

TPB Information sheet

TPB(I) 17/2013

Code of Professional Conduct – Reasonable care to ascertain a client’s state of affairs

Disclaimer

This is a Tax Practitioners Board (TPB) Information sheet (TPB(I)). It is intended to be for information only. It provides information regarding the TPB’s position on the application of subsection 30-10(9) of the *Tax Agent Services Act 2009* (TASA), containing one of the obligations of registered agents under the Code of Professional Conduct (Code) (Code item 9). 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 TASA.

In addition, please note that the principles, explanations and examples in this TPB(I) do not constitute legal advice and do not create additional rights or legal obligations beyond those that are contained in the TASA or which may exist at law. Please refer to the TASA for the precise content of the legislative requirements.

Document history

The TPB released this document as a draft information sheet in the form of an Exposure draft on 30 July 2013. The TPB invited comments and submissions in relation to the information in it. The closing date for submissions was 29 August 2013. The TPB considered the submissions made and now publishes the following TPB(I).

On 7 February 2017 the TPB updated this TPB(I) to incorporate a reference to tax (financial) advisers.

On 22 January 2019 the TPB updated this TPB(I) to include two new examples.

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Reasonable care to ascertain a client's state of affairs

Introduction

1. This Information Sheet (TPB(I)) has been prepared by the Tax Practitioners Board (TPB) to assist registered tax agents and BAS agents (registered agents) to understand their obligations under subsection 30-10(9) of the *Tax Agent Services Act 2009* (TASA) (Code of Professional Conduct (Code) item 9).¹
2. While the focus of this TPB(I) is on Code item 9, it is also important to note that there are 13 other items in the Code² and additional requirements in relation to being a 'fit and proper' person³ which may also be relevant.
3. In this TPB(I), you will find the following information:
 - what the obligation is under Code Item 9
 - consequences for failing to comply with Code Item 9
 - practical examples.

What is the obligation under Code Item 9?

4. Code Item 9 requires registered agents to 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 they are making or a thing they are doing on behalf of the client.

What does 'reasonable care' mean?

5. The duty to take reasonable care is a well-established feature of the common law in Australia. While Code Item 9 requires registered agents to take 'reasonable care' in ascertaining a client's state of affairs, the Code does not extend the common law duty of registered agents to take reasonable care. However, it does establish an additional range of possible statutory consequences under the TASA (see paragraphs 27 to 29 for more information on the consequences for failing to comply with Code Item 9).

¹ The TPB administers a system for the registration of tax agents, BAS agents and tax (financial) advisers (known collectively as 'tax practitioners') under the *Tax Agent Services Act 2009* (TASA). The TPB has also published specific information regarding the obligations of registered tax (financial) advisers under the Code of Professional Conduct in the TASA, including [TPB\(I\) 28/2016 Code of Professional Conduct – Reasonable care to ascertain a client's state of affairs for tax \(financial\) advisers](#) (Code item 9).

² The TPB has also published an explanatory paper that sets out its views on the application of the Code, including Code item 9. Refer to TPB Explanatory paper [TPB\(EP\) 01/2010 Code of Professional Conduct](#).

³ For further information, see TPB Explanatory paper [TPB \(EP\) 02/2010 Fit and proper person](#).

6. There is no set formula for determining what it means to take reasonable care in any given situation. Rather, whether a registered agent has taken reasonable care in a given situation will depend on an examination of all the circumstances,⁴ including the nature and scope of the tax agent services and BAS services being provided and the client's level of professional knowledge and experience.
7. The starting point for determining what reasonable care is will involve a registered agent exercising their own professional judgment taking into account relevant factors, such as the client's individual circumstances including their records and systems and the nature and complexity of the transaction.
8. The standard of 'reasonable care' generally required of a registered agent is that of a competent and reasonable person, possessing the knowledge, skills, qualifications and experience that a registered agent is expected to have, in the circumstances.
9. The Accounting Professional and Ethical Standards Board (APESB) has stated in *APES 110 Code of Ethics for Professional Accountants* and *APES 220 Taxation Services* that professional competence and due care is a fundamental principle that members must comply with. This principle requires a member 'to maintain professional knowledge and skill at a level required to ensure that a client or employer receives competent professional services ... and act diligently in accordance with applicable technical and professional standards'. This requires, among other things, the exercise of sound judgment in applying professional knowledge and skill in the performance of such a service.³

What is 'reasonable care in ascertaining a client's state of affairs'?

10. The obligation to take reasonable care does not mean that the care taken needs to be perfect or to the highest level of care possible. It is sufficient that the registered agent acts in a way that is consistent with how a reasonable person, possessing the required knowledge, skill and experience of a registered agent, objectively determined, would act in providing tax agent services or BAS services.
11. Where a statement provided by a client seems credible (and for existing clients is consistent with previous statements) and the registered agent has no basis on which to doubt the information supplied, the registered agent may discharge their responsibility by accepting the statement provided by the client without further checking.
12. In this case, the registered agent is not just accepting what the client tells them or gives them at face value. Rather, the registered agent is exercising their professional judgment based on the information previously provided by the client and the nature of the client themselves, and making a decision that further checking is not required in the particular circumstances.
13. On the other hand, if the information supplied by a client does not seem credible (in accordance with how a competent and reasonable person, possessing the knowledge, skills, qualifications and experience of a registered agent, objectively determined, would perceive the information) or appears to be inconsistent with a previous pattern of claim or statement, further enquiries would be required, having regard to the terms of the engagement with the client.

⁴ See, for example, Miscellaneous Taxation Ruling MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*.

³ AESB APES 110 *Code of Ethics for Professional Accountants*, sections 100.5 and 130. See also APES 220 *Taxation Services*, paragraphs 3.11 to 3.17.

14. In such situations, taking reasonable care will mean that a registered agent will need to ask questions of their clients or examine the client's records, or both, based on a reasonable registered agent's professional knowledge, skills and experience in seeking information.
15. Also, if the client's circumstances have changed, the registered agent would need to consider what additional questions would need to be asked of the client to ascertain the client's state of affairs relevant to the tax agent services or BAS services being provided.
16. Some other circumstances in which there may be a need to make further enquiries of the client include:
 - new or substantial changes in the law
 - nature and circumstances of the client, including whether a new or inexperienced client
 - unusual transactions in the context of the regular business of the client.
17. Therefore, Code item 9 does not require registered agents to 'audit', examine or review books and records or other source documents to independently verify the accuracy of information supplied by their clients. However, there may be circumstances (see paragraphs 13 to 16 above) where a registered agent may not automatically discharge their responsibility in particular cases by simply accepting what they have been told by their clients.

What does '... to the extent that ascertaining the state of affairs is relevant to a statement the agent is making or a thing the agent is doing on behalf of their client' mean?

18. The requirement to take reasonable care relates to the services that are to be provided and is therefore subject to the agreed terms of the engagement with the client.
19. The terms of the engagement with the client may arise from a variety of sources, which may include a letter of engagement, an email, telephone communication or face-to-face visit. These terms will determine the scope of the engagement between the registered agent and their client and adherence to these terms will usually be the first step towards showing that reasonable care has been taken.
20. The TPB considers that a written agreement between a registered agent and their client that sets out the terms and conditions of the arrangement between the parties is prudent. An engagement letter is likely to be a simple way to assist a registered agent to comply with their obligations under the Code and to define the obligations of both parties. For further information on engagement letters, refer to *TPB(l) 01/2011 Letters of engagement*, available at www.tpb.gov.au
21. Where a registered agent knows or ought reasonably to know that information provided by the client is not credible, the registered agent should make further enquiries or consider declining to act for the client rather than continue to provide tax agent or BAS services. Further, where the agreed scope of the services excludes the examination of information provided by the client or requires the registered agent to rely on the information or advice of another expert, then further enquiries would not be required to rely on the relevant information unless the registered agent identifies, or reasonably ought to have identified, that the information was incorrect or incomplete.
22. In all cases, whether a registered agent has taken reasonable care under Code Item 9 is a question of fact to be determined by examining all of the circumstances of a particular situation. Various factors will need to be considered, including the terms of the engagement between a registered agent and their client.

A 'statement' the agent is making

23. Generally, a statement a registered agent makes will be a statement made to the Commissioner of Taxation (Commissioner). For example, where a registered agent has been engaged to electronically lodge a client's tax return or BAS, the relevant statement will be the registered agent's declaration made when the registered agent electronically submits the tax return or BAS.
24. The statement could also include a statement (oral or written) made by a registered agent to their client. For example, a registered agent may make a statement to their client as to the operation of a taxation law or BAS provision to the client's particular circumstances.

A 'thing' the agent is doing on behalf of the client

25. A thing a registered agent does on behalf of their client is a broad encompassing term. It includes, but is not limited to:
 - preparing or lodging a return, notice, statement, application or other document about a taxpayer's liabilities, obligations or entitlements under a taxation law or BAS provision
 - preparing or lodging on behalf of a taxpayer an objection under Part IVC of the *Taxation Administration Act 1953* (TAA 1953) against an assessment, determination, notice or decision under a taxation law or BAS provision
 - applying to the Commissioner or the Administrative Appeals Tribunal for a review of, or instituting an appeal against, a decision or an objection under Part IVC of the TAA 1953
 - giving a taxpayer advice about a taxation law that the taxpayer can reasonably be expected to rely upon to satisfy their taxation obligations; or
 - dealing with the Commissioner on behalf of a taxpayer, such as lodging a private ruling request or lodging an amendment.

Relevant factors that may impact on the level of reasonable care required

26. Some of the factors that may impact upon the steps required to take reasonable care under Code Item 9 include:
 - the terms of engagement between a registered agent and their client
 - the complexity of the transaction
 - the client's circumstances, including their level of sophistication (such as a large client with in-house tax teams and specialists)
 - the nature of any pre-existing relationship between the registered agent and their client.

Consequences for failing to comply with Code Item 9

27. If a registered agent does not take reasonable care in ascertaining a client's state of affairs under Code Item 9, the TPB may find that the registered agent has breached the Code and may impose sanctions for that breach.

28. If a registered agent breaches the Code, the TPB may impose one or more of the following sanctions:
- a written caution
 - an order requiring the registered agent to do something specified in the order
 - suspension of the registered agent's registration
 - termination of the registered agent's registration.
29. In addition, the same conduct which may amount to a failure to take reasonable care under Code Item 9 could constitute a breach of another Code Item or one of the civil penalty provisions in the TASA. For example, section 50-20 of the TASA makes it an offence for registered agents to make false, misleading or reckless statements to the Commissioner. Also, section 50-30 of the TASA creates an offence in relation to the signing of declarations in certain circumstances, unless the registered agent takes reasonable steps to ensure the accuracy of the document.

Practical examples involving Code Item 9

30. The following are indicative examples which illustrate the general application of Code Item 9. In all cases, consideration will need to be given to the specific facts and circumstances as well as to the taxation laws as applied to those facts.

Example 1

Terms of engagement

Sophia engages Jonah, a registered tax agent, to prepare and lodge her income tax return based on the information provided by Sophia.

Brief description of scenario

Sophia is a regular client of Jonah's and her personal circumstances have not changed from previous years.

Reasonable care steps

To comply with his obligations under Code Item 9, Jonah must take reasonable care to ascertain Sophia's state of affairs to the extent that ascertaining the state of those affairs is relevant to the thing Jonah is doing on behalf of Sophia. In this case, the relevant thing is preparing and lodging Sophia's income tax return.

Sophia is a regular client of Jonah's. Jonah enquires and ascertains that Sophia's personal circumstances have not changed from previous years. Jonah simply checks to ensure that the information provided by Sophia is consistent with previous tax returns prepared for Sophia. Jonah concludes that the information provided by Sophia is consistent with tax returns for previous years. Further, Jonah does not have any reason to doubt the accuracy or completeness of the information provided by Sophia.

In this case, Jonah has satisfied his obligation under Code Item 9 to take reasonable care by exercising his professional knowledge, skills and judgment and would not be required to undertake any further detailed enquiries.

Alternative Scenario

If Sophia was a new client of Jonah's and provided no supporting evidence relating to the information to be included in the tax return, then Jonah would need to make further enquiries to ascertain Sophia's state of affairs in relation to preparing and lodging her tax return in order to demonstrate that he took reasonable care under Code Item 9. The purpose of undertaking further enquiries would be to ensure that the tax return included all relevant information pertaining to the taxation affairs of Sophia.

Example 2

Terms of engagement

Wayne engages Antonia, a registered BAS agent, to prepare and lodge his quarterly BAS.

Brief description of scenario

Wayne is a new client. Wayne advises Antonia that he has appropriate record keeping systems in place and that all his suppliers are registered for, and charging, GST.

Reasonable care steps

To comply with her obligations under Code Item 9, Antonia must take reasonable care to ascertain Wayne's state of affairs to the extent that ascertaining the state of those affairs is relevant to the thing Antonia is doing on behalf of Wayne. In this case, the relevant thing is preparing and lodging Wayne's quarterly BAS.

As Wayne is a new client, Antonia makes relevant enquiries of Wayne and undertakes appropriate follow-up action to assure herself that Wayne does in fact have appropriate record keeping systems in place and that she can rely on the information provided by Wayne to prepare and lodge his quarterly BAS.

In addition, Antonia identifies certain transactions that she considers to be abnormal in the circumstances and seeks further clarification from Wayne in relation to these transactions.

In this case, Antonia has satisfied her obligations under Code Item 9 to take reasonable care by exercising her professional knowledge, skills and judgment and by making further enquiries, particularly in relation to Wayne's record keeping systems and the abnormal transactions identified.

Example 3

Terms of engagement

Marshall's Machinery engages Penny & Co, a registered tax agent, to prepare and lodge its annual income tax return. The engagement letter specifies that the annual income tax return is to be based on the externally audited financial statements of Marshall's Machinery (Penny & Co is not the auditor).

Brief description of scenario

Marshall's Machinery is a large company with appropriately qualified staff, including its own finance and tax team. The financial statements of Marshall's Machinery have been externally audited by Anthony Brown Davis Auditing Services.

Reasonable care steps

To comply with its obligations under Code Item 9, Penny & Co must take reasonable care to ascertain Marshall's Machinery's state of affairs to the extent those state of affairs is relevant to the thing Penny & Co is doing on behalf of Marshall's Machinery. In this case, the relevant thing is preparing and lodging Marshall's Machinery's annual income tax return.

Penny & Co determines that it can rely on the information provided by Marshall's Machinery to prepare and lodge its annual income tax return because:

- Marshall's Machinery has appropriately qualified staff and processes (including external audit of financial statements); and
- Penny & Co ascertains that there is no other reason to doubt the quality of the information provided by Marshall's Machinery.

In this case, Penny & Co has satisfied its obligation under Code Item 9 to take reasonable care by exercising its professional knowledge, skills and judgment and would not be required to undertake any further detailed enquiries.

Alternative Scenario

If Penny & Co becomes aware of an issue with the plausibility of the information provided by Marshall's Machinery, this should be raised with Marshall's Machinery to determine necessary steps to be undertaken prior to Penny & Co lodging the income tax return.

Example 4

Terms of engagement

Poppy Pies Pty Ltd engages Stefan, a registered tax agent, to prepare its income tax return.

Brief description of scenario

Poppy Pies Pty Ltd is a new client. It gives Stefan all of its tax information, including its BAS and goods and services tax (GST) reconciliation accounts which have been prepared by Sarina, a registered BAS agent. Stefan has previously examined work prepared by Sarina for other clients and has not had any concerns as to the quality of Sarina's work.

Reasonable care steps

To comply with his obligations under Code Item 9, Stefan must take reasonable care to ascertain Poppy Pies Pty Ltd's state of affairs to the extent the state of those affairs is relevant to the thing Stefan is doing on behalf of Poppy Pies Pty Ltd. In this case, the relevant thing is preparing the income tax return.

As Sarina is a registered BAS agent and Stefan has no reason to doubt the quality of Sarina's work, Stefan accepts Sarina's work at face value.

Further, Stefan undertakes relevant checks in relation to such tax information provided by Poppy Pies Pty Ltd which has not been prepared by Sarina to assure himself that he has all the relevant information to prepare the income tax return.

In this case, Stefan has satisfied his obligation under Code Item 9 to take reasonable care by:

- exercising his professional knowledge, skills and judgment to determine that he can accept the tax information prepared by Sarina at face value, in the circumstances; and
- undertaking relevant checks in relation to such tax information provided by Poppy Pies Pty Ltd which has not been prepared by Sarina to assure himself that he has all the relevant information to prepare Poppy Pies Pty Ltd's income tax return.

Alternative Scenario

If Stefan has doubts as to the quality of Sarina's work (for example, doubts arising from previous interactions with Sarina), it would not be reasonable for Stefan to accept Sarina's work at face value. In these circumstances, Stefan could demonstrate that he exercised reasonable care in various ways. These might include seeking further instructions from his client to review the original documentation (for example, tax invoices) or to satisfy himself of the procedure and methodology Sarina used to arrive at a particular determination.

Example 5

Terms of engagement

John engages Alana, a registered tax agent, to provide tax advice in relation to the sale of his rental property.

Brief description of scenario

John ordinarily prepares and lodges his own tax return. However, John determines that he needs advice in relation to the sale of his rental property before he can prepare and lodge his current year's tax return.

As part of his instructions to Alana, John informs Alana that his rental property had been sold during the relevant financial year. However, John does not mention to Alana that the rental property had been John's principal place of residence for the past 15 years and that he had only been renting it for five months prior to selling it.

Reasonable care steps

To comply with her obligations under Code Item 9, Alana must take reasonable care to ascertain John's state of affairs to the extent the state of those affairs is relevant to the thing Alana is doing on behalf of John. In this case, the relevant thing is providing advice to John in relation to the sale of his rental property, advice that he will ultimately rely upon to prepare and lodge his tax return.

Alana advises John to provide correct and complete information so that she can properly ascertain his state of affairs and provide the requested advice. Recognising that John is a new client, Alana asks a series of questions to ascertain John's state of affairs. As part of this process, Alana asks John for additional information in regard to the usage of the rental property, including whether John had ever lived in the house.

In this case, Alana has satisfied her obligations under Code Item 9 to take reasonable care by exercising her professional knowledge, skills and judgment and by making further enquiries to ascertain John's state of affairs, including in relation to the use of his rental property.

Alternative Scenario

If Alana had not asked for additional information about the way in which the rental property had been used, Alana would not have taken reasonable care in the circumstances.

Example 6

Terms of engagement

Qube Finance Ltd engages Bernard's Accountants, a registered tax agent, to provide 'high level' preliminary advice on the taxation aspects of certain derivative transactions.

Brief description of scenario

Qube Finance Ltd is a publicly listed company with its own internal tax team and finance department.

From time to time, Qube Finance Ltd will seek preliminary advice from accounting and law firms regarding particular matters. In this particular matter, Qube Finance Ltd's internal tax director (Jenny) decides to seek expert preliminary advice from Bernard's Accountants, a registered tax agent that specialises in taxation of derivatives and options.

To obtain the expert preliminary advice, Jenny drafts a detailed referral letter containing relevant matters for Bernard's Accountants to consider.

Reasonable care steps

To comply with its obligations under Code Item 9, Bernard's Accountants must take reasonable care to ascertain Qube Finance Ltd's state of affairs to the extent the state of those affairs is relevant to the preliminary advice Bernard's Accountants is providing.

Bernard's Accountants relies upon the information contained in the referral letter that is provided by Jenny. Further, Bernard's Accountants outlines in its preliminary advice that its advice is based solely upon the information provided in the referral letter, and to the extent that the information in the referral letter is incorrect, its preliminary advice may vary.

In this case, Bernard's Accountants has satisfied its obligation under Code Item 9 to take reasonable care by exercising its professional knowledge, skills and judgment and would not be required to undertake any further detailed enquiries in relation to the information provided by Jenny on behalf of Qube Finance Ltd. In particular, Bernard's Accountants has taken reasonable care by obtaining relevant information from Qube Finance Ltd in writing and clearly stating the basis on which its advice is provided.

Example 7

Terms of engagement

Since 2014, Borough Bakery Pty Ltd (Borough) engaged Philip Partners, a registered tax agent, to prepare and lodge its income tax returns for the bakery business and the proprietor, Mr Joseph.

Brief description of scenario

Borough's sole business is a suburban bakery, which based on the information provided to Philip Partners, has operated at a loss since 2010 and has not made distributions or paid a salary to its sole director, Mr Joseph.

In preparing Borough's income tax returns for the 2014 to 2018 financial years, Philip Partners takes into account log books provided by the company, as well as Mr Joseph's personal bank account statements. In undertaking these enquiries, Philip Partners notices that:

- the logbooks provided by Borough relate to three new luxury vehicles, which it purports are used solely for business purposes, with the deductions claimed in relation to the use of these vehicles totalling \$120,000;
- there are no loans or other finance arrangements in relation to the luxury vehicles; and
- despite the bakery operating at a loss (evidenced by the company's bank statements), the ATO's Portal indicated that Mr Joseph earned significant interest income during the period.

Noting the inconsistencies and lack of credibility in relation to the information and evidence provided by Borough, Philip Partners makes further enquiries to satisfy itself of the veracity of the claims being made in the company's income tax returns, including requesting evidence in relation to:

- the use of the luxury vehicles;
- how the company financed the purchase of the luxury vehicles, having regard to the company's financial position;
- the source of the interest income earned by Mr Joseph; and
- whether there are any other relevant bank accounts.

Despite the requests from Philip Partners, Borough does not provide additional supporting evidence to substantiate its claims. Accordingly, Philip Partners declines to act for Borough, makes comprehensive file notes in relation to the matter, and returns all original documentation back to Borough.

Reasonable care steps

By asking further questions and requesting supporting evidence in relation to the claims being made by Borough, and by declining to act for the company when it refused to provide additional information and evidence, Philip Partners has appropriately discharged its obligations under Code Item 9.

Alternative Scenario

If Philip Partners had not asked for additional information and evidence, and lodged Borough's income tax returns despite the inconsistencies in the information it was provided, Philip Partners would not have carried out its obligations under Code Item 9.

Example 8

Terms of engagement

Irina engages George, a registered tax agent, to lodge her income tax return. Irina is a new client and has only recently arrived in Australia.

Brief description of scenario

Irina has been working in Australia as a pharmacy assistant for 5 months of the relevant financial year. She provides George with her Payment Summary showing that she earned \$30,000 during that period. Irina instructs George to include work related expense deductions of \$12,000, comprising of:

- home office expenses;
- motor vehicle expenses.

Reasonable care steps

George notices that the amount and nature of the claims made by Irina seem out of the ordinary, given her income and occupation type. After asking Irina further pertinent questions, George establishes that Irina is not entitled to claim home office expenses, and that while she can claim motor vehicle expenses (Irina's duties include delivering medication to some customers), she has calculated these expenses based on the entire 12 month period of the financial year, even though she was only in Australia for 5 months during the relevant period. George advises Irina of her entitlements in light of this information, and receives Irina's instructions to lodge her income tax return on the basis of Irina's reduced entitlement. George has met his obligations under Code Item 9.