

# Proposed Guideline

## TPB(PG) 02/2010

### Course in commercial law that is approved by the Board

This document is a Tax Practitioners Board (TPB) proposed guideline (TPB(PG)) that the TPB intends to issue as a TPB guideline (TPB(G)) under paragraph 60-15(d) of the *Tax Agent Services Act 2009*, but on which the formal drafting and Parliamentary tabling processes have not yet been undertaken.

The TPB intends to follow this TPB(PG) until such time as the TPB(G) is formally made. However, being proposed guidelines, the TPB may be prepared to consider alternative outcomes to the TPB(PG) in special circumstances.

Once this TPB(PG) becomes a TPB(G), it will be a legislative instrument that binds both the TPB and those to whom it applies. The purpose of the TPB(G) will be to assist the TPB in achieving its functions, which includes the administration of the system for the registration of tax agents and BAS agents.

#### Document History

The TPB released this TPB(PG) in the form of an information sheet as an exposure draft on 14 April 2010. The TPB invited comments and submissions in relation to the information contained in it. The closing date for submissions was 18 June 2010. The TPB considered submissions made and published this TPB(PG) on 16 December 2010.

On 13 September 2012, the TPB updated this TPB(PG) to:

- define the scope of the TPB(PG)
- redefine the topic requirements for a course in commercial law that is approved by the Board
- include 'other registered higher education institutions' as another category of course provider that can provide a course in commercial law that is approved by the Board.

On 18 September 2013, the TPB updated this TPB(PG) to:

- incorporate amendments made pursuant to Items 2 and 3 in Schedule 1 to the Tax Administration and Tax Agent Services Legislation Amendment Regulation 2013 (Select Legislative Instrument No. 130, 2013)
- incorporate transitional arrangements applying to certain applications made between 1 March 2013 and 30 June 2014 inclusive.

On 1 April 2022, the TPB further updated this TPB(PG) to:

- remove outdated information relating to transitional arrangements that applied between 1 March 2013 and 30 June 2014
- replace references from the repealed Tax Agent Services Regulations 2009 to Tax Agent Services Regulations 2022.

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# A course in commercial law that is approved by the Board

This TPB(PG) sets out the views of the Tax Practitioners Board (TPB) in relation to the meaning of 'a course in commercial law that is approved by the Board' for the purpose of Items 201(b), 203(c) and 205(c) of Part 2 of Schedule 2 to the Tax Agent Services Regulations 2022(TASR). This TPB(PG) includes information relating to the following aspects of a course: topics and learning outcomes, duration, course providers, education level, manner of delivery, assessment and currency.

The information draws on advice given to the TPB in February, August, November 2010 and March 2012 by Professors Michael Dirkis and Michael Walpole.

The purpose of this information is to assist relevant institutions, professional associations, potential registrants and the wider community to understand the factors that provide the basis for the TPB's approach to the educational eligibility requirements for registration as a tax agent.

The TPB has adopted the views expressed in this TPB(PG).

The TPB has published a separate document outlining its approval process for courses which are covered by Schedule 2 to the TASR – see [TPB\(I\) 07/2011 Approval process for course providers](#).

## Introduction

1. As the *Tax Agent Services Act 2009* (TASA) is designed to '... ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct' (see section 2-5 of the TASA), it is both necessary and desirable, in certain respects, to increase the expectation of the thoroughness of education and training that a registered tax agent should have when compared with the expectations under the registration rules applying before the commencement of the TASA on 1 March 2010.
2. The TPB recognises that a balance must be struck between what is reasonably achievable within the modern educational and professional paradigm and assuring the public of high professional standards. In doing so, regard has been had to the educational qualifications, and the types of providers of training and education recognised within the [Australian Qualifications Framework](#) (AQF).

## Background

3. To register as a tax agent, an applicant must meet certain eligibility criteria, including the requirements prescribed by the TASR. In certain cases, one such prescribed requirement is that an applicant seeking registration must have successfully completed a course in commercial law that is approved by the Board.

4. An individual must have successfully completed 'a course in commercial law that is approved by the Board' if they are seeking registration under any of the following:
  - tertiary qualification in accounting (Item 201 (b) of Part 2 of Schedule 2 to the TASR)
  - diploma or higher award in accounting (Item 203(c) of Part 2 of Schedule 2 to the TASR)
  - work experience (Item 205(c) of Part 2 of Schedule 2 to the TASR).
5. An individual may, if the TPB considers it relevant to the tax agent services to which the application relates, have to have successfully completed 'a course in commercial law that is approved by the Board' if they are seeking registration under 'Tertiary qualifications – specialists' (Item 202(b)(ii) of Part 2 of Schedule 2 to the TASR).
6. An individual is not required to have successfully completed 'a course in commercial law that is approved by the Board' if they are seeking registration under any of the following:
  - tertiary qualifications in law (Item 204 of Part 2 of Schedule 2 to the TASR)
  - membership of a professional association (Item 206 of Part 2 of Schedule 2 to the TASR)
7. This TPB(PG) deals only with the requirements for 'a course in commercial law that is approved by the Board' as referred to in items 201(b), 203(c) and 205(c) of Part 2 of Schedule 2 to the TASR. For information on the requirements for 'a course in commercial law that is approved by the Board' for the purposes of item 202(b)(ii), refer to [TPB\(I\) 14/2012 Tertiary qualifications in a discipline other than accountancy for tax agents](#).
8. According to initial advice given to the TPB, basic or introductory commercial law courses cover:
  - Australian legal system and processes
  - introductory contract law
  - aspects of the law of torts (in particular, negligence and negligent misstatement)
  - key provisions of the *Competition and Consumer Act 2010* (Cth) including those relating to misleading and deceptive conduct.
9. Corporations or entities law courses cover partnership and corporate law. The law of trusts is sometimes only covered in the taxation law unit, while property law, employment law, and banking law are usually covered in electives that are usually not undertaken by accounting students due to course length limitations.

10. The TPB takes the view that, from the list of topic areas at paragraphs 8 and 9 above, all of the following topic areas (which are described by the TPB as the 'core commercial law areas') are essential for individuals required to undertake a course of study in commercial law for the purposes of registration as a tax agent:
- Australian legal systems and processes
  - contracts
  - the law of entities (including partnerships, corporations and trusts) and business structures
  - property law.

## Course structure under the new regulatory model

11. Against this background, the TPB has considered what should be the structure of a course in commercial law that is approved by the Board for the purposes of the TASA and TASR. The TPB takes the view that the Tax Agent Services registration process is designed to assure the public of a necessary basic standard of commercial law education on the part of tax practitioners that is no lower than what was required under the previous regime. The depth of study required under the TASA is far less than that required to engage in legal practice. Thus, a 'course' in commercial law must be of sufficient breadth to equip a registered tax agent with a sufficient understanding of commercial law to advise the public on the tax impacts of a diverse range of commercial transactions that ordinarily arise (see paragraph 43 for further information on the meaning of 'course').
12. The following topic areas are regarded by the TPB as being in the area of commercial law:
- introductory or foundation units commonly described as 'Australian legal systems and processes'
  - the fundamental legal concepts of business organisational structures (such as sole traders, partnerships, corporations, trusts, agencies, joint ventures and incorporated associations) and the underlying regulation of those structures
  - the law of torts (in particular, negligence and negligent misstatement)
  - introduction to the fundamental law of real and personal property transactions
  - non-tax legal aspects of superannuation
  - contracts
  - the law relating to remedies for breach of contract
  - corporations law
  - competition and consumer law
  - finance law
  - law relating to electronic commerce

- insurance law
  - intellectual property
  - bankruptcy and insolvency law
  - other subject areas approved by the Board.
13. It is the TPB's view that a course of study in commercial law for tax agents should include the equivalent of three commercial law units from the topics listed in paragraph 12 above covering most of the following 'core commercial law areas' to a significant extent:
- Australian legal systems and processes
  - contracts
  - the law of entities (including partnerships, corporations and trusts) and business structures
  - property law.
14. The requirement for a course to cover most of the 'core commercial law areas' to a significant extent means they could not be covered in a single unit of study.
15. Therefore, for clarity, a course in commercial law:
- should comprise the equivalent of three tertiary level units from the list of topic areas at paragraph 12 above
  - should cover all, or part, of the 'core commercial law areas' at paragraph 13 above in at least two of the three units
  - should cover most of the 'core commercial law areas' to a significant extent.
16. Currently not all the topics listed at paragraph 13 above are covered in commercial law units offered at universities and by other course providers. Therefore, the TPB proposes to take a progressive approach to this requirement to ensure that individuals who have already commenced study in a course on the reasonable expectation that the course would be acceptable to fulfil the requirement for a course in commercial law are not disadvantaged. This also allows providers sufficient time to respond to the list of prescribed course content at paragraphs 12 to 15 above.
17. Notwithstanding the above, it is expected that in many cases applicants for registration as a tax agent will need to undertake study outside their primary course to ensure that the content requirements are met.
18. The TPB expects that new applicants will show that they have completed a course in commercial law by having wholly or substantially studied all of the 'core commercial law areas' in three units of study, as indicated in paragraph 19 below.

19. The purpose of this paragraph is to aid the design and delivery of a specific course in commercial law that would meet the TPB's requirements. The core commercial law areas may comprise the entire content of the three units that make up a course in commercial law. Alternatively, additional subject matter, such as the law of torts and negligent misstatement, could be included in the overall commercial law course, so long as the core commercial law areas are still covered to a significant extent.
20. Applicants will not be able to satisfy the requirements for a course in commercial law by relying on any of the topics or units used to satisfy the requirements for a course in Australian taxation law that is approved by the Board, refer to [TPB\(PG\) 03/2010: Course in Australian taxation law that is approved by the Board](#).
21. The major reason for the proposed content difference between the requirements for a course in commercial law and Australian taxation law is the enormous breadth of commercial law knowledge that a tax agent needs to possess and understand prior to the application of the taxation law. This arises because taxation law is a process for assigning an amount of tax to certain transactions and activities of persons and entities that give rise to receipts or gains. Thus, taxation law is an overlay of the existing legal system. Even in circumstances where it seeks to override the operation of commercial law and equity to enable particular receipts and gains to be brought to account, it does so only in the context of the operation of commercial law (for example, the corporate consolidation regime). Therefore, a fundamental understanding of the components of common law, equity and statute that comprise commercial law is a crucial requirement in enabling a tax agent to provide tax agent services at the requisite level required by the TASA, including the Code of Professional Conduct (Code).

## Learning outcomes

22. The importance of each of the content requirements set out at paragraph 13 is illustrated in part by the following.

### Australian legal systems and processes

23. The learning outcomes of introduction to law courses are that the student has an understanding of the Australian legal system such that they are able to apply ever changing statutory, common law and equitable principles to particular fact circumstances in order to provide advice.
24. The ever-changing tax environment means that tax agents need to understand how laws are enacted and their underlying policy aims, and how those laws may be interpreted by existing common law and equitable rules. These are skills which are taught to students by foundation topics like Australian legal systems and processes.



## Contracts

25. In some circumstances, the time of entry into a contract can be important in determining how the tax law operates (for example, in determining when capital gains tax (CGT) event A1 happens). A tax agent needs to have an appreciation of the required skills to examine an arrangement to determine if a contract exists. The tax agent also needs to have an awareness of the skills and knowledge to determine the time at which the contract was entered into as that can be uncertain in situations where either:
- common law and/or statutory conditions precedent exist
  - there is a heads of agreement negotiated prior to the formal contract being settled
  - there are changes to the contractual terms between initial agreement and finalisation of negotiations.
26. The introduction to contract law topic should provide students with the necessary skills and knowledge to undertake that analysis.

## The law of entities and business structures

27. An understanding of the fundamental legal concepts of business organisational structures and the underlying regulations is crucial in understanding where the commercial law departs from the taxation treatment of those structures (for example, the taxation of partnerships).
28. A tax agent needs to have a sound knowledge of commercial law as it relates to the law of entities and business structures to be able to advise on the taxation treatment of entities.

## Property law

29. An understanding of the fundamental law underlying property transactions is crucial as the taxation law often turns on the characterisation of a property transaction (for example, different CGT rules apply to leases and licenses). Often transactions will be characterised by taxpayers to take advantage of differences in state and territory stamp duty laws, rather than in terms of their actual character. A lack of proper investigation of the true character of a transaction can lead to incorrect tax advice.

## Duration of courses/s

30. Units of sufficient breadth and depth to cover the relevant topics listed at paragraph 13 above are unlikely to fit within a single standard 12 to 14 week tertiary period consisting of lectures, tutorials, seminars, private study and research totaling 100 to 130 hours made up of (usually) two hours of lectures and one hour of tutorials per week plus private study and research. In addition to the technical content of such units, there should be an expectation that students will also learn skills to enable them to find the law and apply it to a client's circumstances when they are in practice.

31. Accordingly, it is expected that an applicant for registration as a tax agent will have completed a course that consists of at least three semester equivalent units at the appropriate tertiary level in order to address the depth and breadth requirements set out here. It is not expected that all the components of the course would necessarily be from the same provider, nor be completed at exactly the same level within the tertiary sector. For example, an undergraduate commercial law unit might only address aspects of basic business law leaving the applicant to complete a specialist postgraduate unit to cover contracts, business organisational structures and fundamental property law. Many permutations may be possible. At the same time, it is not expected that three units studied at different levels or at different institutions but with extensive overlaps in content would satisfy this requirement.
32. Many tertiary level units are delivered in semester (or term) length periods consisting of a series of lectures and tutorials spaced over a standard 12 to 14 week period. The suggested duration of 100 to 130 hours (mentioned at paragraph 30 above) is based on an assumption of this type of delivery. Because of the need to include components in the course that require students to apply their knowledge and learn research skills, a significant part of the course may consist of private study and research.
33. Accordingly, the TPB is of the view that the duration of the course in commercial law should not be less than the equivalent of three tertiary level units amounting to a total of 300 to 390 hours of study and tuition made up of formal instruction (such as lectures), exercises in applying knowledge (such as tutorials) and private study (such as research, reading, and assignment preparation).
34. The recommendation for three commercial law units is also consistent with the requirements for commercial law under the previous regime before 1 March 2010.

## Providers of course/s

35. The TPB is of the view that a course in commercial law should be attained through study of units with a university, registered training organisation (RTO) or other registered higher education institution, provided the units are offered as part of a qualification at the requisite level that has been recognised and accredited via the AQF.
36. The TPB is of the view that, unless otherwise approved by the TPB, the minimum education level required for an approved course in commercial law is diploma, which meets AQF level 5 criteria. In all cases, the proposed course must satisfy the TPB's requirements relating to assessment (see paragraphs 40 to 42 and 44 to 46 for further information on assessment).
37. The TPB may also choose to accept courses offered by other providers as long as the provider meets the TPB's conditions and standards as set out in [TPB\(I\)07/2011 Approval process for course providers](#) and the course offered by the provider meets the requirements set out in this TPB(PG).

## Manner of delivery

38. Although the suggested duration of 300 to 390 hours is based on an assumption of a traditional lecture/tutorial/self-study model there is a diversity of delivery models available, many are delivered in an intensive format. Others may be delivered by 'distance' or 'flexible' study modes involving engagement with teaching materials and teaching staff via interactive compact disc, video conference, internet etc. Some courses may not require any attendance at lectures or seminars but may rely upon the students' performance in assessment tasks such as a single final examination as a measure of the competence of the students.
39. Accordingly, the TPB does not believe that a hard and fast rule on the manner of delivery is necessary. Provided that whatever manner is adopted in the course or its components involves an expectation that students will develop a thorough understanding of the commercial law through technical content, its application and appropriate research, it is immaterial whether they are usually present in a room with the teacher or not. The outcomes of the course in commercial law or its components should be discernible by reference to how the course/components of the course are assessed.

## Assessment

40. The TPB is of the view that some means of objective assessment is a key aspect of the approval of courses for registration of applicants as tax agents. The TPB takes the view that it must be satisfied that applicants have demonstrated their knowledge and skills in the relevant course or components by some means of an independent and objective assessment. Such assessment should be rigorous and have integrity. Various forms of assessment may be employed. Ideally because of different learning styles and what is appropriate for different aspects of a course, each course or component should employ a mix of assessment practices including:
- tests
  - examinations (oral and written)
  - problem based assignments
  - essays and reports
  - computer based assessment tasks.
41. Not every one of these need be present in an approved course.
42. The TPB proposes not to accept assessments that either lack rigour or that are too narrow in their focus. Such assessments may be seen to be recognised as being one element which is a contributor to overall determination of a student's performance in a course, rather than being treated as the sole measure of their skills and knowledge in commercial law.

# The meaning of 'course'

## What is a course?

43. A course consists of a series of components leading to an overall knowledge of an aspect of the law including commercial law or rules. Such components may take the form of small units designed for tuition or training of discrete aspects of commercial law. The TPB notes that although coherence between the parts/units of the course is desirable, not all applicants will have completed a single coherent series of units delivered, for example, by one provider. Accordingly, the TPB is of the view that provided the content set out in the relevant topics listed at paragraph 13 above is addressed and provided the material addressed is reasonably current the components need not be part of a coherent stream and may include some duplication and overlap with each other provided there is not a substantial duplication of content.

## Does a course need a formal assessment component?

44. The TPB is of the view that there must be a formal assessment component in a course or in the components of a course. This assessment should be sufficient to assure the TPB that there has been a test or examination to ensure relevant content and skills expected in a course have been learnt by the applicant and that rigour has been employed in the testing of the knowledge and skills.
45. The TPB does not propose to be prescriptive about the style and content of assessments, provided the assessments employed represent a genuine test of relevant knowledge and skills and subject to integrity to ensure the relevant applicant will have undertaken the assessment task/s in question.
46. The TPB is of the view that the assessment should, to a significant degree (that is, at least 40%), be done under some form of independent supervision.

## Can a course be constituted solely by recognised prior learning?

47. The TPB is of the view that assessment of knowledge and competence is the best safeguard for the TPB to ensure that it admits to registration only applicants who have the necessary technical qualifications to competently deal with taxpayers' affairs. The TPB recognises that prior learning through experience may be regarded as a proxy for content but it does not propose to accept evidence of prior learning in the workplace, which prior learning has not been formally assessed in some way (see paragraphs 40 to 42 and 44 to 46 for information on assessment).

48. In principle, prior learning through experience which has itself been formally assessed would not require further assessment. However, it is unlikely the Board will approve an application if all the education requirements were satisfied by prior learning through experience as the ability to keep up to date with changes requires the acquisition of essential learning skills (interpretative, analytical and cognitive skills) that come from the rigour associated with formal training courses.

### **How current should a course be?**

49. Taxation laws change rapidly and the introduction of new taxes to replace others can completely transform the knowledge base of the tax professional community. For example, the replacement of sales tax with GST and simultaneous modifications to the tax collection rules, stamp duty laws and other state taxes transformed aspects of the taxation law in the early 2000's. Similar upheavals were encountered when CGT was introduced and when self-assessment was introduced. Some aspects of taxation law change only incrementally as new cases emerge from the courts. Because of the centrality of taxation law to commercial law transactions, and therefore to commercial law, it is possible that the currency of a course of study in commercial law may also quickly become out of date.

50. Many universities and other course providers do not normally grant credit for units of study completed more than ten years prior to application. The TPB considers that this standard should be prima facie adopted in respect of the recognition of units completed to satisfy the requirements of a course in commercial law.

51. However, the TPB notes that the age of the course has to be balanced with the knowledge and experience of the applicant. Well educated professionals will keep their knowledge and skills up to date and will be required to do so through continuing professional development requirements of professional associations. Given such a person's knowledge, a requirement to repeat their undergraduate studies after 20 years of practice would run counter to the policy intent of the legislation.

52. Therefore, the TPB proposes to accept as approved courses of study in commercial law:

- where the component unit of study was completed fewer than 10 years from the date of the application for registration
- where the component unit of study was completed more than 10 years from the date of the application for registration and the applicant can demonstrate an updating of those skills through work experience and continuing professional development.

53. The TPB recognises that there may be applicants that fall outside these two broad guidelines. In these cases, a submission should be included with the application for registration, which the TPB will consider on its merits.

## Summary and conclusion

54. The following topic areas are regarded by the TPB as being in the area of commercial law:

- introductory or foundation units commonly described as 'Australian legal systems and processes'
- the fundamental legal concepts of business organisational structures (such as sole traders, partnerships, corporations, trusts, agencies, joint ventures and incorporated associations) and the underlying regulation of those structures
- the law of torts (in particular, negligence and negligent misstatement)
- introduction to the fundamental law of real and personal property transactions
- non-tax legal aspects of superannuation
- contracts
- the law relating to remedies for breach of contract
- corporations law
- competition and consumer law
- finance law
- law relating to electronic commerce
- insurance law
- intellectual property
- bankruptcy and insolvency law
- other subject areas approved by the Board.

55. It is the TPB's view that a course of study in commercial law for tax agents should include the equivalent of three commercial law units from the topics listed in paragraph 54 above covering most of the following 'core commercial law areas' to a significant extent:

- Australian legal systems and processes
- contracts
- the law of entities (including partnerships, corporations and trusts) and business structures
- property law.

56. The requirement for a course to cover most of the 'core commercial law areas' to a significant extent means they could not be covered in a single unit of study. Therefore, a course in commercial law should cover all, or part, of the 'core commercial law areas' in at least two of the three units comprising the course.

57. The TPB expects that new applicants will show that they have completed a course in commercial law by having wholly or substantially studied all of the 'core commercial law areas' in three units of study, as indicated in paragraph 19 above.
58. Further, the TPB is of the view that a course in commercial law be of 300 to 390 hours duration – equivalent to the former requirement of 18 months of commercial law. This would equate to three tertiary level units.
59. In addition, the TPB is of the view that a course in commercial law should be attained through study of units with a university, RTO, other registered higher education institution or another provider approved by the Board.
60. The TPB is of the view that, unless otherwise approved by the Board, the minimum education level required for an approved course in commercial law is diploma, which meets AQF level 5 criteria.
61. Finally, the TPB takes the view that all courses should be assessed to a significant degree under some form of independent supervision and in a manner demonstrating rigour and integrity.