervision and control of either the registered tax practitioner or another registered tax practitioner
 - ensuring the staff providing the services possess an adequate level of education and understanding of the relevant taxation law to undertake the tasks for which they are responsible. This requirement is more onerous in cases of more complex taxation affairs
 - providing appropriate initial and on-going training
 - training staff to raise issues with supervisors that are beyond their knowledge or experience or any specifically raised concerns of taxpayers. Documented procedures should be implemented to ensure that these processes can occur
 - conducting regular quality review of work undertaken by staff as required
 - implementing quality assurance and quality control mechanisms
 - undertaking spot checks of the source documents and questions asked by staff to justify income and deductions declared
 - inspecting, advising and directing how the staff undertake their tasks. While it is not necessary that all work or interviews be monitored, a substantial degree of oversight of the staff and what they do is necessary. This will vary according to the skills and experience of the staff and the complexity of the tax matters involved
 - whether the registered tax practitioner supervises one entity or multiple entities.
40. One mechanism for ensuring that adequate arrangements are in place is through the development of a plan setting out the supervisory arrangements. The plan should set out the processes and procedures in place to ensure that the tax agent, BAS or tax (financial) advice services provided are of a competent standard and there is adequate supervision and control in place. The supervisory plan should cover the considerations outlined in paragraphs 38 and 39 above.
41. It is the TPB's view that developing a supervisory plan can assist tax practitioners to establish a clear understanding of the responsibilities of supervisors and staff under the plan and ensure that the supervision and control is adequate. As such, the TPB strongly recommends the use of a supervisory plan as a means of establishing the specific processes and procedures in place for the supervisory arrangement and to assist in compliance with the Code of Professional Conduct.

Remote supervisory arrangements

42. The concept of 'remote' supervisory arrangements is not defined in the TASA and therefore takes its ordinary meaning.

43. The Macquarie Dictionary²⁵ provides the following definition:

Remote

1. Far apart; far distant in space
2. Distance from main population centres
3. Out-of-the-way; secluded
5. Distant in relationship or connection

44. Remote supervisory arrangements refer to arrangements where supervision and control is exercised from a different location. It may also refer to remote supervisory arrangements where the supervisor and the supervised entity are employed by different entities.

45. The TPB notes that while it may be ideal that supervision and control be undertaken within a practice or business, physical proximity to the person carrying out the work on behalf of the registered tax practitioner is not necessarily indicative of the adequacy of the supervision and control arrangements in place.

46. In addition to the factors outlined in paragraphs 38 and 39 above, the following additional considerations may be relevant in determining whether remote supervisory arrangements are adequate:

- frequency of contact and the methods of communication
- whether the supervisor is available to be contacted at all times by staff
- access to training and research resources while working remotely
- management of workflow, particularly where the supervision and control is being exercised by an unrelated entity
- how documents are to be reviewed and feedback provided to staff
- how file and document sharing logistics will be managed
- whether systems allow for audits or reviews to be carried out remotely
- whether the registered tax practitioner supervises one entity or multiple entities
- other administrative obstacles inherent with a remote supervisory arrangement.²⁶

47. A determination of whether the supervision is adequate will be a question of fact having regard to the particular circumstances of the arrangement.

²⁵ *The Macquarie Dictionary*, [Multimedia], version 5.0.0.

²⁶ These considerations have been drawn from guiding principles established by other regulators, including the Financial Adviser Standards and Ethics Authority (FASEA), the Australian Securities and Investments Commission (ASIC), Law Society of New South Wales and Victorian Legal Services Board.

48. As noted at paragraphs 40 and 41 above, the TPB strongly recommends the use of a supervisory plan as a means of establishing the specific processes and procedures in place for the remote supervisory arrangement and to assist in compliance with the Code of Professional Conduct. In addition to the factors set out in paragraphs 38 and 39 above, where remote supervisory arrangements are in place, the supervisory plan should also cover the considerations outlined in paragraph 46 above.
49. The TPB is likely to be satisfied with a remote supervisory arrangement where the following arrangements exist:
- there is a structured supervisory arrangement in place, including documented processes and procedures specific to the remote supervisory arrangement in place
 - the remote supervisory arrangement is clearly set out in a supervisory plan
 - an agreed schedule for regular 'check-ins', training, and review of documents exists
 - there is clear communication of routines and expectations to enable work to be completed and reviewed in a timely manner.

Circumstances where a registered tax practitioner is unlikely to carry out adequate remote supervisory arrangements

50. The following is an example of where the TPB is unlikely to be satisfied that adequate remote supervisory arrangements are in place.

Example 4

XYZ Pty Ltd has been a registered tax agent with the TPB since 1 July 2018. Steven, a registered tax agent, is the sole director of the company and the nominated supervising agent.

Amanda provides tax agent services on behalf of XYZ Pty Ltd. She is not registered with the TPB.

As the nominated supervising agent for XYZ Pty Ltd, Steven is responsible for the supervision and control of Amanda who is located in an interstate office.

As part of the supervisory arrangements XYZ Pty Ltd has in place, Steven:

- undertakes spot checks of Amanda's work intermittently
- has infrequent Skype check-ins with Amanda which are often cancelled
- has not undertaken any training or mentoring of Amanda but has provided Amanda with a suite of training material to work through on her own
- has no remote supervisory arrangement plan in place.

In these circumstances, the TPB is unlikely to be satisfied that XYZ Pty Ltd has adequate remote supervisory arrangements in place. There is no remote supervisory arrangement plan setting out the nature of the remote supervisory arrangement, contact with Amanda is irregular and insufficient, and there is no agreed schedule for check-ins, training or review of work undertaken by Amanda on behalf of XYZ Pty Ltd.

Holding multiple supervisory roles

51. The TPB acknowledges that a registered tax practitioner carrying out supervisory arrangements may be doing so for multiple related or unrelated entities, or both.
52. Where a registered tax practitioner is carrying out supervisory arrangements for multiple related entities, due consideration must be given to the factors outlined in paragraphs 38 and 39 above. Where the supervisory arrangements involve unrelated entities, due consideration must also be given to the factors outlined in paragraph 46 above.
53. In addition, where a registered tax practitioner is carrying out supervisory arrangements for multiple entities, related or unrelated, the following additional considerations may be relevant to determine whether the supervisory arrangements are adequate:
 - size of each entity (for example, turnover of business, number of clients, and number of relevant staff)
 - market segment of the client base of each entity
 - type and complexity of the tax agent, BAS or tax (financial) advice services being provided or supervised
 - other professional duties or responsibilities of the registered tax practitioner undertaking the supervision and control.

Circumstances where a registered tax practitioner holding multiple supervisory roles is unlikely to carry out adequate supervisory arrangements

54. The following is an example of where the TPB is unlikely to be satisfied that adequate supervisory arrangements are in place where the registered tax practitioner holds multiple supervisory roles.

Example 5

Gaby is a registered BAS agent. She is the sole director and nominated supervising agent of a registered BAS agent company. She employs 10 staff to undertake BAS services on behalf of the registered BAS agent company. Of the 10 staff:

- two are recent graduates with less than 6 months experience,
- one staff member has five years' experience in providing BAS agent services,
- the remaining staff members have two years' experience, and
- the staff member with five years' experience will on occasion assist in the review of work undertaken by and the training of the two graduates.

Gaby is also the nominated supervising agent for three unrelated entities. All three entities are registered BAS agent companies and Gaby is the sole supervising agent for each.

Gaby's registered BAS agent company provides BAS agent services to 50 small businesses, each with an annual turnover of less than \$2 million. The unrelated entities client base includes mostly medium enterprises with annual turnovers of between \$10 and \$100 million and more complex tax affairs. These unrelated entities have approximately 150 clients each.

In these circumstances, the TPB is unlikely to be satisfied that there are adequate supervisory arrangements in place for Gaby's registered BAS agent company, as well as the unrelated entities, given the number of clients, the size and complexity of the tax affairs of the clients, and Gaby's responsibility to her own client base.

Code of Professional Conduct

55. The Code of Professional Conduct (the Code) sets out the professional and ethical standards that registered tax practitioners are required to comply with. It outlines the duties that registered tax practitioners owe to their clients, the TPB and other registered tax practitioners.

56. The Code is contained in section 30-10 of the TASA and provides some guidance in relation to the meaning of competence. In particular, sub-sections 30-10(7) to (10) of the TASA, which all fall under the key principle of 'competence', require that registered tax practitioners must:

- ensure the tax agent, BAS or tax (financial) advice services they provide, or are provided on their behalf, are provided competently
- maintain knowledge and skills relevant to the tax agent, BAS or tax (financial) advice services they provide
- take reasonable care to ascertain clients' state of affairs
- take reasonable care to ensure the taxation laws are applied correctly.

57. Of most relevance in the context of supervisory arrangements is Code Item 7 which provides that you must ensure that a tax agent, BAS or tax (financial) advice service provided on your behalf is provided competently.

58. To ensure that a service provided on behalf of a registered tax practitioner is provided competently, the registered tax practitioner must be satisfied that the provider of the service, including any subcontractor, has the requisite skills and experience to provide the services on their behalf. They must also ensure that adequate supervision and control arrangements are in place to ensure the accuracy of any services provided on their behalf.
59. The level of supervision and control will depend on a range of factors including:
- the education qualifications and extent of experience of the provider of the service
 - the nature of the actual service being provided
 - any structures or processes in place (for example, supervisory arrangements or quality assurance and control procedures) to facilitate the competent provision of tax agent, BAS or tax (financial) advice services.
60. The TPB has a range of options available to it under the TASA in making findings about the conduct of registered tax practitioners. The options open to the TPB include:
- imposing sanctions for breach of the Code
 - applying for a civil penalty for breach of the civil penalty provisions
 - terminating registration on the basis that the registered tax practitioner is no longer a fit and proper person to be a registered. This may include terminating the director(s) or partner(s) of a registered tax practitioner company or partnership where the director(s) or partner(s) are registered with the TPB and are found to be no longer fit and proper.

Appendix – Case Examples

Re: S & T Income Tax Aid Specialists Pty Ltd and Christopher Forward and Tax Agents' Board of New South Wales 87 ATC 2001

As a result of information received, the Board cancelled the registration of S & T as it was satisfied the company was guilty of misconduct and was not fit and proper to remain a registered tax agent. Furthermore, the Board was satisfied that the nominees of the company were not exercising the necessary supervision and control required by section 251N of the ITAA 1936. The company applied for a review of the Board's decision cancelling its registration.

The AAT (Deputy President Bannon QC, Members Stevens & Taylor) considered if certain actions of the company (through its managing director) created sufficient grounds for the company's registration to be cancelled. Two of the actions alleged were:

1. permitting a person who was not an employee of the company to prepare returns that were then lodged in the name of the company as registered tax agent
2. failing to ensure the necessary supervision and control of nominees of the company.

The AAT found that the evidence justified a positive finding in relation to the first matter. The company allowed a person who was not an employee to prepare tax returns that were lodged in the name of the company. The managing director of the company checked the returns, but the AAT was satisfied that the supervision required by the ITAA 1936 did not exist. The AAT noted that in the case of a company, the ITAA 1936 requires that returns be prepared and supervised by employees of the registered agent. This had not occurred.

In relation to the issue concerning supervision and control, the AAT said:

Section 251N requires much more than that the nominee supervise the preparation of a tax return in the sense of checking a document prepared by an unskilled employee in order to see if the figures appear reasonable. The evidence established that unqualified employees (termed consultants) interviewed the client, examined the client's expenditure receipts and vouchers and entered the particulars in a tax return form, generally a salaried employee's return. The client's receipts and vouchers were then returned to the person concerned. The next step was for the completed document to be perused and checked by another consultant who was provided with a tape check on the figures therein. If these matched and the return appeared reasonable, it was passed to a manager for further checking before being passed to a nominee for his perusal and checking prior to signing or, if any doubt arose as to its correctness, for the taking of appropriate action.

Evidence was given that the nominee would take one to three minutes to deal with an 'S' return. Section 251N calls for much more than this. It requires supervision and control of the preparation of the returns and of the business transacted by S & T relating to any income tax return or income tax matter. This involves, in our opinion, at least making spot checks on the accuracy of the initial material from which the returns are prepared and supervising the office work. S & T's nominees have in many cases done no more than a few hours work in moonlighting jobs over and above their normal employment, making a rough appraisal of the completed work of unqualified employees of S & T. When the Act speaks of the nominee being an employee and supervising the work it is really calling for substantial supervision and employment while the agent's office is open to transact tax business.

Despite finding that the business of the company lacked the requisite degree of supervision and control, the AAT nonetheless exercised the discretion conferred by section 251K and set aside the Board's decision to cancel the registration of the company.

Re: McGowan and Tax Agents' Board of Queensland 96 ATC 2056

The applicant sought review of a decision of the Board to reject his application for registration as a tax agent. Before the AAT (Senior Member Muller (as he was then)), one of the issues was whether or not the applicant had been adequately supervised during his employment.

The AAT found that the applicant was supervised by a registered tax agent for seven years and that for nine months of each year the applicant physically shared the same office as the tax agent. For the remaining three months, the applicant and the tax agent were based in the same building. In addition, for three of these years, the applicant was supervised by a tax agent – they were in contact with each other virtually on a daily basis in busy times and about twice per week during less hectic periods. Approximately 15 per cent of returns prepared by the applicant were spot-checked by the tax agent.

On the basis of these findings, the AAT concluded that the supervision of the applicant by the tax agents was sufficient in the circumstances to constitute proper supervision in accordance with the Act and regulations.

Re: Scott and Tax Agents' Board of Queensland [2001] AATA 435; [2001] ATC 2218

The applicant applied for a review of the Board's decision to cancel her registration as a tax agent. There were a number of matters in issue before the AAT (Deputy President Forgie, Members Way & Horrigan), one of which concerned whether or not the applicant had breached subsections 251N(1) and (2A).

The applicant's husband and one of her sons prepared client income tax returns on behalf of the applicant. The applicant claimed that she supervised them in this.

The applicant was found to be in breach of subsection 251N(2A), in that she failed to exercise supervision and control over her husband and son and an employee. In relation to income tax returns prepared by these people, the applicant checked that returns had been completed and looked at a checklist. However, she did not go further and conduct spot checks of particular income tax returns to see whether they were correct and that claims made were justified.

The AAT affirmed the Board's decision to cancel the applicant's registration as a tax agent.

Re: Cafferty and Tax Agents' Board of New South Wales [2004] AATA 560

This case related to a refusal to grant original registration on the basis that the applicant had failed to satisfy the 'relevant employment' requirement under Regulation 156 of the Income Tax Regulations 1936. Here the applicant relied on a period of work performed for an accounting firm during which he prepared tax returns individually and referred these returns to his supervisor (a public accountant) for final checking. While the supervision model involved a general lack of supervision of the applicant in his day to day work, the supervisor cleared all matters that were to leave the office.

Senior Member M J Sassella, in citing *Re: Underwood v Tax Agents' Board of Queensland* ('Underwood') emphasised that an employee must be adequately supervised in order to have engaged in 'relevant employment' under Regulation 156. In such a case involving the demonstration of employment, the level of supervision was inadequate as it was carried out only at the end of the process, and therefore more closely reflected the position of a self-employed accountant.