

Supervisory arrangements and supervision and control

The following is intended as information only and is not a formal Tax Practitioners Board (TPB) guideline. While it seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the TPB's powers provided in the *Tax Agent Services Act 2009*. This information does not constitute legal advice and maybe changed from time to time.

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Legislative framework

1. Supervisory arrangements are introduced in the *Tax Agent Services Act 2009* (TASA) in the context of the registration requirements contained in section 20-5 of the TASA.
2. Section 20-5 of the TASA relevantly provides:

(2) A partnership is eligible for registration as a registered tax agent, BAS agent or tax (financial) adviser if the Board is satisfied that:

(c) the partnership 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 –....., 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

(3) A company is eligible for registration as a registered tax agent, BAS agent or tax (financial) adviser if the Board is satisfied that:

(d) the 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 –....., 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

3. The concept of 'supervision and control' is also introduced in the TASA in the context of both the civil penalty provisions in section 50-30 of the TASA and relevant experience in Schedule 2 to the Tax Agent Services Regulations 2009 (TASR).

4) 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) you sign a declaration or other statement in relation to a taxpayer that is required or permitted by a taxation law (other than a BAS provision), 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">(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) you sign a declaration or other statement in relation to a taxpayer that is required or permitted by a BAS provision, 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">(iii) another 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.
<p>3. You contravene this subsection if:</p> <ul style="list-style-type: none">(a) you are a partnership or company that is a registered tax agent, and(b) you sign a declaration or other statement in relation to a taxpayer that is required or permitted by a taxation law (other than a BAS provision), 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">(ii) an individual who is working under the supervision and control of a registered tax agent who is an individual.
<p>4. You contravene this subsection if:</p> <ul style="list-style-type: none">(a) you are a partnership or company that is a registered tax agent or BAS agent, and(b) you sign a declaration or other statement in relation to a taxpayer that is required or permitted by a BAS provision, 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">(ii) an individual who is working under the supervision and control of a registered tax agent or BAS agent who is an individual.

5. 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.

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

For a BAS agent registration:

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

- (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*

For a tax agent registration:

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

- (c) under the supervision and control of a tax agent registered under the Act; or 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*

For a tax (financial) adviser registration:

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

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

Overview

8. 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.
9. The Macquarie Dictionary ^[1] provides the following definitions:

<p>Supervise</p> <p>1. to oversee (a process, work, workers, etc) during execution or performance; superintend; have the oversight and direction of.</p>
<p>Supervision</p> <p>1. the act or function of supervising; oversight; superintendence.</p>
<p>Control</p> <p>1. to exercise restraint or direction over; dominate; command</p> <p>4. the act or power of controlling; regulation; domination or command</p> <p>5. check or restraint.</p>

10. Section 20-5 of the TASA requires that a partnership or company tax agent, BAS agent or tax (financial) adviser 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 agent, BAS agent or tax (financial) adviser has sufficient organisational qualifications and experience to provide tax agent, BAS or tax (financial) advice services competently. ^[2]
11. Considering the ordinary meaning of the words and the purpose of this requirement, 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.
12. Under section 50-30 of the TASA, a registered tax agent or BAS agent must not sign a declaration or other statement, in relation to a taxpayer under a taxation law, if the relevant document was **not** prepared by someone who is:
 - (a) a registered individual tax agent or BAS agent, or
 - (b) an individual working under the supervision and control of a registered individual tax agent or BAS agent.
13. Item 103 of Part 1, Item 207 of Part 2 and Item 305 of Part 3 of Schedule 2 to the TASA provides that relevant experience under paragraphs (c) and (d) of the respective items must have been undertaken under the supervision and control of a registered tax agent, BAS agent or tax (financial) adviser (as the case may be). Each of these provisions refers to something being done under the supervision and control of a registered tax agent, BAS agent or tax (financial) adviser.
14. Considering the ordinary meaning of the words in these items and the context in which they are used, supervision and control may be broadly understood as requiring a tax agent, BAS agent or tax (financial) adviser to have exercised some level of direction and oversight over what is being done.

^[1] *The Macquarie Dictionary*, [Multimedia], version 5.0.0.

^[2] Paragraph 2.56 of the Explanatory Memorandum to the *Tax Agent Services Bill 2008*.

Adequate supervisory arrangements or supervision and control

15. There is no precise definition of what constitutes adequate supervisory arrangements or supervision and control. What is adequate should be determined on the basis of the specific facts of a particular case. Determining whether appropriate supervision and control has been exercised or if there are appropriate supervisory arrangements in place, will require an assessment of the measures taken by a tax agent, BAS agent or tax (financial) adviser to supervise and control relevant activities in the context of their circumstances. However, guidance can be taken from case law considering these concepts and balancing these considerations.
16. 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 in the context of the requirement that an agent have some relevant employment prior to being registered as a tax agent and the prohibition on tax agents allowing other non-tax agent entities, not under the agent's supervision and control, to prepare income tax returns on behalf of the agent and to conduct business on the tax agent's behalf.
17. As the TPB must consider the meaning of supervision and control under the TASA in relation to relevant experience and the prohibition on tax and BAS agents allowing other entities to sign declarations on an agent's behalf, these principles will be equally applicable to the TPB under the TASA.
18. Some key examples of these cases have been provided in the [Appendix – Case examples](#).

19. The following considerations may be relevant in determining whether sufficient supervision and control has been, or is being, exercised:

- The level and depth of personal physical oversight undertaken over the provision of tax agent, BAS or tax (financial) advice services. ^[3]
- 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 supervision. ^[4]
- The relevant supervision and control must be exercised over the business transacted relating to any income tax return. ^[5]
- Supervision and control, at the least, requires periodic and 'spot' checks of material prepared by staff and supervision of office work. ^[6]
- The physical proximity to the person carrying out the work on the tax agent, BAS agent or tax (financial) adviser's behalf may be indicative of whether adequate supervision and control is being exercised. ^[7]
- 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 control. ^[8]
- The degree of control over the way in which a person carries out their work will be indicative of the level of control. ^[9]

^[3] *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.

^[4] *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.

^[5] As above.

^[6] As above; *Re Scott and Tax Agents' Board of Queensland* 2001 ATC 2218 at 2254.

^[7] *Re McGowan and Tax Agents' Board of Queensland* 96 ATC 2056 at [5]; *Scott v Tax Agents' Board of Queensland* 2001 ATC 2218 at 2254; *Re S & T Income Tax Aid Specialists Pty Ltd and Christopher Forward and Tax Agents' Board of New South Wales* 87 ATC 2001.

^[8] Explanatory Statement to the *Tax Agent Services Regulations 2009*, at 13.

^[9] *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.

20. The following steps may also be required to ensure that adequate supervision and control is undertaken:

- Ensuring the staff providing the services possess an adequate level of education and understanding of the relevant ITAA concepts to undertake the tasks for which they are responsible. This requirement is more onerous in the case of more complex returns.
- 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 (for example computerised software) to ensure that these processes can occur.
- Conducting regular audits of work undertaken by staff.
- Undertaking spot checks of the source documents and questions asked by staff to justify income and deductions declared.
- Physically 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 physical 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.

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. 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.